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THE ROLE AND RESPONSIBILITIES OF COURT-APPOINTED LAWYERS IN GUARDIANSHIP PROCEEDINGS

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Section 35A-1107 of the North Carolina General Statutes (G.S. 35A-1107) requires the Clerk of Superior Court to appoint an attorney as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding unless the respondent retains counsel.[1]

But what, exactly, is the role and what are the responsibilities of a court-appointed lawyer in a guardianship proceeding?[2]

- What authority and responsibilities are inherent in the role of a guardian ad litem? Are the responsibilities of a guardian ad litem appointed under G.S. 35A-1107 the same as those of guardians ad litem appointed to represent allegedly incompetent adults in other types of legal proceedings?
- Does G.S. 35A-1107 require a lawyer who is appointed as the guardian ad litem for an allegedly incompetent respondent to act as the respondent's attorney?

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[1] A legal proceeding to determine whether an adult is mentally incompetent is a special proceeding before the Clerk of Superior Court. A proceeding to appoint a guardian for an adult who has been determined to be incompetent is an estate proceeding within the original jurisdiction of the Clerk of Superior Court. Legal proceedings to adjudicate incompetency and appoint a guardian for an incompetent adult may be consolidated or bifurcated. If the proceedings are bifurcated, the attorney appointed in connection with the incompetency proceeding continues to represent the respondent in the guardianship proceeding until a guardian is appointed. For the sake of convenience, this bulletin uses the term "guardianship proceeding" to refer to special proceedings to adjudicate incompetency and estate proceedings to appoint a guardian for an incompetent adult.

[2] This bulletin generally uses the term "court-appointed lawyers" to refer to lawyers who are appointed as guardians ad litem under G.S. 35A-1107.

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- Does a lawyer appointed under G.S. 35A-1107 represent the "best interests" of an allegedly incompetent adult? May she act or make recommendations regarding the respondent's "best interest" when her actions or recommendations are contrary to the respondent's express wishes?[3] Does the extent of the respondent's mental impairment affect the guardian ad litem's authority, responsibility, or role?
- Does a guardian ad litem appointed under G.S. 35A-1107 act on behalf of the court as a neutral investigator or fact-finder?
- To what extent is a lawyer subject to the State Bar's Revised Rules of Professional Conduct in connection with her service as a guardian ad litem under G.S. 35A-1107? Are the respondent's communications with her protected by the attorney-client privilege? Is information she obtains regarding the respondent confidential? May she communicate with a petitioner who is represented by counsel? May she testify at the guardianship hearing?
- How can a lawyer who is appointed under G.S. 35A-1107 assess the mental capacity of an allegedly incompetent respondent? How can she determine whether the respondent is incompetent or retains sufficient mental capacity to make competent decisions or retain certain rights?
- May a court-appointed lawyer be held liable for professional malpractice or breach of fiduciary duty in connection with her service as guardian ad litem?
- Does a respondent who is the subject of a guardianship proceeding have a constitutional right to a court-appointed attorney if he is unable to retain legal counsel? If so, is this right satisfied by appointing an attorney as the respondent's guardian ad litem?

This bulletin addresses these questions by examining the roles and responsibilities of court-appointed lawyers in guardianship proceedings under North Carolina law, the guardianship statutes of other states, the rules of professional conduct for lawyers, and the U.S. and North Carolina constitutions.

[3] For the sake of convenience, this bulletin will refer to the court-appointed lawyer as "she" and to the allegedly incompetent respondent as "he."

North Carolina's Guardianship Statutes: Past and Present

North Carolina's Pre-1977 Guardianship Law

Before 1977, North Carolina's statutes governing guardianship proceedings (former G.S. Ch. 35)

1. did not recognize an allegedly incompetent respondent's right to be represented by legal counsel in connection with the proceeding;
2. did not provide for the appointment of an attorney to represent an allegedly incompetent adult who failed to retain counsel; and
3. did not provide for the appointment of a guardian ad litem for an allegedly incompetent respondent.[4]

In at least some instances, however, North Carolina courts appointed guardians ad litem to represent allegedly incompetent adults in guardianship proceedings pursuant to Rule 17 of North Carolina's Rules of Civil Procedure (or similar statutes, such as former G.S. 1-65.1).[5] In one case, the court appointed a lawyer as the respondent's guardian ad litem and the lawyer who was appointed as the guardian ad litem retained another lawyer to act as the respondent's attorney in the guardianship proceeding.[6]

The 1977 and 1979 Amendments

In 1977, the General Assembly amended North Carolina's guardianship statutes to

1. recognize, for the first time, an allegedly incompetent adult's right to retained counsel in a guardianship proceeding initiated under Article 1A of G.S. Ch. 35 (which applied to adults who were incompetent due to mental retardation, epilepsy, cerebral palsy, or autism and provided an alternate procedure for the appointment of guardians for mentally ill adults) [former G.S. 35-1.16(a)];
2. require the court to appoint a lawyer to act as the respondent's attorney in a guardianship proceeding under G.S. Ch. 35, Art. 1A if the

[4] Comment: North Carolina Guardianship Laws—The Need for Change, 54 N.C. L. Rev. at 403. *See also* Guardianship Law in North Carolina (Chapel Hill: Institute of Government, The University of North Carolina at Chapel Hill, 1963).

[5] *See* In re Barker, 210 N.C. 617, 188 S.E. 205 (1936); In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

[6] In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

petition alleged that the respondent was indigent [former G.S. 35-1.16(a)];

3. require the court to appoint a guardian ad litem[7] for an allegedly incompetent respondent in a guardianship proceeding under G.S. Ch. 35, Art. 1A if the respondent was indigent, waived appointment of counsel, and lacked the capacity to waive his right to counsel [former G.S. 35-1.16(a)]; and
4. require the court to appoint a guardian ad litem for an allegedly incompetent adult when a guardianship proceeding was initiated under Article 2 of G.S. Ch. 35 (which applied to adults who were inebriates or mentally incompetent due to reasons other than mental retardation, epilepsy, cerebral palsy, or autism and provided an alternate procedure for the appointment of guardians for mentally ill adults) [former G.S. 35-2].[8]

In 1979, the General Assembly amended former G.S. 35-1.16 to require the appointment of counsel *or* a guardian ad litem for nonindigent respondents who failed to retain legal counsel in guardianship proceedings under G.S. Ch. 35, Art. 1A.[9]

The 1977 and 1979 amendments to former G.S. Ch. 35, therefore, established two possible roles for court-appointed lawyers in guardianship proceedings:

1. the role of attorney for an allegedly incompetent respondent; or
2. the role of the respondent's guardian ad litem (a role that could be filled by either a lawyer or a nonlawyer).

The 1977 and 1979 amendments to G.S. Ch. 35, however, did not expressly describe the roles or responsibilities of court-appointed attorneys and guardians ad litem in guardianship proceedings.

The 1987 Revised Guardianship Law

In 1987, the General Assembly revised, rewrote, and consolidated North Carolina's guardianship statutes, repealing the guardianship statutes in former G.S. Ch. 35 and enacting a new Chapter 35A of the General Statutes.[10]

The 1987 legislation enacted G.S. 35A-1107, which, like the 1977 amendments to former G.S. Ch. 35, recognized an allegedly incompetent respondent's right to be represented in guardianship proceedings by retained counsel of his own choice. Like the 1977 and 1979 amendments to G.S. Ch. 35, the 1987 legislation included provisions requiring the court to appoint lawyers to represent allegedly incompetent respondents who failed to retain legal counsel.[11] But, unlike the 1977 and 1979 amendments to former G.S. Ch. 35, the 1987 legislation

1. defined the role of a court-appointed lawyer in a guardianship proceeding as that of the respondent's guardian ad litem, rather than the respondent's attorney;[12] and

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[7] The 1977 amendments defined "guardian ad litem" as a guardian ad litem under N.C. R. Civ. P. Rule 17. G.S. 35-1.7(8) (repealed).

[8] N.C. Sess. Laws 1977, ch. 725. *See* In re Farmer, 60 N.C. App. 421, 299 S.E.2d 262 (1983) (appellate record indicates that a lawyer was appointed as guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding under former G.S. Ch. 35, Art. 2).

[9] N.C. Sess. Laws 1979, ch. 751. *See* In re Bidstrup, 55 N.C. App. 394, 285 S.E.2d 304 (1982) (appellate record indicates that a lawyer was appointed as legal counsel for a nonindigent respondent in a guardianship proceeding under former G.S. Ch. 35, Art. 1A). The 1979 statute also rewrote former G.S. 35-1.39 to require the appointment of counsel or a guardian ad litem in proceedings seeking restoration of competency. The provisions of former G.S. 35-1.39, however, did not apply to proceedings for restoration of competency under former G.S. 35-4.

[10] N.C. Sess. Laws 1987, ch. 550. The 1987 legislation was based on the recommendations of a committee that was established in 1984 by the state's Administrative Office of the Courts (AOC) and the state Division of Social Services (DSS) to address problems that clerks of superior court and state and county social services agencies had experienced in connection with guardianship proceedings. The committee was composed of clerks of superior court, county social services directors, and staff from the AOC, DSS, and the state Division of Mental Health, Mental Retardation, and Substance Abuse Services. Legal and drafting assistance was provided by staff from the Attorney General's office and the Institute of Government.

[11] G.S. 35A-1107. The 1987 legislation and current law allow, but do not require, the court to discharge an appointed guardian ad litem if the respondent retains legal counsel. A 2000 amendment to G.S. 35A-1107 requires that the appointment and discharge of lawyers as guardians ad litem in guardianship proceedings be in accordance with rules adopted by the Office of Indigent Defense Services.

[12] Like the 1977 amendments, the 1987 legislation defined "guardian ad litem" as a guardian ad litem appointed pursuant to Rule 17 of North Carolina's Rules of Civil Procedure.

2. required that all guardians ad litem appointed to represent respondents in guardianship proceedings be attorneys.[13]

It is not entirely clear, however, whether, or exactly how, the 1987 legislation changed the role and responsibilities of court-appointed lawyers in guardianship proceedings. Although the 1987 legislation made some substantive changes to North Carolina's guardianship statutes, much of the substance of former G.S. Ch. 35 was unchanged.[14] Issues or problems regarding the representation of allegedly incompetent respondents in guardianship proceedings do not appear to have been raised during the study and deliberations that resulted in the drafting and enactment of the revised guardianship statute, and the provisions regarding representation of respondents included in the 1987 legislation were not identified by contemporary commentators as involving substantive changes in existing law.[15]

Although the 1987 legislation described the role of a court-appointed lawyer as that of the respondent's "guardian ad litem," the fact that the General Assembly required that these guardians ad litem be attorneys may suggest that these court-appointed lawyers were intended to act, at least in part, as attorneys for allegedly incompetent respondents, as was the case with respect to attorneys appointed under the 1977 and 1979 amendments to former G.S. Ch. 35. And this interpretation may be strengthened by other provisions included in the 1987 legislation.

The 1987 statute, for example, required the court to appoint a lawyer as the respondent's guardian ad litem *unless* the respondent retained legal counsel, and it allowed the court to discharge the guardian ad litem if the respondent retained legal counsel.[16] This may suggest that the role of a lawyer who was appointed as a respondent's guardian ad litem under the 1987 statute was sufficiently similar to that of an attorney who was retained as the respondent's legal counsel that representation of the respondent by two lawyers—the appointed guardian ad litem and retained counsel—was, or in at least some cases might be, unnecessary. Moreover, the specific responsibilities and authority of guardians ad litem under the 1987 statute were virtually identical to those of court-appointed attorneys under the 1977 amendments to former G.S. Ch. 35 and those of attorneys who were retained as legal counsel for respondents in guardianship proceedings.[17] And the provision of the 1987 legislation regarding payment of fees for guardians ad litem refers to the fees of the "court-appointed counsel or guardian ad litem," suggesting, perhaps, that lawyers who were appointed as guardians ad litem in guardianship proceedings under the 1987 statute act, at least in part, as attorneys for allegedly incompetent respondents.[18]

The role of court-appointed lawyers under the 1987 statute, therefore, was not entirely clear. Writing shortly after the enactment of the 1987 revision of North Carolina's guardianship statutes, Frank Johns, a nationally-recognized elder law attorney, suggested that lawyers who are appointed as guardians ad litem for allegedly incompetent respondents under G.S. 35A-1107 have a dual role—as attorney or legal counsel for the respondent *and* as an officer of the court to investigate, and assist the court in determining, the

[13] The provisions of G.S. 35A-1107 do not apply to proceedings seeking restoration of competency under G.S. 35A-1130. G.S. 35A-1130(c) requires the court to appoint a guardian ad litem to represent the ward in a proceeding seeking restoration of competency if the ward is indigent and is not represented by counsel. Unlike G.S. 35A-1107, however, G.S. 35A-1130(c) does not expressly require that the guardian ad litem be an attorney. A 2000 amendment to G.S. 35A-1130(c), though, provides that guardians ad litem appointed under that section must be appointed in accordance with rules adopted by the Office of Indigent Defense Services, thereby possibly suggesting that these guardians ad litem, like those appointed under G.S. 35A-1107, should or must be attorneys. Although the responsibilities of guardians ad litem under G.S. 35A-1130(c) may be similar to those of guardians ad litem under G.S. 35A-1107, this bulletin addresses only the latter.

