



Guardians ad Litem for Respondent Parents in Juvenile Cases

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As first published in March 2013, this bulletin explored the implications of the decision of the North Carolina Court of Appeals in *In re P.D.R.*, ___ N.C. App. ___, 737 S.E.2d 152 (2012). In that case the court of appeals distinguished between two types of guardian ad litem that could be appointed for adult respondent parents in termination of parental rights proceedings. A guardian ad litem with a role of assistance was appropriate when the appointment was based on a respondent’s diminished capacity and inability to adequately act in his or her own interest. A guardian ad litem with a role of substitution was appropriate when the appointment was based on the respondent’s incompetence. Effective October 1, 2013, the statute the court was interpreting, Section 7B-1101.1 of the North Carolina General Statutes (hereinafter G.S.), was completely rewritten and the wording on which the court based the distinction it articulated in *P.D.R.* was eliminated.¹

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1. See S.L. 2013-129, sec. 32. Section 17 of S.L. 2013-129 made comparable changes in Section 7B-602 of the North Carolina General Statutes (hereinafter G.S.) regarding guardians ad litem for adult respondent parents in abuse, neglect, and dependency proceedings.

The answers to the questions addressed in the previous bulletin—“When should the court appoint a guardian ad litem for a respondent parent in a juvenile proceeding, and what is that guardian ad litem’s role?”—changed with the enactment of S.L. 2013-129. However, the questions remain relevant and the answers, to some extent, elusive for trial courts and parties trying to implement the law properly.

Background

The first Juvenile Code provision for guardians ad litem for respondent parents was enacted in 1979 and applied only to termination of parental rights actions.² The legislation added as a ground for termination of a parent’s rights the following: “That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child . . . , and that there is a reasonable probability that such incapability will continue throughout the minority of the child.” Any time that ground was alleged, the court was required to appoint an attorney, pursuant to G.S. 1A-1, Rule 17, as guardian ad litem to represent the parent unless the parent retained counsel. The same legislation required the court to appoint a guardian ad litem for any minor parent under the age of fourteen. In 1981 the legislature amended the Juvenile Code to provide for the appointment of counsel for indigent parents in all termination of parental rights actions and to require appointment of a guardian ad litem for any minor parent under the age of eighteen.³

In 2001 the legislature first provided for the appointment of guardians ad litem for parents in some other juvenile cases. A trial court was required to appoint a guardian ad litem for a parent in an abuse, neglect, or dependency proceeding if

1. the petition alleged that the child was dependent because the parent was “incapable as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition” of providing proper care and supervision for the child or
2. the parent was under the age of eighteen.⁴

Under these provisions, the Juvenile Code required the court to appoint a guardian ad litem for a respondent parent in some juvenile cases based solely on the allegations in the petition filed in the case. Appellate courts held repeatedly that a court’s failure to appoint a guardian ad litem when the statute required one was reversible error.⁵ These statutory mandates were expanded by case law to require the appointment of a guardian ad litem for a respondent, even when neither the status of dependency nor the incapability ground for termination of parental rights was alleged in the petition, if the allegations and evidence in the case tended to show that the parent was incapable of providing proper care and supervision for one of the reasons specified in the statutes.⁶

2. 1979 N.C. Sess. Laws ch. 875, sec. 1.

3. 1981 N.C. Sess. Laws ch. 966, sec. 1.

4. S.L. 2001-208, sec. 2.

5. See, e.g., *In re S.B.*, 166 N.C. App. 488 (2004); *In re Estes*, 157 N.C. App. 513 (2003).

6. See, e.g., *In re B.M.*, 168 N.C. App. 350 (2005).

Many trial courts chose to err on the side of appointing guardians ad litem for parents “just to be safe” whenever dependency was alleged or when there was any suggestion that a parent had a substance abuse or mental health problem. The statutes did not address the role of a respondent’s guardian ad litem (often referred to by the acronym GAL) in these cases, and that role often was not clear.⁷ Requiring a guardian ad litem for a minor respondent reiterated the requirement in G.S. 1A-1, Rule 17, that a minor party in any civil action appear through a general guardian or guardian ad litem. The relationship between Rule 17 and the requirement that a guardian ad litem be appointed for adult respondents in some juvenile cases was also not clear.

In 2005 the legislature rewrote the statutes providing for guardians ad litem for parent respondents in abuse, neglect, dependency, and termination of parental rights cases.⁸ The appellate courts described this legislation as “reveal[ing] the legislature’s intent to limit the appointment of a guardian *ad litem*” for respondents.⁹ For actions filed on or after October 1, 2005, the requirement to appoint a guardian ad litem for a respondent parent applied only when the parent was an unemancipated minor. Instead, G.S. 7B-602 (for abuse, neglect, and dependency cases) and G.S. 7B-1101.1 (for termination of parental rights cases) authorized a court, in its discretion, to appoint a guardian ad litem for a parent “if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest.” In addition, both statutes provided that a parent’s guardian ad litem could

1. help the parent enter into consent orders, if appropriate;
2. facilitate service of process on the parent;
3. assure that necessary pleadings are filed; and
4. assist the parent and the parent’s attorney, if asked by the attorney to do so, in ensuring that the parent’s procedural due process requirements are met.

