

## Determining Competency in Difficult Cases

2021 Guardianship Proceedings for Appointed Counsel  
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## Capacity Vs. Competency

### Capacity

- ▶ Medical
- ▶ Ability to give informed consent to medical procedures
- ▶ Understand information given to a person about a particular decision
- ▶ Retain that information long enough to be able to make the decision
- ▶ Weigh the information available to make the decision
- ▶ Communicate the decision

### Competency

- ▶ Legal N.C.G.S. 35A
- ▶ An adult or emancipated Minor who lacks sufficient capacity to manage own affairs or make or communicate important decisions regarding person, property, family NCGS 35A-1101 (7)
- ▶ "Person" includes medical needs
- ▶ Physician determines capacity, Judge determines Competency
- ▶ Looks a lot like Capacity in practice

## Mental Illness N.C.G.S. 35A-1101 (12)

- ▶ Respondent Can be Mentally ill but still Competent
- ▶ Bi Polar? Mood disorder Schizophrenia? Thought disorder Schizo-affective? Both
- ▶ WHO OR WHAT IS IN CONTROL? IS THE ILLNESS CONTROLLING THE PERSON OR IS THE PERSON CONTROLLING THE ILLNESS?
- ▶ If the Illness is controlling—what is the impact on the person's functionality?
  - ▶ Can they meet their basic needs for food, shelter, medical care? Review the Questionnaire AOC-SP-208
  - ▶ Are they able to pay their bills or ask for assistance?
  - ▶ Do they seek help appropriately?
  - ▶ Are they seeking treatment and following medical advice?
  - ▶ Are they aware of their illness?
  - ▶ Are they being exploited?
  - ▶ Do they understand the choices they are making and the impact?

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## Anosognosia - Lack of Insight

- ▶ Symptom of Severe Mental Illness experienced by some that impairs a persons ability to understand and perceive their illness.
- ▶ Often individuals with schizophrenia or bipolar who refuse treatment and medication have this symptom.
- ▶ May need to educate your Clerk on this symptom using medical treatises and medical staff testimony.

## Mental Illness—examples of cases

### Incompetent

- ▶ Denies any illness
- ▶ Refuses Medications
- ▶ Pattern of repeated Involuntary Commitments
- ▶ Has no understanding of how their behavior causes problems in their life
- ▶ Has no understanding of how their illness impacts their behavior
- ▶ Often Self Medicate with illegal drugs or alcohol
- ▶ Often taken advantage of by others

### Competent

- ▶ Acknowledge their illness
- ▶ Take prescribed medications & Follow Medical Advice
- ▶ Know when they need help & Seek it appropriately
- ▶ Able to meet their basic needs for Shelter, adequate nutrition, hydration, medication, ...
- ▶ Able to communicate important decisions regarding legal, medical, personal, family matters
- ▶ Understand the choices they are making and the impact of their illness on themselves and others

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### Addiction-Alcoholism and Drug Abuse 35A-1101 (10)

- ▶ Who or what is in control? Is the Illness controlling the Person or is the Person controlling the Illness?
- ▶ May be undiagnosed Mental Illness as many people "Self Medicate"
  - ▶ Has a psychological evaluation been done?
  - ▶ If the underlying illness is treated, will they still need a guardian? Continue the matter for this to occur?
  - ▶ Consider an Interim Guardian 35A-1101 (11) if appropriate
    - ▶ SEE 35A-1114 good for 45 days and can be extended another 45
- ▶ If the illness is controlling—what is the impact on the person's functionality?
  - ▶ Can they meet their basic needs for food, shelter, medical care?
  - ▶ Are they able to pay their bills or ask for assistance?
  - ▶ Do they seek help appropriately?
  - ▶ Are they seeking treatment and following medical advice?
  - ▶ Are they aware of their illness?
  - ▶ Are they being exploited?

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### Alcoholism Examples

#### Incompetent says:

- ▶ I do not have a drinking problem (in spite of a large amount of evidence to the contrary)
- ▶ Everyone is lying about this—including my friends, family, doctors and the police
- ▶ I can control my drinking. Perhaps I had a problem in the past but no longer. I can drink and it is not affecting my health or my family, or ... But their words do not match their behavior
- ▶ ACTIONS SPEAK LOUDER THAN WORDS .. Unable to meet basic needs for Food, Shelter...

#### Competent says:

- ▶ I know that I drink and it causes me problems with my family and my health and the legal system
- ▶ I am aware that my drinking harms my liver and is causing me to have dementia and will likely kill me
- ▶ I am aware that everyone wants me to stop
- ▶ I do not want to stop or I want to stop and I am seeking Rehab. help
- ▶ Able to meet basic needs for Food, water, clothing, Shelter, legal needs, pay bills, get medical care and resist exploitation

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### Intellectual Disability

- ▶ Each case is Unique—That's why people and not computers make these decisions. Take into account all the factors for each person
- ▶ Daniel Memorial Institute Inc. "Independent Living Assessment for Life Skills" can be helpful to review practical skills of respondent
- ▶ Moderate Disability and seeks help appropriately
  - ▶ Understands when they need help?
  - ▶ Resists exploitation? Cooperative with medical caregivers and family who have their best interest at heart?
  - ▶ Or is being exploited and is unable to recognize need for help?
- ▶ Mild Disability but refuses Medical care
  - ▶ What is the impact? I.e. is it life threatening and they do not understand the consequences of their actions?