[14] "The primary focus of the [1987] revision was to simplify and clarify a group of laws that had become unnecessarily complex and confusing." Janet Mason, "Highlights of North Carolina's New Laws Governing Incompetency and Guardianship," 53 Popular Government 4:50 (Spring 1988).

[15] Mason, 53 Popular Government at 4:50, 4:51; A. Frank Johns, "Guardianship from 1978 to 1988 in View of Restructure" (N.C. Bar Foundation, 1988), 20-21, 22.

[16] G.S. 35A-1107 (1987) (now G.S. 35A-1107(a)).

[17] *See* G.S. 35A-1109 (requiring that a copy of the guardianship petition be served on the guardian ad litem or retained counsel); G.S. 35A-1110 (allowing the guardian ad litem or retained counsel to request a jury trial on behalf of the respondent); G.S. 35A-1111(b) (requiring that a copy of a multidisciplinary evaluation of the respondent be provided to respondent's guardian ad litem or retained counsel); G.S. 35A-1112 (allowing the guardian ad litem or retained counsel to request that a guardianship hearing be closed to the public).

[18] G.S. 35A-1116(c).

respondent's best interest.[19] If Johns was correct, it may be accurate to say that the role of court-appointed lawyers under North Carolina's revised guardianship law was both similar to, and somewhat different from, the role of lawyers who were appointed as attorneys or guardians ad litem for respondents under the 1977 and 1979 amendments to North Carolina's guardianship statutes.

The 2003 Amendments

In 2003, the General Assembly amended G.S. 35A-1107 to

1. require a lawyer who is appointed as the guardian ad litem in a guardianship proceeding to personally visit the respondent as soon as possible after being appointed;
2. require the guardian ad litem to make every reasonable effort to determine the respondent's wishes regarding the pending guardianship proceeding;
3. require the guardian ad litem to present to the court the respondent's expressed wishes at all relevant stages of the proceeding;
4. allow the guardian ad litem to make recommendations to the court concerning the respondent's best interest if the respondent's best interest differs from his express wishes; and
5. require the guardian ad litem to make recommendations to the court regarding the rights, powers, and privileges that the respondent should retain if a limited guardianship order is appropriate.[20]

It appears, though, that the 2003 amendments to G.S. 35A-1107 were intended to *clarify* the duties of court-appointed lawyers in guardianship proceedings rather than to *change* their role.[21]

[19] A. Frank Johns, "Guardianship from 1978 to 1988 in View of Restructure" (N.C. Bar Foundation, 1988), 20-21, 22.

[20] G.S. 35A-1107(b), as added by S.L. 2003-236, sec. 3. The amendment also made it clear that an attorney who is appointed as a guardian ad litem represents the respondent until the petition is dismissed or a guardian is appointed for the respondent. G.S. 35A-1107(b).

[21] The title of the 2003 legislation was "An Act … to Clarify the Duty of a Guardian ad Litem Appointed to Represent a Person in an Incompetency Adjudication … ." The legislation also reemphasized the court's authority to order a limited guardianship and provided that the guardianship provisions of G.S. Ch. 35A do not limit a court's authority under Rule 17 to appoint a guardian ad litem for a minor or incompetent party in a civil action.

The Role and Responsibilities of Lawyers Appointed under G.S. 35A-1107

Powers and Duties under G.S. Ch. 35A

G.S. 35A-1107 and other provisions of North Carolina's guardianship statute identify a number of specific powers and duties of lawyers who are appointed as guardians ad litem in guardianship proceedings. As noted above, G.S. 35A-1107 expressly requires a guardian ad litem to

1. represent the respondent until the petition is dismissed or a guardian is appointed for the respondent;
2. personally visit the respondent as soon as possible after being appointed;
3. make every reasonable effort to determine the respondent's wishes regarding the pending guardianship proceeding;
4. present to the court the respondent's expressed wishes at all relevant stages of the proceeding; and
5. make recommendations to the court regarding the rights, powers, and privileges that the respondent should retain if a limited guardianship order is appropriate.

North Carolina's guardianship statutes also expressly authorize guardians ad litem to

1. request, on behalf of the respondent, a jury trial on the issue of incompetency;
2. request, on behalf of the respondent, that the guardianship proceeding be closed to the public; and
3. make recommendations to the court concerning the respondent's best interest if the respondent's best interest differs from his express wishes.

North Carolina's guardianship statute expressly requires that a copy of the guardianship petition be served on the guardian ad litem and that the guardian ad litem be provided with a copy of any court-ordered multidisciplinary evaluation of the respondent.

In addition, guardians ad litem probably have the implied authority under G.S. Ch. 35A to

1. request a multidisciplinary evaluation of the respondent;[22]
2. subpoena witnesses and documents, present testimony and documentary evidence, and

[22] *See* G.S. 35A-1111(a) (authorizing a party to request a multidisciplinary evaluation of the respondent).

examine and cross-examine witnesses at the guardianship hearing;[23] and

3. give notice of appeal, on behalf of a respondent who has not retained counsel, from the court's orders adjudicating the respondent incompetent and appointing a guardian for the respondent.[24]

This listing of the express and implied authority and responsibilities of guardians ad litem under G.S. Ch. 35A, however, almost certainly fails to provide a comprehensive description of the role and responsibilities of court-appointed lawyers in guardianship proceedings.

Role and Responsibilities Under Rule 17

As noted above, G.S. 35A-1107 identifies the role of a court-appointed lawyer as that of "guardian ad litem" for an allegedly incompetent respondent. And G.S. 35A-1101(6) and G.S. 35A-1202(8) define "guardian ad litem" as a guardian ad litem appointed pursuant to Rule 17 of the North Carolina Rules of Civil Procedure. It therefore follows that the role and responsibilities of lawyers who are appointed as guardians ad litem under G.S. 35A-1107 must be defined by reference to, and limited or supplemented by, the provisions of Rule 17.

Rule 17 itself, however, says little about the role and responsibilities of guardians ad litem who are appointed to represent minor children or incompetent adults who are parties in civil actions or special proceedings. According to the rule, a guardian ad litem who is appointed to represent an incompetent respondent must "defend" the incompetent respondent in the pending litigation and "file and serve such pleadings as may be required."[25]

Case law, though, describes in somewhat greater detail the role and responsibilities of guardians ad litem appointed under Rule 17. North Carolina's appellate courts, for example, have stated that the role of a guardian ad litem appointed under Rule 17 is to protect an incompetent party's rights and interests in connection with the pending litigation.[26] Case law also states that a guardian ad litem appointed under Rule 17 has the authority and responsibility to

1. carefully investigate all facts relevant to the pending litigation;[27]
2. employ, if necessary, legal counsel to represent an incompetent party;[28]
3. secure or subpoena witnesses to testify on behalf of the incompetent party;[29]
4. exercise due diligence and act in the utmost good faith with respect to the pending litigation;[30] and
5. "do all things that are required" to protect the incompetent party's rights and interests in connection with the pending litigation.[31]

Although a guardian ad litem is required to protect the rights of the incompetent party she represents, she is not required to manufacture a defense if none exists.[32]

A guardian ad litem appointed under Rule 17 may waive a respondent's right to a jury trial, but has no authority to waive, compromise, or settle the respondent's substantive legal rights or consent to the entry of a judgment against the respondent without investigation and approval by the court.[33]

Unlike G.S. 35A-1107, Rule 17 does not require that the guardian ad litem appointed to represent an

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[23] *See* G.S. 35A-1112(b) (authorizing the respondent to present testimony and evidence, etc.).

[24] *See* G.S. 35A-1115 and G.S. 1-301.2 and 1-301.3 (regarding aggrieved party's right to appeal orders entered by the Clerk of Superior Court).

[25] G.S. 1A-1, Rule 17(b)(2) and 17(d).

[26] *See* Graham v. Floyd, 214 N.C. 77, 81, 197 S.E. 873, 876 (1938); Rutledge v. Rutledge, 10 N.C. App. 427, 431, 179 S.E.2d 163, 165 (1971).

[27] Travis v. Johnston, 244 N.C. 713, 722, 95 S.E.2d 94, 100 (1956); Franklin County v. Jones, 245 N.C. 272, 279, 95 S.E.2d 863, 868 (1957).

[28] In re Stone, 176 N.C. 336, 338, 97 S.E. 216, 217 (1918).

[29] Teele v. Kerr, 261 N.C. 148, 150, 134 S.E.2d 126, 128 (1964).

[30] Travis v. Johnston, 244 N.C. at 722, 95 S.E.2d at 100; Franklin County v. Jones, 245 N.C. at 279, 95 S.E.2d at 868.

[31] Teele v. Kerr, 261 N.C. at 150, 134 S.E.2d at 128. *See also* Hagins v. Redevelopment Comm'n. of Greensboro, 275 N.C. 90, 104, 165 S.E.2d 490, 498 (1969).

[32] Franklin County v. Jones, 245 N.C. at 279, 95 S.E.2d at 868.

[33] Spence v. Goodwin, 128 N.C. 273, 276, 38 S.E. 859, 860-61 (1901); Narron v. Musgrave, 236 N.C. 388, 394, 73 S.E.2d 6, 10 (1952); Blades v. Spitzer, 252 N.C. 207, 213, 113 S.E.2d 315, 320 (1960); State ex rel. Hagins v. Phipps, 1 N.C. App. 63, 64, 159 S.E.2d 601, 603 (1968).

incompetent party be a lawyer.[34] But Rule 17 clearly allows the appointment of an attorney as the guardian ad litem for an incompetent party in a civil action or special proceeding.[35]

The questions, therefore, are (1) whether the role and responsibilities of a lawyer who is appointed as a guardian ad litem under Rule 17 are different from those of a nonlawyer who is appointed as a guardian ad litem, and (2) whether, or to what extent, a lawyer or nonlawyer who is appointed as a guardian ad litem under Rule 17 is required to act as a "zealous advocate" for the incompetent adult she "represents."

It seems clear that the responsibilities of a guardian ad litem described above are, at least when the guardian ad litem does not retain legal counsel to represent the minor or incompetent party, similar to those of an attorney retained to represent a party in a lawsuit. Like a retained attorney, a guardian ad litem who represents a minor or incompetent party must "prosecute" or "defend" the litigation on behalf of the party, file necessary pleadings on the party's behalf, subpoena witnesses and present testimony and evidence, manage the litigation, and protect the party's interest in the pending action.

Thus, in *Tart v. Register*, the court refused to reverse a judgment against a minor child when the trial court had failed to appoint a guardian ad litem for the child but the child's interest had been adequately protected by a lawyer who had been retained as the child's attorney.[36] And in *In re Clark*, the Supreme Court rejected an indigent minor parent's claim that she was denied the right to court-appointed counsel in a juvenile proceeding in which the juvenile court had appointed a lawyer as her guardian ad litem pursuant to Rule 17 and the attorney/guardian ad litem "vigorously represented her as attorney as well as guardian ad litem."[37] These cases, therefore, may suggest that the role and responsibilities of a guardian ad litem are similar to those of an attorney retained to represent a minor or incompetent party, especially if the guardian ad litem is an attorney.[38]

Thus, it seems that "the role of a guardian ad litem is something akin to the role of an attorney acting as legal counsel, but … is [also] somewhat different."[39]

So, how are the roles and responsibilities of attorneys and guardians ad litem alike and how are they different? The short answer may be that a lawyer who acts as the attorney for a competent adult in a civil action or special proceeding is required to zealously

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[34] North Carolina is one of eight states that expressly require the appointment of an attorney as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding. Five of these states (Idaho, Montana, New Mexico, North Dakota, and South Carolina) distinguish the guardian ad litem's role and responsibilities from those of the court-appointed visitor in a guardianship proceeding. The other two states (Tennessee and Wisconsin) distinguish the court-appointed lawyer's role and responsibilities as guardian ad litem from the role and responsibilities of the lawyer who is appointed as the respondent's attorney in the guardianship proceeding. At least two other North Carolina statutes expressly require that the guardian ad litem appointed in a legal proceeding be a lawyer. *See* G.S. 15-11.1; G.S. 51-2.1.