Since October 1, 2009, both G.S. 7B-602 and G.S. 7B-1101.1 have specified that the court’s appointment of a guardian ad litem for a respondent parent should be “in accordance with G.S. 1A-1, Rule 17.” However, when enacted in 2005, the provisions in the two statutes differed. For abuse, neglect, and dependency cases, G.S. 7B-602 referred to appointment of a guardian ad litem in accordance with Rule 17, while for termination of parental rights actions, G.S. 7B-1101.1 referred to Rule 17 only in relation to the appointment of a guardian ad litem for a minor parent. For termination of parental rights cases, the statute did not refer to Rule 17 in relation to appointments based on the court’s finding a reasonable basis to believe the respondent was incompetent or had diminished capacity. The court of appeals found the statutory distinction to be significant with regard to the role of the guardian ad litem in each proceeding. The court interpreted the lack of any reference to Rule 17 in the termination statute as an indication that the guardian ad litem’s role in a termination proceeding, while not limited to the four actions specified in the statute and listed above, was one of assistance, not substitution.¹⁰

7. See *In re Shepard*, 162 N.C. App. 215, 227 (2004) (stating that “North Carolina case law offers little guidance as to . . . any specific duties of a GAL assigned to a parent-ward in a termination proceeding”).

8. S.L. 2005-398, secs. 2, 15.

9. *In re J.S.L.*, 177 N.C. App. 151, 158 (2006). See also *In re D.H.*, 177 N.C. App. 700, 705 (2006).

10. See *In re L.B.*, 187 N.C. App. 326, 329 (2007) (holding that the signature of a parent’s guardian ad litem on a notice of appeal in a termination of parental rights case did not satisfy the requirement that the parent sign the notice), *aff’d per curiam*, 362 N.C. 507 (2008).

In 2009 the legislature amended G.S. 7B-1101.1(c) to insert the words “in accordance with G.S. 1A-1, Rule 17.”¹¹ So, statutory provisions for guardians ad litem for parents who might be incompetent or have diminished capacity were the same regardless of whether the case was for termination of parental rights or for an initial adjudication of abuse, neglect, or dependency.¹²

After a finding that there was a reasonable basis to believe that a parent was incompetent or had diminished capacity, whether to appoint a guardian ad litem for the parent was in the court’s discretion. Logically, a court’s exercise of that discretion would be informed by an understanding of what a guardian ad litem’s role would be and what effect the appointment would have on the respondent’s rights. For years trial courts were without sound guidance regarding those critical questions. As a carryover from the pre-2005 version of the statutes that required the appointment of guardians ad litem in some instances, some courts continued to appoint guardians ad litem routinely whenever substance abuse or mental health issues were apparent. Often the guardian ad litem him- or herself was unsure of the proper role of the guardian ad litem.

In December 2012 a decision of the North Carolina Court of Appeals in a termination of parental rights case provided some guidance about the appointment and role of a guardian ad litem for a parent in a juvenile proceeding.¹³ The court held that the role of the guardian ad litem and the effect of the appointment on the respondent depended on which of the two possible bases of statutory authority underlay the court’s appointment.

- If the appointment was based on the court’s determination that there was a reasonable basis to believe the parent was incompetent, the role of the guardian ad litem was one of substitution.
- If the appointment was based on the court’s determination that there was a reasonable basis to believe the parent had diminished capacity and could not adequately act in his or her own interest, the role of the guardian ad litem was one of assistance.

The court instructed trial courts that any order appointing a guardian ad litem for a parent who was not an unemancipated minor should specify on which statutory prong the court was relying. The court should make findings to support that determination and, consistent with those findings, state whether the guardian ad litem’s role was one of assistance or substitution.¹⁴

Current Law

A law that became effective October 1, 2013, rewrote G.S. 7B-602 (for abuse, neglect, and dependency proceedings) and G.S. 7B-1101.1 (for termination of parental rights proceedings) to delete the wording on which the court based its decision in *P.D.R.*¹⁵ The statutes no longer provide a basis for distinguishing between guardians ad litem of assistance and guardians ad litem of substitution. They no longer authorize the appointment of a guardian ad litem based on

11. S.L. 2009-311, sec. 9.

12. See *In re A.Y.*, ___ N.C. App. ___, 737 S.E.2d 160 (2013) (holding that an appellate court’s analysis of the guardian ad litem provisions in G.S. 7B-1101.1(c) applies equally to those in G.S. 7B-602(c)).

13. *In re P.D.R.*, ___ N.C. App. ___, 737 S.E.2d 152 (2012).

14. *In re P.D.R.*, ___ N.C. App. at ___, 737 S.E.2d at 159.

15. S.L. 2013-129, secs. 17 and 32.

Relevant Statutes (effective October 1, 2013)**§ 7B-602. Parent's right to counsel; guardian ad litem.**

[The right to counsel and waiver of counsel subsections are not reproduced here.]

- (b) In addition to the right to appointed counsel set forth above, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent who is under the age of 18 years and who is not married or otherwise emancipated. The appointment of a guardian ad litem under this subsection shall not affect the minor parent's entitlement to a guardian ad litem pursuant to G.S. 7B-601 in the event that the minor parent is the subject of a separate juvenile petition.
- (c) On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17.
- (d) The parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney. Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.
- (e) Repealed by S.L. 2013-129, sec. 17.

§ 7B-1101.1. Parent's right to counsel; guardian ad litem.

[The right to counsel and waiver of counsel subsections are not reproduced here.]

- (b) In addition to the right to appointed counsel under subsection (a) of this section, a guardian ad litem shall be appointed in accordance with G.S. 1A-1, Rule 17, to represent any parent who is under the age of 18 years and who is not married or otherwise emancipated.
- (c) On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17.
- (d) The parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney. Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.
- (e) Repealed by S.L. 2013-129, sec. 32.
- (f) The fees of a guardian ad litem appointed pursuant to this section shall be borne by the Office of Indigent Defense Services when the court finds that the respondent is indigent. In other cases, the fees of the court-appointed guardian ad litem shall be a proper charge against the respondent if the respondent does not secure private legal counsel.

a reasonable basis to believe that a party has diminished capacity and cannot adequately act in his or her own interest. Under current law, the court may appoint a guardian ad litem only for a parent who “is incompetent.”

As rewritten, the statutes say the following about the appointment and role of guardians ad litem for parents in juvenile cases.