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### Brain Injury

- ▶ Can be challenging if you only ask questions of the respondent because some can answer verbally but not carry out their own direction
- ▶ Ask what they can do and have them show you if possible. Use a phone, look up plumber on the phone or computer...
- ▶ Adynamia—lack of motivation is common with injury to frontal lobe that occurs with TBI. Difficulty getting started with activities is common.

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### Will a Guardian give the respondent a fuller capacity for exercising rights?

- ▶ 35A-1201 (a)(4) "Limiting the rights of an incompetent person by appointing a guardian should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights"
- ▶ (a)(5) "Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him."
- ▶ Poor Judgment does not make someone incompetent—Our prisons are filled with people who exercise poor judgment
- ▶ "He or She could benefit from a guardian" does not mean the person lacks the ability to manage their affairs.

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### Review the Evidence—Medical Records, School Records, Facility or Caregiver Notes

- ▶ What do their Records say? Do Doctors think they have capacity?
- ▶ Number of Involuntary Commitments?
- ▶ Pattern of Being Admitted to Hospital, getting better, being released, stop taking their medications and being readmitted? No insight (awareness)?
- ▶ How long does it take for person to decompensate (illness to take over)?
- ▶ What is the impact on their Person? Family? Property?
- ▶ Review the Questionnaire AOC-SP-208
- ▶ Remember this is a very important legal matter and your recommendation/opinion counts! Guardianship requires Personal Service on the respondent because it is so important. Think of how many other legal matters do not require Personal Service!

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## Review the Evidence—Client testimony, other Witnesses

- ▶ Must be able to communicate with your client. Important to express understanding of their situation even if their “reality” does not match others. “It must be very difficult when ...”
- ▶ LISTEN and ask questions to determine their level of awareness and how their behavior contributes to their competency or incompetency.
- ▶ Words are important—“It must have been very Stressful” vs. “You were acting crazy” STRESS is okay or “Getting on your Nerves”
- ▶ Explain to others your role to act in the best interest of the respondent so they feel comfortable communicating with you.

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## Talk with your client and your client’s loved ones (family, friends, neighbors...)

- ▶ 35A-1107 (b) PERSONALLY VISIT ASAP
- ▶ Any Insight? Awareness of the illness and the impact it has on them and their lives?
- ▶ Watch how you ask questions---Are you an alcoholic? Vs. Does Alcohol cause you problems?
- ▶ Communicate your role so the respondent does not feel mislead and communicate your clients rights (i.e. right to jury trial, hire own counsel...)
- ▶ Communicate your findings to the respondent before court so you can discuss what rights are important for the respondent to retain, limited guardianship, choice of who to serve as guardian, type of guardian needed...

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## Multidisciplinary Evaluation N.C.G.S. 35A-1111

- ▶ Can be very helpful to determine the nature and extent of a person’s disability.
- ▶ This can also help in deciding the type of guardian needed and rights to be retained...review the Order AOC-E-406
- ▶ YOU must act QUICKLY “A request for MDE shall be made in writing and filed with the clerk within 10 days after service of the petition on the respondent.”
- ▶ TIMING on the MDE “The agency shall file the evaluation with the Clerk no later than 30 days after the agency receives the clerk’s order.”
- ▶ Often, I contact the agency repeatedly to make sure this occurs in a timely manner. You may need to drive this “train” and educate the agency on what the MDE should include...MULTIPLE DISCIPLINES!

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## Attorney Advocate vs. Guardian Ad Litem

### Attorney

- ▶ 35A-1107 (b)
- ▶ SHALL make every reasonable effort to determine the respondents wishes regarding the incompetency proceeding and any proposed guardianship
- ▶ Present the express wishes at all relevant stages of proceedings

### Guardian Ad Litem

- ▶ Make recommendations to the Clerk concerning the respondent’s best interests if those interests differ from the respondent’s express wishes.
- ▶ Consider limited guardianship and review rights, powers and privileges the respondent should retain.

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## Easier Said than Done

- ▶ Communication with Client is Important
- ▶ Alternatives to Guardianship must be considered!
- ▶ Power of Attorney can be an option to settle guardianship case if you find the respondent has ability to understand the document and wishes to do this
- ▶ Consider Mediation, particularly helpful when everyone agrees on incompetency but who is to serve as guardian is contested
- ▶ If financial exploitation risk, Durable POA, Requiring joint signatures on all checks, Representative Payee for SSI or Social Security, Custodian for VA funds and Trusts can be helpful
- ▶ Always consider Limited Guardianship (review AOC-E-406)
- ▶ Sometimes a Guardian who controls only mental health medical decisions is all that is required

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## Options to consider when you have a dangerous client

- ▶ Talk to the Petitioner or others to gather more information, what are this person’s “triggers”—what you say, what you wear can be important
- ▶ Bring someone with you, ideally someone who the respondent trusts and can introduce you...DSS Worker, friend or family member of respondent
- ▶ Ask for Police or Sheriff Escort
- ▶ Communicate on the phone, via Zoom, outside the respondents residence, in their therapists office and/or in the courthouse (since they have metal detectors)

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## What if my client seems competent at the time of the hearing?