[35] *See* In re Clark, 303 N.C. 592, 598, 281 S.E.2d 47, 52 (1981) (noting the "traditional practice" in North Carolina of appointing licensed attorneys as guardians ad litem for minor children who are parties in civil actions or special proceedings).

[36] Tart v. Register, 257 N.C. 161, 170-71, 125 S.E.2d 754, 761 (1962). *Cf.* In re R.A.H., ___ N.C. App. ___, 614 S.E.2d 382 (2005) (reversing an order terminating parental rights when the juvenile court appointed an attorney-advocate for the minor child but failed to appoint a volunteer guardian ad litem for the child as required by G.S. 7B-1108).

[37] In re Clark, 303 N.C. at 599, 281 S.E.2d at 52.

[38] *But see* In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1 (2004). Under North Carolina's Juvenile Code (G.S. 7B-1101(1)) the court must appoint legal counsel *and* a guardian ad litem for an indigent parent in cases involving termination of parental rights based on parental "incapacity." In *Shepard*, the indigent "incapacitated" parent was represented by a court-appointed lawyer who acted as her attorney *and* by a second court-appointed lawyer who acted as her guardian ad litem. Under these circumstances, the court concluded that the lawyer who was appointed as the parent's guardian ad litem was *not* acting as the parent's attorney, that the lawyer/guardian ad litem was therefore free to testify against the parent, and that her testimony regarding her determination regarding the parent's "best interest" and capacity to act as a parent was admissible as evidence supporting termination of the respondent's parental rights. In re Shepard, 62 N.C. App. at 228-29, 591 S.E.2d at 10. It is not at all clear, however, that the *Shepard* case governs the role or responsibilities of a lawyer appointed as the guardian ad litem for an allegedly incompetent respondent who is not represented by retained or appointed counsel in a guardianship proceeding. Although the *Shepard* decision cites In re Farmer, 60 N.C. App. 241, 299 S.E.2d 262 (1983), it is clear from the appellate record in *Farmer* that the case involved a lawyer whose testimony was based on his experience as the temporary receiver or guardian for an incompetent respondent and *not* on his service as the respondent's guardian ad litem.

[39] Orr v. Knowles, 337 N.W.2d 699, 702 (Neb. 1983).

represent the expressed wishes of her client, while a lawyer who represents an incompetent adult or minor child in a civil action or special proceeding, regardless of whether the lawyer is acting as the party's attorney *or* guardian ad litem, must represent the party's "best interests" *if* and to the extent that the party lacks sufficient mental capacity to make decisions regarding his own best interests.[40]

The Role of Court-Appointed Lawyers under the Guardianship Laws of Other States

How do the role and responsibilities of court-appointed lawyers under North Carolina's guardianship statute compare with those under the guardianship laws of other states?

Guardian ad Litem

Approximately half of the states require or allow a court to appoint a guardian ad litem to represent an allegedly incompetent respondent in a guardianship proceeding.[41]

Some of these states allow or require the appointment of a guardian ad litem in addition to the appointment of an attorney to act as legal counsel for the respondent.[42] Some allow or require the appointment of a guardian ad litem in addition to a visitor, investigator, friend of the court, or similar officer.[43] And some provide for the appointment of a guardian ad litem, an attorney for the respondent, and a visitor, investigator, or friend of the court in guardianship proceedings involving allegedly incompetent adults.[44]

In some states, the role of a guardian ad litem in guardianship proceedings is distinguished, implicitly if not clearly, from that of the respondent's court-appointed attorney or court visitor. The Texas Probate Code, for example, requires the appointment of an "attorney ad litem" and visitor in guardianship proceedings, allows the appointment of a guardian ad litem, and specifies the roles and responsibilities of each.[45] Some state guardianship laws, however, combine (and, some would argue, confuse) the guardian ad litem's role with that of the respondent's attorney or court-appointed visitor.[46]

Eight states (including North Carolina) expressly require that the person appointed as the respondent's guardian ad litem be a lawyer or provide that a court-appointed lawyer in a guardianship proceeding acts as, or has the powers of, a guardian ad litem.[47] In the remaining states that allow or require the appointment of a guardian ad litem, state law does not expressly require that the person appointed be a lawyer, though, in practice, lawyers frequently are appointed as guardians ad litem in guardianship proceedings.[48]

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[40] *See* text accompanying notes 103 through 122.

[41] Elizabeth R. Calhoun and Suzanna L. Basinger, "Right to Counsel in Guardianship Proceedings," 33 Clearinghouse Rev. 316, 321 (Sept.-Oct. 1999) (data revised based on author's research).

[42] *See*, for example, Mich. Comp. Laws § 700.5303.

[43] *See*, for example, N.D. Cent. Code § 30.1-28-03. Approximately twenty states provide for the appointment of a visitor, investigator, or friend of the court in guardianship proceedings. In some instances, the visitor's responsibilities are similar to those of a guardian ad litem under the guardianship statutes of other states. For example, the Uniform Guardianship and Protective Proceedings Act requires a court-appointed visitor to interview the respondent, explain the nature of the guardianship proceeding and the respondent's legal rights to the respondent, ascertain the respondent's views regarding the guardianship proceeding, interview the petitioner and proposed guardian, and make recommendations to the court regarding additional evaluation of the respondent's condition, the appropriateness of guardianship, and the suitability of the proposed guardian. No state requires that the visitor in a guardianship proceeding be a lawyer, but some states allow the court to appoint a lawyer as the visitor. *See* Ariz. Rev. Stat. § 14-5308 (a court-appointed investigator must have a background in law, nursing, or social work).

[44] *See*, for example, Colo. Rev. Stat. §§ 15-14-115 and 15-14-305 (allowing the appointment of a guardian ad litem and requiring the appointment of a court visitor and an attorney for a respondent in a guardianship proceeding).

[45] *See*, for example, Texas Probate Code §§ 645, 646, 647, 648, 648A; Ga. Code § 29-5-6, Tenn. Code § 34-1-107; and D.C. Code § 21-2033.

[46] Calhoun, 33 Clearinghouse Rev. at 318-319.

[47] *See*, for example, N.C. Gen. Stat. § 35A-1107 (attorney appointed as guardian ad litem); S.C. Code § 62-5-303 (court-appointed attorney has powers of a guardian ad litem).

[48] For example, although Virginia's guardianship statute (Va. Code § 37.2-1003) does not expressly require that guardians ad litem appointed in guardianship proceedings be lawyers, it appears that the state's universal practice is to appoint only lawyers as guardians ad litem. Administrative rules adopted by the Judicial Council of Virginia require that all lawyers who are appointed as guardians ad litem in guardianship proceedings be certified

In some states, state law does not expressly define the powers and duties of a guardian ad litem in guardianship proceedings. South Carolina's guardianship statute, for example, simply states that the attorney appointed to represent an allegedly incompetent respondent "shall have the powers and duties of a guardian ad litem."[49] Other state guardianship statutes provide only a general description of the guardian ad litem's role. Wyoming's guardianship statute, for example, simply provides that the court must appoint a guardian ad litem "to represent the best interest" of a respondent in a pending guardianship proceeding.[50]

Several state guardianship statutes, however, provide more detailed lists of a guardian ad litem's responsibilities in guardianship proceedings. Tennessee's guardianship statute generally requires the court to appoint a lawyer as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding unless the respondent is represented by "adversary" counsel.[51] Under Tennessee law, the lawyer who is appointed as guardian ad litem is *not* an advocate for the respondent, but rather "owes a duty to the court to impartially investigate to determine the facts" of the case and to "determine what is best for the respondent's welfare."[52] Tennessee law specifically requires a lawyer who serves as guardian ad litem to

- verify that the respondent has been properly notified of the guardianship proceeding;
- explain the nature of the guardianship proceeding and the respondent's legal rights to the respondent in language easily understood by the respondent;
- investigate the respondent's physical and mental capabilities;
- recommend the appointment of adversary counsel if the respondent wants to contest the guardianship proceeding and has not retained counsel; and
- submit a report to the court indicating whether a guardian should be appointed, whether the proposed guardian should be appointed, or whether some other person should be appointed as guardian for the respondent.[53]

New Mexico's guardianship statute, like North Carolina law, requires the court to appoint an attorney as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding unless the respondent has retained an attorney of his own choice.[54] Under the New Mexico statute, lawyers appointed as guardians ad litem are required to

- interview the respondent in person before the hearing;
- present the respondent's declared position to the court;
- interview the proposed guardian, the visitor, and the health care professional who has evaluated the respondent;

and meet continuing legal education requirements to maintain their certification. *See* Virginia Judicial Council, Standards to Govern the Appointment of Guardians Ad Litem for Incapacitated Persons (Adults), January 1, 2002 (available on-line at http://www.courts.state.va.us/stdrds.htm.)

[49] S.C. Code § 62-5-303(a). South Carolina's guardianship statute, however, implicitly distinguishes the guardian ad litem's role from that of the court-appointed visitor. *See* S.C. Code § 62-5-308.

[50] Wyo. Stat. §§ 3-1-101(a)(vi), 3-1-205(a)(iv).

[51] Tenn. Code § 34-1-107(a), (c) (a nonlawyer may be appointed as guardian ad litem if there are insufficient lawyers within the court's jurisdiction for the appointment of a lawyer as guardian ad litem).

[52] Tenn. Code § 34-1-107(d)(1).

[53] Tenn. Code § 34-1-107(d)(2), (f). Unlike Tennessee, Michigan does not require that a lawyer be appointed as the guardian ad litem for an allegedly incompetent respondent. The provisions of Michigan's statute regarding the responsibilities of guardians ad litem in guardianship proceedings, however, are similar to those in Tennessee's statute. Michigan law also requires a guardian ad litem to advise the court regarding whether the respondent wants to be present at the hearing, wants to contest guardianship, objects to the appointment of a particular person as guardian, or wants to limit the guardian's powers, and to make recommendations to the court with respect to whether there are appropriate alternatives to guardianship, whether a limited guardianship is appropriate, and whether disputes regarding the guardianship proceeding might be resolved through court-ordered mediation. Mich. Comp. Laws § 700.5305. Under Virginia law, the guardian ad litem's report must address whether the respondent needs a guardian, whether the guardian's powers and duties should be limited, the suitability of the proposed guardian, the amount of the guardian's bond, and the proper residential placement of the respondent. Va. Code § 37.2-1003(C).

[54] N.M. Stat. § 45-5-303(C). Unlike North Carolina's guardianship law, New Mexico law also requires the appointment of a "visitor" who is required to evaluate the respondent's needs and make recommendations to the court regarding the scope of the guardianship and the appropriateness of the proposed guardian. N.M. Stat. § 45-5-303(E).

- review the reports submitted by the visitor and health care professional who have evaluated the respondent; and
- obtain independent medical or psychological assessments of the respondent, if necessary.[55]

Wisconsin's guardianship statute also requires that a lawyer be appointed as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding.[56] Under Wisconsin law, the guardian ad litem is "an advocate for the best interests" of the respondent, must "function independently, in the same manner as an attorney for a party to the action, and shall consider but shall not be bound by, the wishes of the [respondent] or the positions of others as to the best interests of the [respondent]."[57] The general duties of a guardian ad litem include

- interviewing the respondent;
- explaining the guardianship proceeding to the respondent;
- advising the respondent of his legal rights;
- requesting the court to order additional medical, psychological, or other evaluations if necessary;
- informing the court whether the respondent objects to a finding of incompetency or the guardian ad litem's recommendations regarding the respondent's best interests;
- presenting evidence concerning the respondent's best interest, if necessary; and
- reporting to the court on any other relevant matter upon request of the court.[58]

Attorney

Traditionally, the role of court-appointed lawyers in guardianship proceedings was described as that of a guardian ad litem.[59] The more recent trend, however, has been to require court-appointed lawyers to act as attorneys and zealous advocates for allegedly incompetent respondents in guardianship proceedings.[60]

Thirty-three states and the District of Columbia require that a lawyer be appointed as the attorney for an allegedly incompetent respondent in a guardianship proceeding if the respondent does not retain, is unable to retain, requests, or needs legal counsel.[61]

In these states, the role and responsibilities of lawyers appointed to represent allegedly incompetent respondents in guardianship proceedings are generally the same as those of appointed or retained lawyers who represent parties in other civil proceedings. And at least two state appellate courts have ruled that a court-appointed lawyer's responsibilities to an allegedly incompetent respondent are the same as those involved in the "traditional" lawyer-client relationship.[62] So, in these states the legal and professional responsibilities of a lawyer appointed as the attorney for a respondent in a guardianship proceeding include

- treating the respondent as her client,

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[55] N.M. Stat. § 45-5-303.1(A).