1. If a parent is an unemancipated minor, the court must appoint a guardian ad litem for the parent pursuant to G.S. 1A-1, Rule 17.
2. On motion of any party or on the court’s own motion, the court may appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17, for an incompetent parent.
3. The court may not appoint a parent’s attorney to serve as the parent’s guardian ad litem.
4. The guardian ad litem may not act as the parent’s attorney.
5. Communications between a parent’s guardian ad litem and the parent and between the guardian ad litem and the parent’s attorney are privileged and confidential to the same extent as communications between the parent and his or her attorney.
6. With respect to termination of parental rights proceedings, fees of the parent’s guardian ad litem are paid by the Office of Indigent Defense Services when the court finds the respondent is indigent, and in other cases the fees are a proper charge against the respondent if he or she does not secure private legal counsel.¹⁶

Of these provisions, only the second is a substantive change. In addition to restating the circumstance in which the court may appoint a guardian ad litem for an adult parent, the statutes no longer include the former language about practices in which a parent’s guardian ad litem “may engage.”

So, under the current law, as before, the court must appoint a guardian ad litem for a parent who is under the age of eighteen and not emancipated. Otherwise, the court is authorized to appoint a guardian ad litem for a parent who “is incompetent.” All appointments of guardians ad litem for parents must be made pursuant to G.S. 1A-1, Rule 17. Although the changes to G.S. 7B-602 and G.S. 7B-1101.1 became effective October 1, 2013, they apply to all juvenile actions, including those filed before October 1, 2013.

Rule 17 of the North Carolina Rules of Civil Procedure applies in any civil action in which a party is incompetent (or an unemancipated minor). Nothing in the current wording of the Juvenile Code suggests that the appointment or role of a guardian ad litem for a parent in a juvenile proceeding differs from that of a guardian ad litem appointed pursuant to Rule 17 in any other civil action.¹⁷ However, Rule 17 itself has not been the subject of many appellate court decisions or other forms of interpretation, and many of the questions that existed before the October 1, 2013, statutory changes persist.

16. In practice the same is true for abuse, neglect, and dependency cases, although G.S. 7B-603(b), which addresses payment of counsel appointed for parents in those cases, is silent with respect to parents’ guardians ad litem.

17. When a guardian ad litem is appointed pursuant to Rule 17 for indigent parties in other civil actions, the Office of Indigent Defense Services (IDS) frequently lacks the authority to pay the fees of the guardian ad litem. In these cases the court may fix and tax the guardian ad litem’s fee as part of the costs. *See* G.S. 1A-1, Rule 17(b)(2). Questions regarding the ability of IDS to pay for a Rule 17 guardian ad litem should be directed to the IDS Assistant Director (919.354.7200).

Relevant Statutes

Rule 17. Parties plaintiff and defendant; capacity.

....

(b) Infants, incompetents, etc. –

....

(2) Infants, etc., Defend by Guardian Ad Litem. – In actions or special proceedings when any of the defendants are . . . incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such . . . incompetent persons. . . . The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said . . . incompetent persons or defendants.

...

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. – Notwithstanding the provisions of . . . (b)(2), a guardian ad litem for an . . . incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the . . . insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

....

(c) Guardian ad litem for . . . incompetent persons; appointment procedure. – When a guardian ad litem is appointed to represent an . . . incompetent person, he must be appointed as follows:

....

(3) When an . . . incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon . . . the written application of any other party to the action, or by the court on its own motion, before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an . . . incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

....

(e) Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem. – Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, . . . and had been present in court after legal notice in the action in which such final judgment, order or decree is entered.

Discussion

1. What is the status of a guardian ad litem appointed before October 1, 2013, for a respondent parent pursuant to an order indicating he or she is a “guardian ad litem of assistance”?

There is no longer statutory authority for the appointment or payment of guardians ad litem with a role of assistance but not substitution, even in cases filed before October 1, 2013. Diminished capacity that falls short of incompetence is not a basis for appointing a guardian ad litem. In a case decided both before the recent statutory changes and before the decision of the court of appeals in *P.D.R.*, the court of appeals held that once a trial court determined that a respondent was incompetent or had diminished capacity and appointed a guardian ad litem pursuant to G.S. 7B-602, “it was necessary for the [respondent] to be represented by a GAL throughout the neglect and dependency and termination proceedings, as long as the conditions that necessitated the appointment of a GAL still existed.”¹⁸ Because a reasonable basis to believe that a respondent has diminished capacity and is unable to adequately act in his or her own interest is no longer a basis for the appointment of a guardian ad litem, that holding would seem to have no bearing on the release or withdrawal of a guardian ad litem appointed on that basis.

An attorney or other person appointed as guardian ad litem with a role of assistance and who has not already done so should make a motion to be relieved or to withdraw. Presumably the need to review the status of the guardian ad litem also could be raised by a party or by the court itself. Notice of the motion should be given to all parties, including the party for whom the guardian ad litem was appointed. A trial court’s denial of the guardian ad litem’s motion to withdraw should be based on a determination that the respondent parent is incompetent and needs a guardian ad litem. The Office of Indigent Defense Services will not pay for services provided on or after October 1, 2013, by a guardian ad litem appointed with a role of assistance based on a parent’s diminished capacity.

2. What is the status of a guardian ad litem appointed before October 1, 2013, for a respondent parent pursuant to an order that does not indicate whether the role of the guardian ad litem is one of assistance or one of substitution?