- ▶ Common challenge with individuals with Mental Illness or Addiction if they have been recently hospitalized or undergone treatment.
- ▶ Review the evidence...what are their patterns? Are they in control or is the illness in control? What is the impact on their lives? Are they aware of this?
- ▶ In all cases, I always ask the Court to seal medical records and psychological evaluations of my client to preserve the respondents privacy.

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## Discovery -Needs to be expedited

- ▶ 35A-1112 PETITIONER and RESPONDENT are entitled to:
- ▶ Present Testimony and Documentary Evidence
- ▶ MEDICAL RECORDS HIPAA ORDER NEEDED
- ▶ Subpoena Witnesses
- ▶ Production of Documents
- ▶ Examine and Cross Examine Witnesses
- ▶ The Rules of Civil Procedure apply to Special Proceedings but the N.C.G.S. require the hearing to be held within 30 days of notice on the respondent unless extended for good cause... NCGS 35A-1108
- ▶ Can be vitally important as relates to DSS/APS-initiated Petition; financial abuse; exploitation; and situations involving a Respondents Successive Spouse who is withholding information/visitation/access to Respondents Children

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## Request to Bifurcate the Hearing

Can be helpful to separate issues, particularly if only one matter is contested and/or different witnesses likely needed

### Adjudication of Incompetency

- ▶ Appeal de Novo to Superior Court and then to the Court of Appeals 35A-1115
- ▶ Clerk hears evidence on the issue of competency
- ▶ Often more formal presentation of evidence
- ▶ Appeal does not stay the appointment of a guardian unless so ordered by Superior Court of Court of Appeals

### Determination of a Guardian.

- ▶ Appeal Review of the Record
- ▶ Clerk hears evidence on the determination of who should serve as guardian
- ▶ Clerk has complete discretion so evidence may be accepted more informally

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## Partial or Full Restoration Options

- ▶ Advise Client re: future motions to modify to restore rights can be brought and Complete restoration can occur
- ▶ Ask Court to order status reports annually
- ▶ If appropriate, ask the Court for a review hearing in the future

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## Other Challenging cases

- ▶ Jury Trial demands and the role of the GAL, particularly where the Respondent has private counsel.
- ▶ Some Options If you need a Third Party Disinterested Guardian:
  - ▶ In Western N.C.:
    - ▶ FideliCare [www.fidelicare.net](http://www.fidelicare.net) (if Guardian of the Estate)
    - ▶ Hope for the Future, [www.hopeforthefutureguardianship.com](http://www.hopeforthefutureguardianship.com)
  - ▶ In Charlotte and Western NC:
    - ▶ IKOR [www.ikorglobal.com](http://www.ikorglobal.com)
  - ▶ In Raleigh area: The ARC of NC [www.arcnc.org](http://www.arcnc.org)
  - ▶ In Greensboro area, Corporation of Guardianship, [www.corpguard.org](http://www.corpguard.org)

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## Getting Paid...

- ▶ I have heard complaints that one county only pays the IDS rate even if the respondent/ward has resources to cover the GAL's normal hourly rate?
- ▶ This is concerning as it is a disincentive for attorney's to serve as GAL
- ▶ I have not had this situation occur in Western NC. I always submit a detailed timesheet billing in 6 minute segments with a petition and order or AOC form
- ▶ If a Guardian is appointed, the Guardian cannot pay the GAL bill from the wards funds without court approval. I submit a petition and order to the Clerk
- ▶ In some cases, I have submitted affidavits from witnesses and attorneys involved, particularly if the matter was resolved through mediation and dismissed.

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## More information to help GAL Attorney:

- ▶ <https://www.uniformlaws.org/committees/community-home/CommunityKey-Zeba8654-8871-4909-ad38-aabb573911c>
- ▶ **Frequently Asked Questions by Guardians during the COVID-19 Pandemic**  
[https://www.guardianship.org/wp-content/uploads/2020/04/FAQ\\_FINAL\\_04162020.pdf](https://www.guardianship.org/wp-content/uploads/2020/04/FAQ_FINAL_04162020.pdf)
- ▶ [https://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice/](https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/)
- ▶ [http://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2020-guardianship-leg-summary.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-guardianship-leg-summary.pdf)
- ▶ <http://rethinkingguardianshipnc.org>
- ▶ <http://rethinkingguardianshipnc.org/sites/default/files/general%20documents/RG%20BrochureEnglish%20FINAL.pdf>

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## Helpful Resources for GAL Attorney

- ▶ <https://www.nccourts.gov/help-topics/guardianship/guardianship>
- ▶ [https://files.nc.gov/ncdhhs/documents/files/guardian\\_manual.pdf](https://files.nc.gov/ncdhhs/documents/files/guardian_manual.pdf)
- ▶ [https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByChapter/Chapter\\_35A.pdf](https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByChapter/Chapter_35A.pdf)

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## Thanks

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