[56] Wis. Stat. § 880.33(2)(a)(1).

[57] Wis. Stat. § 880.331(3).

[58] Wis. Stat. § 880.331(4). Wisconsin's guardianship statute requires the appointment of "full legal counsel" to represent an allegedly incompetent respondent if the respondent is unable to retain counsel and appointment of legal counsel is requested by the respondent, recommended by the guardian ad litem, or determined by the court to be in the respondent's best interest. Wis. Stat. § 880.33(2)(a)(1). Wisconsin's guardianship law does not provide for the appointment of a visitor, investigator, or friend of the court in a guardianship proceeding.

[59] Sally Balch Hurme, "Current Trends in Guardianship Reform," 7 Md. J. Contemp. L. Issues 143, 151 (1995-96).

[60] Hurme, 7 Md. J. Contemp. L. Issues at 151.

[61] Calhoun, 33 Clearinghouse Rev. at 321 (data revised based on author's legal research). *See*, for example, Ariz. Rev. Stat. § 14-5303 (court must appoint attorney to represent respondent unless respondent has retained legal counsel); Mich. Comp. Laws § 700.5303 (court must appoint attorney to represent respondent if respondent requests legal counsel, guardian ad litem recommends appointment of legal counsel, or court determines that respondent's best interest requires appointment of counsel); Wash. Rev. Code § 11.88.045 (court must appoint attorney for indigent respondent). Approximately seven states allow, but do not require, the court to appoint a lawyer to represent a respondent in a guardianship proceeding. Calhoun, 33 Clearinghouse Rev. at 321 (data revised based on author's research). *See*, for example, Wyo. Stat. § 3-1-205 (court has discretion to appoint attorney to represent respondent). Nine of the remaining states (including North Carolina) require or allow the appointment of a guardian ad litem to represent an allegedly incompetent respondent in a guardianship proceeding, and six of these states (including North Carolina) require that a guardian ad litem be an attorney. Only Delaware makes no provision for the appointment of an attorney or guardian ad litem to represent a respondent in a guardianship proceeding.

[62] *See* In re M.R., 638 A.2d 1274 (N.J. 1994); In re Lee, 754 A.2d 426, 438 (Md. Spec. App. 2000). *See also* Vicki Gottlich, "The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective," 7 Md. J. Contemp. L. Issues 191 (1995-96).

- advising the respondent regarding the respondent's legal rights,
- preserving the confidentiality of communications from and information about the respondent,
- advocating the respondent's position,
- protecting the respondent's interests, and
- complying with the applicable rules of professional conduct in the course of her representation of the respondent.[63]

Some state guardianship statutes expressly require a court-appointed lawyer to act as a "zealous advocate" for the respondent,[64] list some of the attorney's specific responsibilities to the respondent,[65] or explicitly differentiate the attorney's role from that of a guardian ad litem or visitor.[66]

Georgia's guardianship law, for example, expressly provides that a lawyer who is appointed as the respondent's attorney may not serve as the guardian ad litem in the pending guardianship proceeding and that a lawyer who is appointed as the guardian ad litem in a pending guardianship proceeding may not serve as the respondent's attorney.[67] And Washington's guardianship statute states that the role of a court-appointed attorney in a guardianship proceeding is "distinct from that of the guardian ad litem," requires a court-appointed attorney to "act as an advocate for the [respondent]," and prohibits a court-appointed attorney from substituting her "own judgment for that of the [respondent] on the subject of what may be in the [respondent's] best interests."[68]

West Virginia's guardianship statute goes even further, listing twenty specific responsibilities of attorneys who represent respondents in guardianship proceedings, including

- advising the respondent of the possible legal consequences of the guardianship proceeding and inquiring into the client's interests and desires with respect thereto;
- maintaining contact with the respondent throughout the proceeding;
- interviewing potential witnesses and contacting persons who may have relevant information concerning the respondent;
- pursuing discovery through formal and informal means;
- obtaining independent psychological examinations, medical examinations, and home studies as needed;
- reviewing all medical reports;
- subpoenaing witnesses to the hearing;
- communicating the respondent's wishes to the court;
- presenting evidence on all relevant issues;
- cross-examining witnesses, making objections to inadmissible testimony and evidence, and otherwise zealously representing the respondent's interests and desires;
- raising appropriate questions as to any person nominated or proposed as guardian;
- taking steps to limit the scope of the guardianship as appropriate; and
- informing the respondent of the respondent's right to appeal and filing an appeal on behalf of the respondent when appropriate.[69]

"Zealous Advocate" or "Best Interest"?

Discussions regarding the role of court-appointed lawyers in guardianship proceedings often are couched in terms of two competing models or perspectives: the "zealous advocate" model and the "best interest" perspective.

"Best Interest"

Under the "best interest" perspective, the role of a court-appointed lawyer in a guardianship proceeding

[63] In re Lee, 754 A.2d at 438-439. *See also* "Wingspan—The Second National Guardianship Conference, Recommendations," 31 Stetson L. Rev. 595, 601 (2002); Lu-in Wang, et al., "Trends in Guardianship Reform: Roles and Responsibilities of Legal Advocates," 24 Clearinghouse Review 561, 566-67 (Oct. 1990); Gottlich, 7 Md. J. Contemp. Legal Issues at 216-220; Joan L. O'Sullivan, "Role of the Attorney for the Alleged Incapacitated Person," 31 Stetson L. Rev. 687, 727-733 (2001-02); American Bar Association Commission on the Mentally Disabled, *Involuntary Civil Commitment: A Manual for Lawyers and Judge*, 17-43 (1988) (discussing the responsibilities of respondents' attorneys in involuntary mental commitment hearings).

[64] D.C. Code § 21-2033.

[65] Tex. Probate Code § 647 (requiring a court-appointed lawyer to interview the respondent and explain the law).

[66] *See*, for example, Ariz. Rev. Stat. § 14-5303 (requiring the appointment of an attorney and a court investigator in guardianship proceedings and specifying the duties of the court investigator).

[67] Ga. Code § 29-5-6.

[68] Wash. Rev. Code § 11.88.045(1)(b).

[69] W.Va. Code § 44A-2-7.

should be to determine, represent, and protect the "best interest" of the allegedly incompetent respondent.[70] Under this model, a court-appointed lawyer acts primarily as an investigator or officer of the court rather than the respondent's attorney or a zealous advocate for the position voiced by the respondent.

> In this role, the attorney determines what is in the best interest of the person who is the subject of the guardianship [proceeding]. The attorney uses his or her own judgment to decide whether the person is competent, investigates the situation, and typically files a report with the court advocating what the attorney decides is in the best interest of the client.[71]

The responsibilities of a court-appointed lawyer under the "best interest" model therefore generally include

- conducting an independent and impartial investigation of the respondent's mental capacity, needs, and situation; and
- making recommendations to the court with respect to the respondent's need for a guardian, the nature and scope of the proposed guardianship, the suitability of the proposed guardian, and the respondent's best interests even if those recommendations conflict with the respondent's expressed desire or position with respect to the guardianship proceeding.[72]

"Zealous Advocate"

By contrast, proponents of the "zealous advocate" model contend that

> [t]he role of the court-appointed attorney is … the traditional attorney role. … "[t]he representative attorney is a zealous advocate for the wishes of the client."[73]

The "zealous advocate" model, therefore, requires a court-appointed lawyer to represent the allegedly incompetent respondent in a guardianship proceeding in the same manner, insofar as it is possible to do so, she would represent any client in a pending legal proceeding. More specifically, the "zealous advocate" model requires a respondent's court-appointed lawyer to

> (a) advise the [respondent] of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options;
> (b) give that advice in the language, mode of communication and terms that the [respondent] is most likely to understand; and
> (c) zealously advocate the course of actions chosen by the [respondent].[74]

Proponents of the "zealous advocate" model, including the American Bar Association's Commission on Legal Problems of the Elderly, the ABA's Commission on the Mentally Disabled, the 1988 "Wingspread" Conference on Guardianship, and the 2001 "Wingspan" Guardianship Conference, argue that, despite their "therapeutic" or beneficent purpose, guardianship proceedings usually result in "significant and usually permanent loss of [the respondent's legal] … rights and liberties."[75]

> From its inception, [the state's exercise of] *parens patriae* authority [in guardianship proceedings] has been seen as benevolent in nature, rather than adversarial, because the state is acting to protect those who cannot protect themselves. … However, not every petitioner for guardianship is focused on doing good. [Moreover,] … the imposition of a guardianship may rob a [respondent] of his or her autonomy and his or her ability to manage affairs independently. * * * A respondent in a guardianship case can lose his or her right to vote, marry, contract, determine where he or she will live, choose the kind of health care he or she will receive, and decide how to manage his or her assets.[76]

Proponents of the "zealous advocate" model contend that the potential loss of the respondent's legal rights in a guardianship proceeding requires, as a matter of public policy if not due process, that a court-appointed lawyer act as the respondent's attorney and advocate in any case in which the respondent is unable,

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[70] *See* Frederick R. Franke, Jr., "Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships," 7 Md. J. Contemp. Legal Issues 223 (1996-96).

[71] O'Sullivan, 31 Stetson L. Rev. at 687.

[72] Calhoun, 33 Clearinghouse Rev. at 318; In re Lee, 754 A.2d at 439.

[73] In re Mason, 701 A.2d 979, 982 (N.J. Super. Ch. Div. 1997).

[74] "Wingspan—The Second National Guardianship Conference, Recommendations," 31 Stetson L. Rev. at 601.

[75] In re Lee, 754 A.2d at 439.

[76] O'Sullivan, 31 Stetson L. Rev. at 703 and 698-99. *See also* Gotttlich, 7 Md. J. Contemp. L. Issues at 197 ("Despite the seemingly benevolent nature of the guardianship system, the consequences of a guardianship are very harsh. When a court appoints a guardian, the ward loses all rights to determine anything about her life."); Calhoun, 33 Clearinghouse Rev. at 317 ("a petition for guardianship is an obvious threat to the [respondent's] rights and liberties").

due to indigency or incapacity, to retain legal counsel of his own choice or adequately communicate his own position regarding the guardianship proceeding to the court. They also contend that the "zealous advocate" model should apply even in cases in which the respondent's incompetency is clear or uncontested, since the respondent may need an advocate to contest other aspects of the guardianship proceeding, including the scope of the proposed guardianship, the suitability of the proposed guardian, or the residential placement or medical treatment of the respondent.[77]

And while proponents of the "zealous advocate" model generally recognize that a court-appointed attorney's role "does not extend to advocating [a respondent's] decisions [if they] are patently absurd or … pose an undue risk of harm" to the respondent, they also contend that "advocacy that is diluted by excessive concern for the [respondent's] best interests … raise[s] troubling questions for attorneys in an adversarial system."[78]

How Helpful Are the "Zealous Advocate" and "Best Interest" Models?

Courts and commentators commonly use the "zealous advocate" and "best interest" models to describe and distinguish the role of court-appointed lawyers in guardianship proceedings, often equating the "best interest" model with a lawyer's role as guardian ad litem and the "zealous advocate" model with a lawyer's role as the respondent's attorney. One New Jersey court, for example, stated:

> The court-appointed attorney … acts as an "advocate" for the interests of his client [while] the [guardian ad litem] acts as the "eyes of the court" to further the "best interests" of the alleged incompetent. Court-appointed counsel is an independent legal advocate for the alleged incompetent and takes an active part in the hearings and proceedings, while the [guardian ad litem] is an independent fact finder and an investigator for the court. The court-appointed attorney … subjectively represents the [respondent's] intentions, while the [guardian ad litem] objectively evaluates the best interests of the alleged incompetent.[79]

It is far from clear, however, that the "best interest" model accurately and completely describes the role of a guardian ad litem in guardianship proceedings *or* that the "zealous advocate" model adequately describes the role of a court-appointed lawyer who acts as the attorney for an allegedly incompetent respondent.