Guardians ad litem in this position generally were appointed before the court of appeals interpreted the former statutes as distinguishing between guardians ad litem with a role of assistance and those with a role of substitution.¹⁹ Their roles were unclear before October 1, 2013, and their status remains unclear until a court determines in what capacity they were appointed or makes a new determination about whether the respondent is incompetent. A guardian ad litem in this position who has not already done so should make a motion seeking that clarification. Presumably the need to review the status of the guardian ad litem also could be raised by a party or by the court itself. If the guardian ad litem has been acting only in a role of assistance, he or she probably should allege that and seek to withdraw or be relieved. If the guardian ad litem has been acting in a role of substitution or in some hybrid role of substitution and assistance, the motion should ask the court to determine whether there is a substantial question as to the respondent’s competency and, if the court finds that there is, whether the respondent is incompetent and needs a guardian ad litem.

18. *In re A.S.Y.*, 208 N.C. App. 530, 539 (2010).

19. *See In re P.D.R.*, ___ N.C. App. ___, 737 S.E.2d 152 (2012).

In the motion the guardian ad litem should seek to withdraw or be relieved if the court determines that there is not a substantial question as to the respondent's competence or that there is but the respondent is not incompetent for purposes of the juvenile proceeding.²⁰ The guardian ad litem also could seek to withdraw or be relieved if the court determines that the respondent is incompetent and needs a guardian ad litem, if the guardian ad litem does not want to assume or continue in that role. Notice of the motion should be given to all parties, including the person for whom the guardian ad litem was appointed.

3. When and by whom should the question of whether a respondent needs a guardian ad litem be raised?

Any party or the court itself may move for the appointment of a guardian ad litem for a respondent parent. If the petitioner (or a movant in a termination of parental rights action) knows when the action is initiated that the respondent parent is incompetent, the petitioner should "make written application" for the appointment of a guardian ad litem before or at the time the action is filed.²¹ When service by publication is required, the court may appoint a guardian ad litem before the publication is completed. Then the guardian ad litem must be served and, in a termination of parental rights action, notified to respond within the time specified in the published notice.²² When service by publication is not required, the court may appoint a guardian ad litem before or at the time the action is commenced.²³ Under Rule 17, when the court appoints the guardian ad litem it may enter an order dispensing with service on the incompetent party.²⁴ However, because the Juvenile Code is so specific about on whom service must be made, the safer approach is to serve both the guardian ad litem and the respondent.²⁵

A petitioner often will not know with any certainty when the action is filed whether a respondent is incompetent. Neither G.S. 7B-602(c) nor G.S. 7B-1101.1(c) includes any limitation on when during a proceeding a motion seeking appointment of a guardian ad litem may be made. However, courts have held that when there is a substantial question as to whether a party in a civil action is competent, the court should address that question "as soon as possible in order to avoid prejudicing the party's rights."²⁶ Pre-trial or pre-adjudication hearings are required in all juvenile cases and provide an appropriate opportunity for the parties and the court to consider whether a competency issue should be addressed.²⁷

20. The same would be true if the court determined that the respondent was incompetent but did not need a guardian ad litem, a circumstance that would arise rarely but could occur, for example, if the court determined that the respondent had a general guardian appointed pursuant to G.S. Chapter 35A.

21. See G.S. 1A-1, Rule 17(c).

22. *Id.* See also G.S. 7B-1106(a).

23. G.S. 1A-1, Rule 17(c).

24. *Id.* This provision allows the court to override the requirement in G.S. 1A-1, Rule 4(j)(2), that service be made on both the incompetent party and that party's guardian or guardian ad litem.

25. See G.S. 7B-407 and G.S. 7B-1106.

26. *In re J.A.A.*, 175 N.C. App. 66, 72 (2005). See also *In re I.T.P.-L.*, 194 N.C. App. 453, 466–67 (2008) (holding that appointment of a guardian ad litem for a respondent was "timely" when made on motion of the petitioner seventeen days after a termination of parental rights petition was filed and three months before the first hearing).

27. See G.S. 7B-800.1, which requires pre-adjudication hearings in abuse, neglect, and dependency cases, and G.S. 7B-1108.1, which requires pre-trial hearings in termination of parental rights cases.

Guardian ad litem issue raised by respondent's attorney. The attorney representing a respondent may be understandably reluctant to raise a question about his or her client's mental capacity, especially if the parent's ability to care for the child is an issue in the case. An attorney reasonably could ask the court to conduct a hearing to determine whether the client needs a guardian ad litem, without affirmatively asserting that the client is incompetent. In addition, the attorney is bound and should be guided by Rule 1.14 of the North Carolina State Bar's Rules of Professional Conduct,²⁸ which reads as follows:

Rule 1.14. Client with Diminished Capacity

- (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.

In one termination of parental rights case, the respondent appellant argued that she was denied effective assistance of counsel because her attorney told the trial court that she did not need a guardian ad litem.²⁹ The court of appeals rejected the ineffective assistance of counsel claim, noting that the record showed the attorney had vigorously represented the respondent for an extended period of time, the evidence of grounds for termination was overwhelming, and the respondent had not shown that she was denied a fair trial.³⁰

An attorney who has difficulty "maintain[ing] a normal client-lawyer relationship" with a client who has diminished capacity may be more likely to seek to withdraw from the case than to seek the appointment of a guardian ad litem, as permitted by Rule 1.14(b) of the Rules of Professional Conduct. A respondent with mental health issues may ask the court to "fire" appointed counsel and appoint new counsel. Whether to allow an attorney to withdraw and whether to grant a respondent's request for the appointment of a different attorney are in the trial court's discretion.³¹ However, if the court allows a respondent's

28. See Title 27, Chapter 02, of the N.C. Administrative Code.

29. *In re J.A.A.*, 175 N.C. App. 66.

30. *Id.* at 74.