As noted above, the "zealous advocate" model does not require that an attorney always advocate the positions or wishes of her client. A court-appointed attorney's role "does not extend to advocating [a respondent's] decisions [if they] are patently absurd or … pose an undue risk of harm"[80] And the rules of professional conduct governing lawyers allow a lawyer to make decisions on behalf of a client if the client's mental incapacity prevents him from making appropriate decisions in connection with a legal proceeding and the lawyer's actions are in the client's "best interest."[81]

Nor is there an exact correlation between the "best interest" model and the role and responsibilities of a guardian ad litem for an allegedly incompetent adult. Under Rule 17, a guardian ad litem is required to protect the interests of a party who, due to infancy or incapacity, is unable to protect his own interests in connection with a pending legal proceeding. And in doing so, the guardian ad litem acts, in some sense, as a diligent and "zealous advocate" for a minor or incompetent party and the party's expressed interests to the extent the party has sufficient capacity to make competent decisions regarding his own interests. And while a guardian ad litem, in some instances, may be called upon to act as the court's "eyes and ears" or serve an independent and impartial fact finder, those responsibilities more accurately describe the role of a visitor, investigator, or friend of the court than that of a guardian ad litem.

So while the "zealous advocate" and "best interest" models may provide a general context for discussing the role of court-appointed lawyers in guardianship proceedings, their usefulness is limited and they are not determinative.

Ambiguity and Confusion Regarding the Role of Court-Appointed Lawyers in Guardianship Proceedings

Although most state guardianship statutes nominally provide that a court-appointed lawyer acts as either the respondent's attorney or guardian ad litem, the role and responsibilities of court-appointed lawyers in

[77] In re M.R., 638 A.2d at 1285.

[78] In re M.R., 638 A.2d at 1285.

[79] In re Mason, 701 A.2d at 983.

[80] In re M.R., 638 A.2d at 1285.

[81] *See* text accompanying notes 103 through 110.

guardianship proceedings are not always clearly defined or understood.[82]

For example, two 1994 studies of guardianship proceedings in Maryland found that "confusion reigns regarding what role the appointed attorney is to play."[83] And a subsequent decision by Maryland's Special Court of Appeals noted that the proper role of court-appointed lawyers in guardianship proceedings remains "shrouded in ambiguity."[84] Similarly, a 1994 study of guardianship cases in ten states by the University of Michigan's Center for Social Gerontology found that "attorneys may often be confused or uncertain of the role they are to play, i.e., whether they are advocating for the [respondent's] best interests or the [respondent's] stated desires."[85]

As a result of this ambiguity and confusion, some court-appointed lawyers apparently "choose whichever role [they] prefer[]"[86] and often will choose "the easier investigative function," acting in what they perceive to be the respondent's "best interests" rather than acting as "zealous advocates" for respondents.[87] Others choose to act as zealous advocates, opposing the appointment of a guardian for the allegedly incompetent respondent without regard to whether guardianship is in the respondent's "best interest."[88] In either case, "some important functions [that should be performed by an attorney or guardian ad litem] may never be performed by anyone [and] other functions may be performed by persons who do not have the training to perform them properly … ."[89]

Confronted with the dilemma of whether to act as the respondent's attorney or guardian ad litem, some court-appointed lawyers attempt to "wear both hats."[90] And while this is not a problem *if* and to the extent that the responsibilities of these two roles are consistent with each other and with state law, some courts and commentators believe that the roles of attorney and guardian ad litem are "materially different," are potentially, if not inherently, incompatible, and should not be performed simultaneously by one person.[91]

The solution to this ambiguity and confusion, of course, is the enactment of guardianship statutes that clearly define the role of court-appointed lawyers in guardianship proceedings and describe in detail their legal and professional responsibilities, coupled with high quality education and training programs for lawyers who are appointed to represent allegedly incompetent respondents.

Do the Revised Rules of Professional Conduct Apply to Lawyers Who Are Appointed as Guardians ad Litem?

The North Carolina State Bar's ethics committee recently addressed this question in the context of lawyers who are appointed, pursuant to G.S. 7B-1101(1) and Rule 17, as guardians ad litem for "incapacitated" parents who are respondents in juvenile proceedings involving termination of parental rights.[92]

All lawyers who are licensed to practice in North Carolina are subject to the North Carolina State Bar's Revised Rules of Professional Conduct. However,

> … some of the Rules of Professional Conduct create duties that are owed only in the

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[82] Calhoun, 33 Clearinghouse Rev. at 318-19; O'Sullivan, 31 Stetson L. Rev. at 688; Joan L. O'Sullivan and Diane E. Hoffman, "The Guardianship Puzzle: Whatever Happened to Due Process?" 7 Md. J. Contemp. Legal Issues 11, 66 (1995-96); A. Frank Johns, "Three Rights Make Strong Advocacy for the Elderly: Right to Counsel, Right to Plan, and Right to Die," 45 S. Dak. L. Rev. 492, 494 (2000).

[83] O'Sullivan and Hoffman, 7 Md. J. Contemp. L. Issues at 66.

[84] In re Lee, 754 A.2d at 439.

[85] Lauren Barritt Lisi, et al., National Study of Guardianship Systems: Findings and Recommendations (Ann Arbor: The Center for Social Gerontology, 1994), cited in O'Sullivan, 7 Md. J. Contemp. Legal Issues at 44.

[86] O'Sullivan, 31 Stetson L. Rev. at 688.

[87] Gottlich, 7 Md. J. Contemp. Legal Issues at 194; O'Sullivan, 7 Md. J. Contemp. Legal Issues at 38-39, 66 (reporting findings that most lawyers appointed to represent respondents in guardianship proceedings in Maryland acted as guardians ad litem or investigators rather than as zealous advocates or attorneys for respondents).

[88] A. Frank Johns, "Guardianship from 1978 to 1988 in View of Restructure" (N.C. Bar Foundation, 1988).

[89] James M. Peden, "The Guardian Ad Litem Under the Guardianship Reform Act: A Profusion of Duties, a Confusion of Roles, 68 U. Det. L. Rev. 19, 29 (1990-91).

[90] A. Frank Johns, "Guardianship from 1978 to 1988 in View of Restructure" (N.C. Bar Foundation, 1988).

[91] *See* In re Lee, 754 A.2d at 438 ("the duties of an attorney may at times conflict with the duties of a guardian ad litem"); Gottlich, 7 Md. J. Contemp. L. Issues at 194; Hurme, 7 Md. J. Contemp. L. Issues at 151 (suggesting that in most cases, "the same person cannot, and should not, serve in both roles simultaneously"); Calhoun, 33 Clearinghouse Rev. at 319.

[92] 2004 Formal Ethics Opinion 11 (North Carolina State Bar, Jan. 21, 2005). *See also* In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1 (2004).

> professional client-lawyer relationship. For example, the confidentiality rule only applies when a lawyer has a client-lawyer relationship or has agreed to consider the formation of one. Conversely, there are other rules that apply although a lawyer is acting in a non-professional capacity. For example, a lawyer who commits fraud in a business transaction has violated Rule 8.4 by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[93]

The ethics committee therefore ruled that if another lawyer is appointed as the parent's attorney, the lawyer who is appointed as the parent's guardian ad litem "does not have a client-lawyer relationship with the parent, and therefore, would not be governed by the Rules of Professional Conduct relating to duties owed to clients."[94] Thus, a court-appointed lawyer who acts "purely as a guardian [ad litem] and not [as] an attorney" is *not* bound by the ethical rules governing confidentiality (Rule 1.6), zealous advocacy (Rule 1.3), loyalty (Rules 1.7 through 1.10), or evaluations for use by third persons (Rule 2.3), but is subject to the ethical rules governing candor toward the court (Rule 3.3), fairness to opposing party and counsel (Rule 3.4), ex parte communications with and unlawful influence of judicial officials (Rule 3.5), and dishonesty, fraud, deceit, misrepresentation, and conduct prejudicial to the administration of justice (Rule 8.4).

The committee, however, also ruled that if a court appoints a lawyer to act as a party's attorney *and* guardian ad litem, the lawyer must comply with the Rules of Professional Conduct that apply to client-lawyer relationships.

The nature and scope of a court-appointed lawyer's ethical and professional responsibilities in a guardianship proceeding therefore depend on whether the lawyer's appointment as the guardian ad litem for an allegedly incompetent respondent creates a "professional client-lawyer relationship." And, as discussed above, the answer to this question is not entirely clear.

An incapacitated parent in a termination of parental rights proceeding is represented by two court-appointed lawyers—one who acts as the parent's attorney and another who acts as the parent's guardian ad litem. So it is possible, though not necessarily easy, to distinguish between a court-appointed lawyer's role as the parent's attorney and a lawyer's role as the parent's guardian ad litem.

By contrast, in a guardianship proceeding there is only one court-appointed lawyer, not two, and an allegedly incompetent respondent usually is not represented by retained legal counsel. And while the court-appointed lawyer's role is nominally that of the respondent's guardian ad litem, her responsibilities bear at least some similarity to those of an attorney for the respondent.[95] So a lawyer who is appointed under G.S. 35A-1107 as guardian ad litem for an allegedly incompetent respondent who is *not* represented by appointed or retained counsel in a guardianship proceeding *may* be acting as the respondent's attorney *and* guardian ad litem. And if this is so, a lawyer who is appointed as the guardian ad litem for an unrepresented respondent in a guardianship proceeding may be subject to the Rules of Professional Conduct that govern client-lawyer relationships.[96]

These rules generally require a lawyer to act, within the bounds of law and insofar as possible, as a "zealous advocate" for her client. The official comments to Rule 1.3 of the North Carolina State Bar's Revised Rules of Professional Conduct require a lawyer to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." In representing a client, a lawyer is required to "abide by a client's decisions concerning the objectives of representation and … consult with the client as to the means by which they are to be pursued."[97]

A lawyer's professional obligation to act as a zealous advocate for her client "is not a license to raise frivolous defenses or to stand obdurately on procedural points."[98] It does, however, require a court-appointed lawyer to communicate with her client; to explain the potential legal consequences of and the legal options with respect to the pending litigation to the client; to ascertain the client's wishes with respect to pending litigation; to secure and present evidence and

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[93] 2004 FEO 11 (citations omitted).

[94] 2004 FEO 11.

[95] *See* notes 26 to 40 and accompanying text.

[96] *See* Restatement (Third) of the Law Governing Lawyers § 14(2) (a client-lawyer relationship is formed when a court appoints a lawyer to provide "legal services" to a party) and comment d (a court may appoint a lawyer to represent an incompetent party without the party's consent).

[97] N.C. State Bar Revised Rules of Professional Conduct, Rule 1.2. In representing a client, a lawyer may exercise her professional judgment to waive or fail to assert a right or position of the client and may exercise professional discretion in determining the means by which a matter should be pursued. Rule 1.2(a)(3); Rule 1.4 (Comment 1).

[98] O'Sullivan, 7 Md. J. Contemp. Legal Issues at 68. *See also* Rule 3.1; Rule 1.2(a)(2).

arguments on behalf of the client; and to take appropriate actions (such as objecting to inadmissible evidence and cross-examining adverse witnesses) necessary to protect the client's legal rights and interests in the litigation.[99]

At a minimum, the rule of "zealous advocacy" requires a lawyer who is appointed as the attorney and guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding to ensure that the respondent is not found to be incompetent in the face of insufficient evidence, that guardianship is not ordered if there are appropriate and less restrictive alternatives available to protect the respondent's interests, that the guardian appointed for an incompetent respondent is suitable and qualified, and that appropriate limits are placed on the guardianship when necessary to protect the respondent's rights and interests.