31. See, e.g., *In re Faircloth*, 153 N.C. App. 565, 580 (2002) (holding that the trial court's refusal to remove respondent's attorney and appoint another one was not an abuse of discretion).

appointed counsel to withdraw, it must either appoint new counsel or obtain a proper waiver of counsel from the respondent. A respondent's request that his or her attorney be removed, by itself, cannot be treated as a waiver of the right to counsel.³² Before permitting a respondent to proceed pro se, the court must examine the respondent on the record and make findings of fact sufficient to show the waiver is knowing and voluntary.³³

Guardian ad litem issue raised by another party. Any party may raise the issue of whether a substantial question exists as to a respondent's competence, both to ensure fairness to the respondent and to preclude an issue on appeal as to whether the court should have made an inquiry into the respondent's competence. This may be especially true for a petitioner who alleges that the respondent has serious substance abuse or mental health problems or alleges in fact or in effect that the respondent is incompetent or has diminished capacity.³⁴

Guardian ad litem issue raised by the court. The court of appeals has said that "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*."³⁵ That inquiry, the court of appeals said, should be made "as soon as possible in order to avoid prejudicing the party's rights."³⁶ Thus, a trial court should be alert for "red flags" indicating the need to make an inquiry regarding a respondent's competence. Under the previous versions of G.S. 7B-602 and G.S. 7B-1101.1, there were no published cases reversing a trial court for abusing its discretion by failing to appoint a guardian ad litem for a respondent. Twice, though, trial courts were reversed for failing to conduct an inquiry to determine whether a guardian ad litem should be appointed, when information before the court raised a substantial question as to the respondent's competence or capacity.³⁷

In the first case,³⁸ the county department of social services (DSS) had alleged that the children involved were dependent and that the respondent mother was unable to provide proper care because of her anger control problems, aggressive tendencies, and lack of understanding about earlier neglect of the children. An assessment indicated that the mother had an IQ significantly below average and that she "was diagnosed as having Personality Disorder NOS and Borderline Intellectual Functioning."³⁹ The trial court's findings at adjudication included that the respondent's mental health issues affected her ability to provide proper care for the children. The court of appeals held that, based on the DSS

32. See *In re S.L.L.*, 167 N.C. App. 362, 364 (2004).

33. G.S. 7B-602(a1) and G.S. 7B-1101.1(a1). These subsections were added by S.L. 2013-129, secs. 17 and 32, effective October 1, 2013.

34. See, for example, *In re I.T.P.-L.*, 194 N.C. App. 453 (2008), a termination of parental rights case in which the petitioner (county department of social services) moved for the appointment of a guardian ad litem for a parent who had been diagnosed with antisocial personality disorder and mild mental retardation.

35. *In re J.A.A.*, 175 N.C. App. 66, 72 (2005) (citation omitted).

36. *Id.*

37. See *In re N.A.L.*, 193 N.C. App. 114 (2008), and *In re M.H.B.*, 192 N.C. App. 258 (2008).

38. *In re N.A.L.*, 193 N.C. App. 114.

39. *Id.* at 118.

allegations and the respondent's diagnosis, the trial court should have discerned a "substantial question" as to the respondent's capacity and conducted an inquiry to determine whether she needed a guardian ad litem. Failure to do that was an abuse of discretion and required reversal.

In the second case,⁴⁰ the court of appeals held that the trial court's findings of fact raised "serious questions as to Respondent's competency, capacity, and ability to adequately act in his own interest."⁴¹ Red flags included, among other things, evidence or findings that the respondent

- had suffered from posttraumatic stress disorder, been diagnosed as manic depressive and bipolar, quit taking prescribed lithium, and self-medicated with marijuana;
- was receiving mental health treatment;
- was mentally and emotionally unstable and had threatened suicide after the petition was filed; and
- while testifying, was agitated and weeping and expressed suicidal thoughts.⁴²

Although the respondent asserted that the trial court abused its discretion by failing to appoint a guardian ad litem for him, the appeals court held that the trial court abused its discretion by not conducting an inquiry to determine whether a guardian ad litem should be appointed for the respondent.⁴³

However, in a third case,⁴⁴ the court of appeals held that the trial court's failure to conduct such an inquiry was *not* an abuse of discretion. The respondent in that case mistakenly relied on the pre-2005 wording of the statute to assert that appointment of a guardian ad litem was required because the "incapability" ground for terminating his rights was alleged. Again, the court of appeals held that whether to conduct an inquiry as to a respondent's need for a guardian ad litem was in the trial court's discretion. Considering facts starkly different from those in the two cases described above, the court of appeals held that nothing in the record raised questions as to the respondent's competency or mental capacity. Allegations about the respondent's incapability were based primarily on his repeated incarceration, not on mental health issues affecting his ability to parent.

Indications that a respondent has mental health or substance abuse problems did not necessarily mandate a hearing on the need for a guardian ad litem even when diminished capacity could be the basis for an appointment. The court of appeals rejected a respondent's argument that the trial court erred in failing to appoint a guardian ad litem for her when it had referred to her being emotionally unbalanced and to evidence that her psychiatric evaluation indicated that she was easily excited, prone to emotional outbursts, impulsive, and rebellious; had made findings about her erratic behavior; and had found that she was involuntarily committed after an incident at which the police had to restrain her.⁴⁵ The court of appeals found no abuse of discretion, noting that the respondent had testified that she was working in the field of home health care and at a convenience store and was pursuing her EMT license. The court concluded that the record indicated nothing calling into question the respondent's mental competence, her ability to perform mentally or act

40. *In re M.H.B.*, 192 N.C. App. 258.

41. *Id.* at 264.

42. *Id.* at 262–63.

43. *Id.* at 266.

44. *In re C.G.A.M.*, 193 N.C. App. 386 (2008).