If a court-appointed lawyer acts as the attorney and guardian ad litem for a respondent in a guardianship proceeding, the lawyer has an ethical and professional obligation to protect the respondent's confidences and secrets and is prohibited from revealing information about the respondent acquired during the attorney-client relationship unless the respondent gives informed consent to the disclosure or disclosure is authorized under the Revised Rules of Professional Conduct.[100]

In addition, a lawyer who is appointed as the respondent's attorney and guardian ad litem is subject to the State Bar's rules governing

- communication with a client (Rule 1.4);[101]
- competent legal representation (Rule 1.1);
- loyalty to a client and conflicts of interest (Rules 1.7 through 1.10);
- terminating legal representation (Rule 1.16);
- undertaking evaluations for use by third parties (Rule 2.3);
- the assertion of nonmeritorious claims or defenses (Rule 3.1);
- dilatory practices and delaying litigation (Rule 3.2);
- candor toward the court (Rule 3.3);
- fairness to the opposing party and counsel (Rule 3.4);
- ex parte communications with judicial officials and unlawful attempts to influence judicial officials (Rule 3.5);
- testifying as a witness at trial (Rule 3.7);
- making false statements of law or fact to others (Rule 4.1);
- communication with persons represented by counsel (Rule 4.2);
- dealing with unrepresented persons (Rule 4.3);
- respect for the rights of others (Rule 4.4);
- dishonesty, fraud, deceit, misrepresentation and conduct prejudicial to the administration of justice (Rule 8.4); and
- representing clients with diminished mental capacity (Rule 1.14).[102]

Rule 1.14: Representing Clients with Diminished Mental Capacity

If a lawyer who is appointed as the guardian ad litem for a respondent in a guardianship proceeding is subject to the ethical and professional rules governing

[99] O'Sullivan, 7 Md. J. Contemp. Legal Issues at 68; Anne K. Pecora, "Representing Defendants in Guardianship Proceedings: The Attorney's Dilemma of Conflicting Responsibilities," 1 Elder L. J. 139, 148 (1993).

[100] 2004 FEO 11.

[101] In cases involving clients with diminished mental capacity, the lawyer's communication with a client must take into account the client's mental capacity. For example, clients who suffer from Alzheimer's disease may experience "sundowner syndrome," becoming more confused around dusk. A lawyer representing a client with Alzheimer's disease, therefore, should communicate with the client early in the morning or after a meal. Similarly, lawyers should use simple terms and concrete examples in explaining legal proceedings and the possible consequences of guardianship to clients with diminished mental capacity. *See* O'Sullivan, 31 Stetson L. Rev. at 715, 727-728. A client's physical condition, such as hearing loss, also should be taken into consideration in determining the attorney's obligations under Rule 1.4. Lawyers can attempt to enhance their communication with elderly or impaired clients by printing documents in large type, speaking in plain language and avoiding legalese, sending materials to clients for review before meetings, and minimizing background noise and distractions. Jan Ellen Rein, "Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say," 9 Stan. L. & Policy Rev. 241, 244 (1998). Another useful technique to test the client's understanding of advice or explanations provided by a lawyer is to ask the client to paraphrase (not merely repeat) what the lawyer said.

[102] Some of the professional and ethical obligations of lawyers who act as the attorneys for allegedly incompetent respondents in guardianship proceedings are discussed in greater detail in O'Sullivan, 31 Stetson L. Rev. at 713-719, and Gottlich, 7 Md. J. Contemp. Legal Issues at 201-207.

client-lawyer relationships, the lawyer's representation of the allegedly incompetent respondent may be affected by Rule 1.14 of the Revised Rules of Professional Conduct, which governs a lawyer's representation of a client with diminished mental capacity.[103] The rule states:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Because an adult respondent in guardianship proceedings is alleged to be mentally incapacitated or incompetent, a court-appointed lawyer who acts as the attorney and guardian ad litem for an allegedly incompetent respondent must consider whether and to what extent Rule 1.14 applies with respect to her representation of the respondent.

> Representing a questionably competent client is always an enormous challenge …. The client may be confused about some things, but not about others. He or she may make bad decisions and insist that the lawyer advocate for him or her, or may demand that the lawyer defend a seemingly indefensible position.[104]

If a court-appointed lawyer representing an allegedly incompetent respondent in a guardianship proceeding determines that the respondent's capacity to make adequately considered decisions in connection with the pending proceeding is diminished due to a mental impairment, the lawyer must, as far as reasonably possible, maintain a normal attorney-client relationship with the respondent.

Comment 1 to Rule 1.14 reminds lawyers that "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." Thus, the North Carolina State Bar's ethics committee has ruled that an attorney may represent an allegedly incompetent respondent in opposing adjudication of the respondent's incompetency and appointment of a guardian if (a) the respondent instructs the attorney to do so, (b) the attorney determines that the respondent has sufficient mental capacity to make an adequately considered decision to oppose the guardianship petition, and (c) opposing the petition does not require the attorney to present a frivolous claim or defense on behalf of the respondent or violate another rule of professional conduct.[105]

Rule 1.14, however, allows a lawyer to take "protective action" on behalf of a client (and presumably contrary to the client's expressed wishes) if the lawyer determines that the client's mental impairment is such that he cannot make adequately considered decisions that will adequately protect his interests in connection with a legal proceeding and is thereby at risk of substantial physical, financial, or other harm.[106] Similarly, comments 9 and 10 to Rule 1.14 allow a lawyer to take legal action on behalf of a person whose mental capacity is so severely diminished that he cannot establish a client-lawyer relationship with the attorney or make or express considered judgments about a legal matter *if* a person acting in good faith on behalf of the incapacitated person requests the lawyer to act on behalf of the incapacitated person and legal action is required to avoid imminent and irreparable harm to the health, safety, or financial interests of the incapacitated individual. And comment 7 to Rule 1.14 suggests that any protective action that a lawyer takes on behalf of a client with diminished capacity should be "guided by such factors as the wishes and values of the client to

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[103] Rule 1.14 is discussed in detail in Rein, 9 Stan. L. & Policy Rev. 241, and in Elizabeth Laffitte, "Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered," 17 Georgetown J. of Legal Ethics 313 (2003). *See also* Restatement (Third) of the Law Governing Lawyers § 24.

[104] O'Sullivan, 31 Stetson L. Rev. at 725.

[105] 1998 Formal Ethics Opinion 16 (North Carolina State Bar, Jan. 15, 1999).

[106] Even in these instances, the lawyer may disclose confidential information about the client only to the extent reasonably necessary to protect the client's interests.

the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."

Similarly, the Restatement (Third) of the Law Governing Lawyers states that when a lawyer determines that a client is unable to make adequately considered decisions regarding the matter of legal representation, the lawyer may pursue her reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions—even if the client expresses no wishes or gives contrary instructions.[107]

> When a client's disability prevents maintaining a normal client-lawyer relationship and there is no guardian or other legal representative to make decisions for the client, the lawyer may be justified in making decisions with respect to questions within the scope of the representation that would normally be made by the client. A lawyer should act only on a reasonable belief, based on appropriate investigation, that the client is unable to make an adequately considered decision rather than simply being confused or misguided.[108]

In some instances, ethical and professional rules may require a court-appointed lawyer to oppose adjudication of the respondent's incompetency, to oppose the appointment of a guardian or interim guardian, to oppose the appointment of a particular person as guardian or interim guardian, or to propose a limited, rather than plenary, guardianship. In other instances, though, the rules may justify the lawyer's conceding the respondent's incompetency or accepting the appointment of a guardian to manage the respondent's affairs. In the case of a comatose (or a severely delusional, demented, or cognitively impaired) respondent, Rule 1.14 clearly allows a court-appointed lawyer to take legal action on behalf of the respondent in a guardianship proceeding to the extent necessary to protect the respondent's health, safety, or financial interests from imminent and irreparable harm. Thus, a court-appointed lawyer may act, with little or no guidance from a severely incapacitated respondent, to ensure that

> (1) there is no less restrictive alternative to guardianship; (2) proper due-process procedure is followed; (3) the petitioner proves the allegations in the petition [as required by law] … ; (4) the proposed guardian is a suitable person to serve; and (5) if a guardian is appointed, the order leaves the client with as much autonomy as possible.[109]

On the other hand, though, a court-appointed lawyer who acts as the attorney and guardian ad litem for an allegedly incompetent adult in a guardianship proceeding may *not* disclose confidential information to the court without the respondent's consent and may *not* make recommendations to the court regarding the respondent's best interests if those interests differ from the respondent's express wishes *if* the respondent's mental impairment does not prevent his making adequately considered decisions that will adequately protect her interests in connection with the guardianship proceeding.[110]

Determining Mental Capacity

What is the legal standard for determining whether a respondent is "incompetent" or lacks sufficient mental capacity to make decisions in connection with the pending guardianship proceeding? How can a court-appointed lawyer determine whether a respondent in a guardianship proceeding is incompetent or suffers from diminished mental capacity?

Under G.S. 35A-1101(7), an adult is "incompetent" if, due to mental illness, developmental disability, autism, inebriety, senility, or similar causes or conditions, he "lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property."[111]

Under this standard, a person is incompetent if his mental condition is such that he "is incapable of transacting the ordinary business involved in taking care of his property [or] is incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, or his property and estate."[112] Conversely, a person is not incompetent if he "understands what is necessarily required for the management of his ordinary business affairs and is

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[107] Restatement (Third) of the Law Governing Lawyers § 24.

[108] Restatement (Third) of the Law Governing Lawyers § 24, Comment d.

[109] O'Sullivan, 31 Stetson L. Rev. at 726.

[110] In re Lee, 754 A.2d at 439-441.

[111] *See also* Stephen J. Anderer, *Determining Competency in Guardianship Proceedings* (Washington, DC: American Bar Association, 1990).

[112] Hagins v. Redevelopment Comm'n of Greensboro, 275 N.C. 90, 105-106, 165 S.E.2d 490, 500 (1969).

able to perform those acts with reasonable continuity, if he comprehends the effect of what he does, and can exercise his own will."[113]

The incompetency standard established by G.S. 35A-1101(7) focuses primarily on an individual's *general* capacity to make important decisions regarding himself, his family, and his property. By contrast, the standard of capacity under Rule 1.14 focuses on a *specific* capacity: a person's capacity to make "adequately considered decisions" and "adequately act" in his own interest in connection with a pending lawsuit or other legal matter.

In both cases, though, incompetency or incapacity is "a flexible, elusive, and ultimately undefinable concept."[114] Although capacity "involves the ability to understand and process information so that a decision can be made and communicated,"[115] no single definition or test can succeed in pinpointing the boundary between capacity and incapacity because capacity is fluid—more a matter of degree than an "all or nothing" status and often changing or transitory rather than static or permanent.

> Not only is each individual at some point on a capacity continuum, but an individual's capacity can vary over time and with the task or decision in question. Individuals can be capable of handling some tasks but not others. They can be fine in the morning but fuzzy by late afternoon. … Furthermore, what looks like incapacity is often not mental incapacity at all, but simply a symptom of reversible or correctable medical and environmental interferences.[116]

In assessing a respondent's mental capacity, lawyers should remember that a person does not lack capacity merely because a guardianship proceeding has been brought against him or he

> does things that other people find disagreeable or difficult to understand. Indeed, a great danger in capacity assessment is that eccentricities, aberrant character traits, or risk-taking decisions will be confused with incapacity. A capacity assessment first asks what kind of person is being assessed and what sorts of things that person has generally held to be important.[117]

And because capacity may be "affected by countless variables: time, place, social setting, emotional, mental or physical states, etc.," capacity assessment should be approached in "two stages—first take reasonable steps to optimize capacity; and second, perform a preliminary assessment of capacity."[118]

Assessment of a respondent's cognitive capacity should focus on the respondent's decision-making *process* more than the decisional *output* of the respondent's reasoning. The issue is whether the respondent's reasoning process is significantly impaired, not whether the respondent's decisions are, in an objective sense, reasonable. In assessing a respondent's cognitive capacity, the issue is not whether the respondent's cognitive abilities are impaired, subaverage, or suboptimal, but rather whether the respondent's cognitive abilities are at least minimally sufficient to make important decisions.

A court-appointed lawyer, therefore, should consider several factors in assessing a respondent's cognitive capacity:

- awareness (extent of the respondent's capacity to perceive, concentrate, remember information);
- comprehension (ability to understand and assimilate information);
- reasoning (ability to integrate and rationally evaluate information);
- deliberation (ability to weigh facts and alternatives in light of personal values and potential consequences);

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[113] Hagins v. Redevelopment Comm'n of Greensboro, 275 N.C. at 106, 165 S.E.2d at 500.