45. *In re A.R.D.*, 204 N.C. App. 500, *aff'd per curiam*, 364 N.C. 596 (2010).

in her own interest, or her ability to handle her own affairs. Comparing the facts to those in the first two cases described above, which were reversed, the court found the absence of a diagnosis of mental illness to be “one critical distinguishing factor.”⁴⁶

Similarly, in another case the court of appeals rejected the respondent’s argument that the trial court abused its discretion by not appointing a guardian ad litem for her *sua sponte*.⁴⁷ The respondent based her argument on her history of substance abuse and mental health and anger control issues. Contrasting this case with those in which it found error, the court of appeals noted that here the dependency ground for termination was not alleged, there was no allegation that the respondent’s mental health issues or substance abuse problems rendered her incompetent or incapable of caring for her children, the respondent was sufficiently competent to attend and participate in hearings and enter into a mediated agreement, and nothing in her testimony or in the court proceeding raised a question about her competence.⁴⁸

4. What procedures should the court follow when there is a substantial question as to a respondent’s competence?

Failing to conduct an inquiry or appoint a guardian ad litem was asserted as error in a number of cases under former versions of the statutes.⁴⁹ Error also may occur, however, when a court appoints a guardian ad litem for a party but does so without (1) making a proper inquiry and (2) protecting the party’s due process rights. An Illinois appellate court, reversing a trial court’s *sua sponte* appointment of guardians ad litem for two adult plaintiffs who were former foster children, stated that a “trial judge’s personal opinion that a guardian *ad litem* is required is not a justification for dispensing with the procedural . . . due process requirements of notice and hearing.”⁵⁰ The appellate court found the error “particularly troubling” where the plaintiffs, through counsel, had objected to the appointment of guardians ad litem.⁵¹

The courts have said that “[a]ppointment of a GAL under Rule 17 [of the N.C. Rules of Civil Procedure] for an incompetent person ‘will divest the parent of their [sic] fundamental right to conduct his or her litigation according to their [sic] own judgment and inclination.’”⁵² Neither the Juvenile Code nor Rule 17 provides guidance for the court with respect to the procedures it should follow in deciding whether to appoint—and in actually appointing—a guardian ad litem for a respondent. The procedure may be as simple as determining that (1) a valid order exists adjudicating the person to be incompetent—either under G.S. Chapter 35A or under comparable statutes of another state, (2) the party lacks a

46. *Id.* at 505. The opinion in *In re A.R.D.* mischaracterizes the holding in *In re N.A.L.*, cited above, stating that the latter case “found error in the trial court’s failing to appoint a guardian ad litem for respondent-mother.” The court in *N.A.L.* actually held that the trial court abused its discretion by not conducting an inquiry to determine whether the respondent needed a guardian ad litem.

47. *In re S.R.*, 207 N.C. App. 102 (2010).

48. *Id.* at 109.

49. *See, e.g., In re S.R.*, 207 N.C. App. 102; *In re Estes*, 157 N.C. App. 513, *disc. review denied*, 357 N.C. 459 (2003).

50. *J.H. v. Ada S. McKinley Cmty. Servs., Inc.*, 369 Ill. App. 3d 803, 820, 861 N.E.2d 320, 334 (2006).

51. *Id.*

52. *In re P.D.R.*, ___ N.C. App. ___, ___, 737 S.E.2d 152, 157 (2012) (quoting *In re J.A.A.*, 175 N.C. App. 66, 71 (2005)).

general guardian⁵³ or it is not feasible or appropriate for the general guardian to act for the party in the action,⁵⁴ and (3) no party objects to the appointment of a guardian ad litem.

It is clear, however, that an actual adjudication of incompetence pursuant to G.S. Chapter 35A is not a precondition for the appointment of a guardian ad litem in a juvenile case or other civil action. The court of appeals held otherwise in a case that later was both reversed on other grounds and superseded by statutory changes. In 1989 the court held that the trial court in a divorce action lacked jurisdiction to determine a party's incompetence and appoint a guardian ad litem for the party because the incompetency statutes stated that Chapter 35A provided the "exclusive procedures" for adjudicating a person to be incompetent.⁵⁵ The state supreme court reversed, holding that the husband was not an aggrieved party and did not have standing to appeal, that the order was interlocutory and not immediately appealable, and that the court of appeals "should have dismissed [the] attempted appeal."⁵⁶ Since the court of appeals apparently never should have considered the appeal, it seems evident that the court's holding with respect to how incompetency should be determined for purposes of appointing a guardian ad litem was without effect.⁵⁷ For some time thereafter, however, views about the significance of that holding varied, and it sometimes was cited as authority or treated as persuasive.⁵⁸ Then, in 2003, the legislature amended G.S. 35A-1102 to state that while Article 1 of G.S. Chapter 35A "establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child, . . . nothing in [the] Article shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North Carolina Rules of Civil Procedure."⁵⁹ This legislation clarified that the decision of the court of appeals in *Culton* was not, if it ever had been, a restraint on the trial court's authority to determine incompetence for purposes of appointing a guardian ad litem. It also removed

53. In some cases a person who has been declared incompetent will have only a guardian of the person or only a guardian of the estate, but not a general guardian. Although Rule 17 refers to an incompetent party's defending by "general or testamentary guardian," the term "testamentary guardian" is obsolete. Under former G.S. 33-2 a parent, in his or her will, could appoint a guardian for a minor child, and upon the parent's death the person named in the will became the child's testamentary guardian. (G.S. Chapter 33 was repealed in 1987 when Chapter 35A was enacted by S.L. 1987-550.) Under current law a parent, in his or her will, may make a "testamentary recommendation" that someone be appointed as guardian for a child after the parent's death, but the recommendation does not create a guardianship and is not binding on the court. See G.S. 35A-1224, G.S. 35A-1225.

54. Rule 17(b)(2) provides that incompetent defendants must defend "by general or testamentary guardian, if they have any *within this State*." Thus, the court may appoint a guardian ad litem for a party who has a general guardian in another state. In addition, if the court deems it "expedient" it may appoint a guardian ad litem for a party even though the party has a general guardian in the state. A general guardian might have a conflict of interest, for example, that required the appointment of someone else to represent the party's interests in the action.

55. *Culton v. Culton*, 96 N.C. App. 620, 621–22 (1989), *rev'd on other grounds*, 327 N.C. 624 (1990).

56. *Culton v. Culton*, 327 N.C. 624, 626 (1990).

57. See Thomas L. Fowler, *Holding, Dictum . . . Whatever*, 25 N.C. CENT. L.J., Spring 2003, at 139, 153–62.

58. *Id*; see also, e.g., *In re J.A.A.*, 175 N.C. App. 66, 72 (2005) (treating the holding in *Culton* as having been binding until it was superseded by statute).

59. S.L. 2003-236, sec. 4.

any doubt as to the continued validity of pre-*Culton* appellate court decisions addressing the appointment of guardians ad litem.⁶⁰

Still, the procedures the court should follow before appointing, or deciding not to appoint, a guardian ad litem for a parent (or for any party in a civil action) are less than clear. The court of appeals, in an unpublished opinion, said recently, “We have been unable to find case law establishing the trial court’s procedure for making a determination pursuant to N.C.G.S. § 7B-602(c)” about the need to appoint a guardian ad litem.⁶¹ More than forty years ago, the court made a similar observation about Rule 17 of the North Carolina Rules of Civil Procedure, noting that the rule “fail[s] to specify the method or procedure by which a disputed question of competency is to be determined” when a party’s competence is called into question in the context of a civil action.⁶² Case law, however, does suggest the following steps.

- *Determination of whether a substantial question exists as to the respondent’s competence.* As discussed in response to the preceding question, the issue may be raised by any party or by the court itself. The court may make this initial determination based on the pleadings, evidence offered by the parties, the respondent’s conduct or appearance in court, the respondent’s responses to questions posed by the court, or any circumstances brought to the court’s attention. “Whether the circumstances which are brought to the attention of the trial judge are sufficient to raise a substantial question as to the party’s competency is a matter to be initially determined in the sound discretion of the trial judge.”⁶³ While no particular formal procedure is required, the court of appeals has offered this guidance: (1) If practicable, the respondent whose competency is questioned should be present in court. (2) When possible, the court should conduct a voir dire examination of the respondent. (3) If the court hears conflicting evidence, the judge should make findings of fact to support a determination of whether a substantial question exists.⁶⁴
- *Notice to the respondent.* Once the court determines that a substantial question as to a respondent’s competence exists, the court must conduct a hearing to determine whether the respondent is incompetent and needs a guardian ad litem. The respondent must have notice of the hearing. Although the statute is silent with respect to notice, the state supreme court has held that “when a party’s lack of mental capacity is asserted and denied—and he has not previously been adjudicated incompetent to manage his affairs—he is entitled to notice and an opportunity to be heard before the judge can appoint . . . a guardian ad litem for him.”⁶⁵ Unless the court specifies a shorter time, at least five days’ notice should be given.⁶⁶
- *Hearing to determine incompetence.* The court’s determination that a substantial question exists as to the respondent’s competence and the hearing on whether the respondent is incompetent and needs a guardian ad litem may occur together. For example, if the issue is before the court pursuant to a written motion for appointment

60. Two of the most frequently cited cases are *Hagins v. Redevelopment Comm’n of Greensboro*, 275 N.C. 90 (1969), and *Rutledge v. Rutledge*, 10 N.C. App. 427 (1971).

61. *In re C.M.*, ___ N.C. App. ___, 725 S.E.2d 474 (2012) (unpublished).

62. *Rutledge*, 10 N.C. App. at 431.

63. *Id.* at 432.

64. *Id.* at 432–33.

65. *Hagins*, 275 N.C. at 101–2 (citations omitted). See also *Rutledge*, 10 N.C. App. at 430–31.

66. *Rutledge*, 10 N.C. App. at 433–34. See also G.S. 1A-1, Rule 6(d).

of a guardian ad litem, the respondent may be given notice of a hearing that effectively addresses both questions. Or, as with any notice, the respondent and his or her attorney may waive notice of the hearing and they are likely to do so if the need for a guardian ad litem is not contested.

The court can raise the issue of competence and initiate this hearing on its own motion. Neither the statutes nor case law indicate that a party has a burden of proof, although logically the court may expect a party who seeks the appointment of a guardian ad litem to proceed with evidence that one is needed. No one is in a position comparable to that of a petitioner in an incompetency proceeding under G.S. Chapter 35A. Neither Rule 17 nor the Juvenile Code specifies a standard of proof.⁶⁷ It simply is not clear whether the court can determine incompetence by a preponderance of the evidence or whether a higher standard applies.⁶⁸ Especially if the court itself initiated the inquiry into competence, it may play a more active role in the hearing than in most proceedings. This may include directing questions to the respondent parent and others as well as seeking additional witnesses or evidence that would aid the court.

In a termination of parental rights case in which the respondent's ability to care for his or her child is at issue, after finding "reasonable cause" the court may order that the respondent be examined by a psychiatrist, psychologist, physician, or other expert.⁶⁹ There does not appear to be any reason the results of such an examination could not be considered before adjudication when the court is assessing the respondent's competence for purposes of deciding whether to appoint a guardian ad litem.⁷⁰

The Juvenile Code does not include a comparable pre-adjudication procedure for obtaining an evaluation of a respondent parent in an abuse, neglect, or dependency proceeding. In those cases the court may be able to order an examination of the respondent under either Rule 35 of the North Carolina Rules of Civil Procedure or pursuant to Rule 706 of the North Carolina Rules of Evidence. G.S. 1A-1, Rule 35, authorizes the court to order a party to submit to a physical or mental examination by a physician when the party's physical or mental condition is in controversy in a civil action. The statute says the "order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of

67. For examples of other states' treatment of the question, see, e.g., *In re James F.*, 42 Cal. 4th 901, 174 P.3d 180 (Cal. 2008) (holding that a juvenile court's appointment of a guardian ad litem for a parent without the parent's consent must be based on "substantial evidence" that the parent is incompetent); *N. Y. Life Ins. Co. v. V.K.*, 184 Misc. 2d 727, 734, 711 N.Y.S.2d 90, 96 (N.Y. Civ. Ct. 1999) (holding that "a guardian *ad litem* is justified when, based on a preponderance of the evidence, the court concludes that a party's condition impedes her ability to protect her rights").