[114] Rein, 9 Stanford L. & Policy Rev. at 242. *See also* Anderer, *Determining Competency in Guardianship Proceedings*; Charles P. Sabatino, "Competency: Refining Our Legal Fictions" in Michael Smyer, et al. (eds.), *Older Adults' Decision-Making and the Law* (New York: Springer Publishing Co., 1996).

[115] Baird B. Brown, "Determining Clients' Legal Capacity," 4 Elder L. Rep. 1 (Feb. 1993). Decisional capacity also may be defined as "(1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to deliberate about one's choices." Daniel L. Bray and Michael D. Ensley, "Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney," 33 Fam. L. Q. 329, 336 (1999).

[116] Rein, 9 Stanford L. & Policy Rev. at 242.

[117] Sabatino, 16 J. Am. Acad. of Matrimonial Lawyers at 486.

[118] Sabatino, 16 J. Am. Acad. of Matrimonial Lawyers at 486, 487-490, 490-499. *See also* American Bar Association Commission on Legal Problems of the Elderly and Legal Counsel for the Elderly, *Effective Counseling of Older Clients: The Attorney-Client Relationship*, 15 (1995) and Stephen J. Anderer, *Determining Competency in Guardianship Proceedings* (American Bar Association 1990).

- understanding (ability to appreciate the nature of the situation and the possible consequences of one's decisions);
- choice (ability to express in a sufficiently stable and consistent manner one's preference or decision).

Similarly, comment 6 to Rule 1.14 states:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with known long-term commitments and values of the client.[119]

Standard screening tests, such as the Mini-Mental Status Examination (MMSE) or the Short Portable Status Questionnaire (SPSQ), may be useful in making preliminary assessments of a respondent's mental capacity.[120] These tests, however, "provide only a crude global assessment of cognitive functioning" and do not establish or "rule out the ability to perform some decisionmaking tasks."[121] Thus, in appropriate circumstances a lawyer may, and should, seek guidance from an appropriate diagnostician regarding the nature and extent of a respondent's incapacity.[122]

Civil Liability of Guardians ad Litem

May a court-appointed lawyer be held liable for failing to satisfactorily discharge her duties as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding?

In 1956, the North Carolina Supreme Court stated, in *dicta*, that:

> One who accepts appointment as guardian *ad litem* of a person under disability owes a high duty to his ward. He should carefully investigate the facts and must exercise diligence in the protection of the rights and estate of his ward. For failure to perform the solemn duty he has undertaken, he is liable in damages for any loss caused thereby.[123]

But in a more recent decision, *Dalenko v. Wake County Department of Human Services*, the North Carolina Court of Appeals held, without citing the Supreme Court's 1956 *Travis* decision, that an attorney who is appointed as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding is absolutely immune from civil liability for the performance of her duties as the respondent's guardian ad litem.[124]

Citing the Fourth Circuit's decision in *Fleming v. Asbill*,[125] the court of appeals held that a guardian ad

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[119] The factors listed in comment 6 are similar to those adopted by the Working Group on Client Capacity at the 1993 Conference on Ethical Issues in Representing Older Clients. 62 Fordham L. Rev. 1003 (1994). These factors are discussed in more detail in Charles P. Sabatino, "Representing a Client with Diminished Capacity: How Do You Know It *And* What Do You Do About It?" 16 J. Am. Acad. of Matrimonial Lawyers 481, 495-498 (2000).

[120] The MMSE, SPSQ, and other standard screening tests are described in Sabatino, 16 J. Am. Acad. of Matrimonial Lawyers at 492-494. The primary advantages of these tests are that they can be administered by persons who are not trained mental health professionals, are short, and are simple to administer, score, and interpret. But they also have many weaknesses, including high false-positive and false-negative rates, ceiling and floor effects (failure to distinguish well among those who score at the higher and lower ends), confounding effects of age, education, gender, and ethnicity, etc. The MMSE is available on-line at http://www.fhma.com/mmse.htm. The SPSQ is available on-line at http://nncf.unl.edu/alz/manual/sec1/portable.html.

[121] Sabatino, 16 J. Am. Acad. of Matrimonial Lawyers at 493. *See also* Anderer, *Determining Competency in Guardianship Proceedings*; Thomas Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* (New York: Plenum Press, 1986); Marshall B. Kapp and D. Mossman, "Measuring Decisional Capacity: Cautions on the Construction of a Capacimeter," *Psychology, Pubic Policy and Law* 2(1): 73-95 (1996); B. Nolan, "Functional Evaluation of the Elderly in Guardianship Proceedings," *Law, Medicine and Health Care* 12: 10 (1984); Mary Joy Quinn, "Everyday Competencies and Guardianship: Refinements and Realities" in Michael Smyer et al. (eds.), *Older Adults' Decision-Making and the Law* (New York: Springer Publishing Co., 1996); Timothy A. Salthouse, "A Cognitive Psychologist's Perspective on the Assessment of Cognitive Competency" in Smyer, *Older Adults' Decision-Making and the Law*; Sherry L. Willis, "Assessing Everyday Competency in the Cognitively Challenged Elderly" in Smyer, *Older Adults' Decision-Making and the Law*.

[122] North Carolina State Bar Revised Rules of Professional Conduct, Rule 1.14, Comment 6.

[123] Travis v. Johnston, 244 N.C. 713, 722, 95 S.E.2d 94, 100 (1956).

[124] Dalenko v. Wake County Department of Human Services, 157 N.C. App. 49, 56-58, 578 S.E.2d 599, 604-605 (2003).

[125] Fleming v. Asbill, 42 F.3d 886 (4th Cir. 1994).

litem, as an actor in the judicial process, is entitled to "quasi-judicial immunity." Under North Carolina law, quasi-judicial immunity protects individuals who are not judges from liability for "actions taken while exercising their judicial [or quasi-judicial] function[s]."[126] A "quasi-judicial" function generally involves a "discretionary act of a judicial nature" made by a public official who is empowered to investigate the facts of a particular case, weigh evidence, and apply "legislative or quasi-legislative requirements to individuals under particular sets of facts" as the basis for an official action.[127]

In *Dalenko*, the court of appeals concluded, without any analysis of the role or responsibilities of guardians ad litem in guardianship proceedings, that the duties of a guardian ad litem appointed under G.S. 35A-1107 are "quasi-judicial" in nature and that, as a matter of public policy, granting absolute immunity to guardians ad litem was necessary and appropriate.

> A guardian ad litem must … be able to function without the worry of possible later harassment and intimidation from dissatisfied [parties]. … A failure to grant immunity would hamper the duties of a guardian ad litem in his role as advocate … in judicial proceedings.[128]

It should be noted, however, that other courts have criticized the "blanket" extension of quasi-judicial immunity to *all* guardians ad litem. These courts, following the lead of the U.S. Supreme Court, have held that a "functional" analysis should be used to determine whether a guardian ad litem enjoys quasi-judicial immunity.[129]

> Under this approach, a guardian ad litem would be absolutely immune in exercising functions such as testifying in court, prosecuting custody or neglect petitions, and making reports and recommendations to the court in which the guardian acts as *an actual functionary or arm of the court, not only in status or denomination but in reality.*[130]

Conversely, though,

> a guardian ad litem who is *not* acting as a "friend of the court"—assisting the court in determining [the best interest of a minor or incompetent party]—is not entitled to immunity. Where the guardian ad litem is acting as an advocate for his client's position—representing the … interests of [the minor or incompetent party] instead of looking into the [party's best interest] on behalf of the *court*—the basic reason for conferring quasi-judicial immunity on the guardian does not exist. In that situation, he or she functions in the same way as does any other attorney for a client—advancing the interests of the client, not discharging (or assisting in the discharge of) the duties of the court. While the threat of civil liability may deter the guardian in various ways, the same can be said of the effects of the similar threat with which all attorneys appearing in lawsuits are faced. * * * Where the guardian's functions embrace primarily the rendition of professional services in the form of vigorous advocacy on behalf of [a minor or incompetent party], the reason for the protection of immunity—avoiding distortion of the investigative help or other assistance provided to the court—is lacking, and the attorney rendering professional service to [a minor or incompetent party] should be held to the same standard as are all other attorneys in their representation of clients.[131]

The problem, again, is determining the role, responsibilities, and function of attorneys who are appointed as guardians ad litem. And as discussed above, a guardian ad litem may play a dual role: assisting the court in carrying out its duty to protect the interests of a minor or incompetent party and acting as a zealous advocate to protect and represent the interest of a minor or incompetent party.

Thus, despite the holding in *Dalenko*, it may not be entirely clear whether an attorney who is appointed as a guardian ad litem under G.S. 35A-1107 is absolutely immune from civil liability in connection with the performance of her duties or whether a guardian ad litem's immunity depends on whether she

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[126] Northfield Development Co., Inc. v. Burlington, 136 N.C. App. 272, 282, 523 S.E.2d 743, 750 (2000).

[127] 2 Am.Jur.2d, Administrative Law § 28. *See* Sharp v. Gulley, 120 N.C. App. 878, 880, 463 S.E.2d 577, 578 (1995). *Cf.* Paige K.B. v. Molepske, 580 N.W.2d 289 (Wis. 1998) (quasi-judicial immunity extends to nonjudicial officers when they perform acts intimately related to the judicial process).

[128] Fleming v. Asbill, 42 F.3d at 889, citing Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984).

[129] *See* Gardner v. Parson, 874 F.2d 131, 146 (3rd Cir. 1988); Collins v. Tabet, 806 P.2d 40, 45 (N.M. 1991); Fleming v. Asbill, 483 S.E.2d 751, 755 (S.C. 1997).

[130] Gardner v. Parson, 874 F.2d at 146.

[131] Collins v. Tabet, 806 P.2d at 48, 50. *See also* Reese v. Danforth, 406 A.2d 735 (Pa. 1979) (holding that a court-appointed public defender is not entitled to official immunity).

is acting as an "arm of the court" or an advocate for an allegedly incompetent respondent.

Due Process and the Right to Counsel in Guardianship Proceedings

Does an allegedly incompetent respondent have a *constitutional* right to court-appointed counsel in a guardianship proceeding if he is indigent or unable to retain legal counsel?

As noted above, approximately thirty-three states and the District of Columbia have enacted *statutory* provisions requiring a court to appoint an attorney to represent a respondent in a guardianship proceeding if the respondent is unable to retain counsel, if the respondent requests counsel, or in other circumstances.[132]

Some advocates for elderly and disabled persons, however, argue that federal and state *constitutional* requirements regarding due process require

1. that an attorney be appointed to represent an allegedly incompetent respondent in a guardianship proceeding (at least in cases in which the respondent is unable, due to indigency or incapacity, to retain legal counsel or adequately defend himself or present his position regarding the proposed guardianship proceeding to the court); and
2. that a lawyer appointed to represent an allegedly incompetent respondent in a guardianship proceeding act as a zealous advocate for the respondent.[133]

[132] Calhoun, 33 Clearinghouse Rev. at 321 (data revised based on author's legal research). Seven states, including North Carolina, statutorily recognize a respondent's right to counsel in guardianship proceedings and seven states have enacted statutes allowing, but not requiring, the appointment of counsel for respondents in guardianship proceedings. In only three states—Massachusetts, Mississippi, and North Dakota—is state law completely silent regarding a respondent's right to counsel in guardianship proceedings.

[133] *See* Gottlich, 7 Md. J. Contemp. L. Issues at 198-200 (1995-96). *See also* Anne K. Pecora, "The Constitutional Right to Court-Appointed Adversary Counsel for Defendants in Guardianship Proceedings," 43 Ark. L. Rev. 345 (1990). According to these advocates, allowing a court-appointed lawyer to act as the guardian ad litem for an allegedly incompetent respondent rather than as the respondent's attorney "undermines traditional notions of due process." Peden, 68 U. Det. L. Rev. at 29.

Due Process and the Right to Retained Counsel in Guardianship Proceedings

The U.S. Constitution clearly prohibits a state court from depriving an allegedly incompetent person of his liberty or property through an adjudication that he is incompetent and the appointment of a guardian to manage his affairs unless he is afforded "due process of law."[134] And it is clear that due process requires, at a minimum, that a respondent be given adequate notice of a legal proceeding to appoint a guardian for him based on his alleged incompetency and provided a fair opportunity to be heard in the guardianship proceeding.[135]

It also is clear that an allegedly incompetent respondent in a guardianship proceeding has a constitutional right to legal counsel in the sense that he may retain a lawyer of his own choosing to represent him in the proceeding.[136] His "right" to counsel, however, is contingent on whether he can afford to pay an attorney to represent him in the proceeding (or whether a third party is willing to pay an attorney to represent him or an attorney is willing to represent him *pro bono*), whether an attorney is willing to represent him in the proceeding, whether he has sufficient capacity to enter into a client-lawyer relationship with the attorney, and whether, considering the nature and extent of his incapacity, the attorney can represent him in the proceeding within the limits imposed by rules of ethical and professional conduct for attorneys.

Due Process and the Right to Court-Appointed Counsel in Guardianship Proceedings

It is less clear, though, that a respondent has a *constitutional* right to court-appointed counsel in a

[134] *See* Simon v. Craft, 182 U.S. 427 (1901); In re Deere, 708 P.2d 1123, 1125-26 (Okla. 1985); In re Evatt, 722 S.W.2d 851, 852 (Ark. 1987); West Virginia ex rel. Shamblin v. Collier, 445 S.E.2d 736, 739 (W.Va. 1994); In re Milstein, 955 P.2d 78, 81 (Colo. 1998). *See also* N.C. Const., Art. I, § 19; In re Smith, 82 N.C. App. 107, 345 S.E.2d 423 (1986) (North Carolina Constitution's "law of the land" clause is synonymous with "due process of law" under the U.S. Constitution); Comment: North Carolina Guardianship Laws—The Need for Change, 54 N.C. L. Rev. 389, 405-406 (1976).

[135] Simon v. Craft, 182 U.S. 427 (1901); In re Deere, 708 P.2d at 1125-1126.

[136] Simon v. Craft, 182 U.S. 427 (1901); In re Deere, 708 P.2d at 1126. *See also* In re Milstein, 955 P.2d at 82 (statutory right to counsel).

guardianship proceeding if he cannot afford to retain counsel or lacks the capacity to do so.

State Appellate Court Decisions

Appellate courts in several states have held, or at least suggested, that an indigent respondent has a constitutional right to a court-appointed attorney in a guardianship proceeding.

A 1985 decision by a California appellate court, for example, held that due process requires the appointment of legal counsel for *indigent* respondents in guardianship proceedings.[137] But it is important to note that the guardianship statute at issue in that case not only allowed the appointment of a guardian for a person determined to be "gravely disabled" as the result of mental incapacity, but also provided for the involuntary commitment of a gravely disabled respondent for treatment in a mental institution for a period of up to one year. And it is clear that in determining what due process was required in the proceeding the court considered the proceeding to be a proceeding for civil commitment.[138] It is not clear that the court would have reached the same conclusion if the guardianship proceeding allowed the appointment of a guardian for the allegedly incompetent person but did not result in the respondent's involuntary commitment for treatment in a mental institution.

More recently, Florida's Fourth District Court of Appeals held that a "trial court's failure to appoint … counsel … to represent the [respondent in a guardianship proceeding] constituted error of *constitutional* proportion, because such failure deprived the [respondent] of her right to due process …."[139] The court, however, cited no authority for its conclusion that the respondent had a constitutional, rather than merely statutory, right to counsel and its actual *holding* in the case was that the trial court erred in failing to comply with the *statutory* requirements regarding appointment of counsel in guardianship proceedings.[140]

Similarly, Oklahoma's Supreme Court held that a trial court's failure to grant a continuance in a guardianship proceeding based on the absence of the respondent's attorney ignored the procedural safeguards of the state's guardianship statute and the due process "guarantees of the United States and Oklahoma constitutions."[141]

> When the state participates in the deprivation of a person's right to personal freedom [through the appointment of a guardian for the person] minimal due process requires proper written notice and a hearing at which the alleged incompetent may appear to present evidence in his own behalf [, … the] opportunity to confront and cross-examine adverse witnesses before a neutral decision maker, *representation by counsel*, findings by a preponderance of the evidence, and a record sufficient to permit meaningful appellate review …."[142]

Again, however, the court failed to cite any case directly on point in support of its conclusion that respondents have a constitutional right to counsel in guardianship proceedings, did not indicate whether due process requires the *appointment* of attorneys at state expense for respondents who are unable to retain legal counsel, and did not specify what role a court-appointed lawyer must play in representing an allegedly incompetent respondent in a guardianship proceeding.

Rud v. Dahl

In contrast to these state appellate decisions, one federal appellate court has expressly held that the U.S. Constitution's due process clause does *not* require the appointment of legal counsel for indigent respondents in guardianship proceedings.[143]

While recognizing the "significant liberty interests implicated in an incompetency [and guardianship] proceeding" and conceding that due process may require the appointment of counsel for indigent respondents in involuntary mental commitment proceedings, the U.S. Court of Appeals for the Seventh Circuit concluded in *Rud v. Dahl* that "the presence of counsel is [not] an essential element of due process" in guardianship proceedings.[144]

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[137] In re Gilbuena, 209 Cal. Rptr. 556, 559-560 (Cal. Ct. App. 1985). *See also* In re Roulet, 590 P.2d 1 (1979).

[138] In North Carolina, guardianship proceedings and involuntary commitment proceedings are entirely separate. North Carolina's statute allowing the involuntary commitment of mentally ill persons who constitute a danger to themselves or others for treatment in a mental institution is codified in G.S. 122C-261 et seq. Respondents in these proceedings have a statutory right to court-appointed counsel. *See also* text accompanying note 146.

[139] In re Fey, 624 So.2d 770, 771 (Fla. Dist. Ct. App. 1993).

[140] In re Fey, 624 So.2d at 772.

[141] In re Deere, 708 P.2d at 1126.

[142] In re Deere, 708 P.2d at 1126.

[143] Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978).

[144] Rud v. Dahl, 578 F.2d at 679.

> First of all, the nature of the intrusion on liberty interests resulting from an adjudication of incompetency is far less severe than the intrusion resulting from other types of proceedings in which the presence of counsel has been mandated. Involuntary incarceration, for example, does not result from an incompetency proceeding. Moreover, the technical skills of an attorney are less important, as the procedural and evidentiary rules of an incompetency proceeding are considerably less strict than those applicable in other types of civil and criminal proceedings. Finally, the costs associated with the mandatory appointment of counsel will undermine one of the essential purposes of the proceeding itself, protection of the limited resources of the incompetent's estate from dissipation, for few alleged incompetents will be able to effect a "knowing and intelligent" waiver of undesired counsel. Accordingly, for these reasons and because we doubt that the presence of counsel is essential to protect the accuracy of the fact-finding process at incompetency hearings, we decline to require the mandatory appointment of counsel as an essential element of due process.[145]

Thus, it is not at all clear whether a respondent who is unable to retain legal counsel has a *constitutional*, rather than merely statutory, right to a court-appointed lawyer in a guardianship proceeding.

Due Process and the Role of Court-Appointed Lawyers in Guardianship Proceedings

Despite the absence of clear legal authority, some advocates argue that respondents have a constitutional right to court-appointed counsel in guardianship proceedings *and* that due process requires that the lawyer appointed to represent an allegedly incompetent respondent act as the respondent's *attorney and advocate* rather than a guardian ad litem.

In support of this argument, advocates sometimes cite the decision in *Lessard v. Schmidt*. In *Lessard*, the U.S. District Court for the Eastern District of Wisconsin held that, in the context of involuntary mental commitment (rather than guardianship) proceedings, the appointment of a lawyer to act as a guardian ad litem, rather than a zealous advocate, for a mentally ill respondent "cannot satisfy the constitutional requirement of representative counsel."[146]

The Seventh Circuit's subsequent decision in *Rud v. Dahl*, however, clearly undermines *Lessard's* applicability to legal proceedings involving the appointment of guardians for incompetent adults. As noted above, the appellate court in *Rud* expressly held that due process does not require the appointment of counsel for respondents in guardianship proceeding and, in determining the requirements of due process, distinguished the legal context and consequences of guardianship proceedings from those in legal proceedings for involuntary commitment and treatment of mentally ill persons who present a danger to themselves or others.

Apart from *Lessard*, only one other reported appellate decision, *In re Lee*, suggests that due process requires that a court-appointed lawyer act as the attorney, rather than guardian ad litem, for a respondent in a guardianship proceeding.[147] In *Lee*, Maryland's Court of Special Appeals reversed a lower court's appointment of a guardian for an allegedly incompetent adult because the respondent's court-appointed lawyer acted as a guardian ad litem or investigator for the court rather than as an attorney and advocate for the respondent's expressed interests. In doing so, the court stated that because guardianship proceedings result in "significant and usually permanent loss of [a respondent's] basic rights and liberties," "due process demands nothing less" than the appointment of a lawyer who will act as an *attorney* for the respondent and *not* as a guardian ad litem or court investigator.[148] A close reading of the court's decision in *Lee*, however, reveals that the court's determination regarding the proper role of court-appointed lawyers in guardianship proceedings was based primarily on the state's guardianship statute—*not* the due process requirements of the federal or state constitutions.

More importantly, though, the arguments of advocates and the decisions in *Lee* and *Lessard* seem

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[145] Rud v. Dahl, 578 F.2d at 679. The court, however, did not completely close the door on the argument that due process may require the appointment of counsel for indigent respondents in guardianship proceedings, noting that "we [are not] dealing with an indigent unable to afford counsel, who requests the State to appoint one on his behalf" but rather the claim that, absent waiver of the right to counsel, "the State is constitutionally compelled to appoint counsel, whether or not the alleged incompetent requests such an appointment." Rud v. Dahl, 578 F.2d at 678.

[146] Lessard v. Schmidt, 349 F.Supp. 1078, 1099 (E.D. Wis. 1972), *reinstated after remand*, 413 F.Supp. 1318 (E.D. Wis. 1976).

[147] In re Lee, 754 A.2d 426 (Md. Spec. App. 2000).

[148] In re Lee, 754 A.2d at 439.

to be based on a mistaken assumption regarding the role and responsibilities of guardians ad litem—the assumption that the guardian ad litem's role is to act as a neutral investigator or to make recommendations regarding an allegedly incompetent person's "best interest" and *not* to act as an advocate or attorney for an allegedly incompetent person.[149]

Conclusion

North Carolina law states that court-appointed lawyers act as guardians ad litem for allegedly incompetent respondents in guardianship proceedings and identifies several specific responsibilities of lawyers who are appointed as guardians ad litem pursuant to G.S. 35A-1107.

North Carolina law, however, does not clearly define the *role* of these court-appointed lawyers. Are they required to act as the attorneys and zealous advocates for allegedly incompetent respondents in guardianship proceedings? Do they determine and represent the respondents' "best interests"? Are they investigators who act primarily as the "eyes and ears" of the court? Do they wear more than one "hat"?

Although North Carolina law does not provide clear answers to these questions, it may be argued that a lawyer appointed under G.S. 35A-1107 acts as the attorney *and* guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding (other than one in which a respondent retains legal counsel)—acting as an attorney and zealous advocate for the respondent's expressed interests to the extent that the respondent retains sufficient mental capacity to determine his own best interest and make decisions regarding the proceeding, but determining and representing the respondent's best interests to the extent that the respondent's mental incapacity prevents him from determining his own best interests or making decisions with respect to the proceeding.

In discharging their responsibilities, lawyers appointed under G.S. 35A-1107 must look first and foremost to the provisions of G.S. Ch. 35A, Rule 17, and North Carolina case law governing the duties of guardians ad litem. But the guardianship statutes of other states also may provide some guidance regarding the role and responsibilities of court-appointed lawyers in North Carolina guardianship proceedings.

Ultimately, of course, the solution to the ambiguity and confusion regarding the role of court-appointed lawyers in guardianship proceedings is the enactment of guardianship statutes that clearly define the role of court-appointed lawyers in guardianship proceedings and describe in detail their legal and professional responsibilities, coupled with high quality education and training programs for lawyers who are appointed to represent allegedly incompetent respondents.

The real issue regarding the role and responsibilities of court-appointed lawyers in guardianship proceedings, though, is not merely one of statutory construction but rather one of public policy. What roles—attorney, guardian ad litem, visitor or court investigator—must be performed in order to protect the rights and interests of allegedly incompetent respondents in guardianship proceedings? How should these roles be defined? Should these roles be combined or clearly separated? Should one person perform more than one of these roles? Which of these roles should be performed by court-appointed lawyers?

And, again, only the General Assembly can answer these questions definitively by enacting legislation to define and clarify the role and responsibilities of court-appointed lawyers in guardianship proceedings.

[149] *See* text accompanying notes 103 through 110.

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