68. In a proceeding to adjudicate incompetence under G.S. Chapter 35A, the standard of proof is clear, cogent, and convincing. See G.S. 35A-1112(d).

69. G.S. 7B-1109(c).

70. Whether a judge in this circumstance should recuse him- or herself based on hearing this kind of evidence before adjudication is governed by Canon 3 of the Code of Judicial Conduct, available at www.aoc.state.nc.us/www/public/aoc/NCJudicialCode.pdf. For a discussion of recusal, including when a motion for recusal should be heard by a different judge, see *In re Faircloth*, 153 N.C. App. 565 (2002); *In re LaRue*, 113 N.C. App. 807 (1994) (holding in a termination of parental rights case that a judge's knowledge of "evidentiary facts" acquired from earlier hearings in the case did not require the judge to disqualify himself). Also see Michael Crowell, "Recusal," *Administration of Justice Bulletin* No. 2009/03 (Sept. 2009), <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0903.pdf>.

the examination and the person or persons by whom it is to be made.” This procedure is a form of discovery that one might think could be initiated only by motion of a party.⁷¹ At least in district court child custody cases, however, appellate courts have held that the trial court is authorized to order such examinations even without a motion by a party.⁷² There may be some question as to whether Rule 35 applies at all in juvenile proceedings. The courts have held that the Rules of Civil Procedure do not provide procedural rights beyond those provided by the Juvenile Code but that the rules will apply “to fill procedural gaps where Chapter 7B requires, but does not identify, a specific procedure.”⁷³ In the only juvenile case that mentions Rule 35, the trial court had denied a father’s motion pursuant to the rule for a mental examination of his son in a termination of parental rights case. The court of appeals affirmed the denial, without questioning or discussing the applicability of Rule 35 in juvenile cases, holding that the father failed to make the necessary showing of good cause.⁷⁴ At least one of the cases upholding a trial court’s authority to order parents in a custody action to consult a mental health professional did so without reference to Rule 35, referring instead to the court’s “wide discretion to protect the child’s best interests and welfare.”⁷⁵

Under Rule 706 of the North Carolina Rules of Evidence, the court, acting on its own motion or the motion of a party, may appoint an expert witness and specify that witness’s duties. Relevant portions of Rule 706 are set out below.

Rule 706. Court appointed experts.

- (a) Appointment. – The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross examination by each party, including a party calling him as a witness.
- (b) Compensation. – Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. . . . [T]he compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

....

71. Discovery in juvenile cases is governed by G.S. 7B-700.

72. *See, e.g.*, *Jones v. Patience*, 121 N.C. App. 434, 442 (1996), *citing* *Rawls v. Rawls*, 94 N.C. App. 670, 676–77 (1989) (“affirming court-ordered consultation with psychiatrist or psychologist as exercise of inherent judicial authority premised upon court’s statutory duty to promote interest and welfare of child”); *Williams v. Williams*, 29 N.C. App. 509, 510 (1976) (affirming order in which the trial judge ordered both parents in a custody action to submit to psychiatric examinations).

73. *In re B.L.H.*, 190 N.C. App. 142, 146, *aff’d per curiam*, 362 N.C. 674 (2008).

74. *In re Williams*, 149 N.C. App. 951 (2002). This case was decided before the current Juvenile Code discovery provisions in G.S. 7B-700 were enacted.

75. *Rawls*, 94 N.C. App. at 676.

- (d) Parties' experts of own selection. – Nothing in this rule limits the parties in calling expert witnesses.

There does not appear to be any appellate court decision in a juvenile case referencing Rule 706.⁷⁶

Several juvenile cases include references to court-ordered pre-adjudication evaluations of respondents, without any references to the statutory authority for such orders.⁷⁷ The evaluations in these cases may have been done with the consent of the respondents. There does not appear to be a case in which the court's authority to order the evaluation has been an issue on appeal.

All parties should be allowed to present relevant evidence and cross-examine witnesses at the hearing on the question of competence. The court should make findings of fact and conclusions of law to support any determination that a respondent is incompetent and needs a guardian ad litem. Because neither the statutes nor case law specifies a standard of proof, and because appointment of a guardian ad litem may affect a party's ability to control litigation affecting a fundamental right, the better practice may be for a court's determination of incompetence to be based on clear and convincing evidence. At the same time, the purpose of appointing a guardian ad litem is to protect the parent's rights in that very litigation. A conclusion about the appropriate standard of proof will depend in part on one's understanding of (1) the meaning of "incompetent" and (2) the role of a guardian ad litem. Both of those are discussed below.

Appointing a guardian ad litem without giving the respondent notice or conducting a proper inquiry may be reversible error. It is not altogether clear whether that kind of error automatically requires reversal or whether it is subject to a harmless error analysis.⁷⁸ Failing to appoint a guardian ad litem when a statute requires one is reversible error per se.⁷⁹ Under North Carolina's current statutes, however, appointment of a guardian ad litem for a parent is required only when the parent is a minor. Otherwise, the issue of whether to appoint a guardian ad litem for a parent respondent in a juvenile case is always in the trial court's discretion.⁸⁰

76. The opinion in *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994), includes numerous references to the testimony of a court-appointed psychologist who had interviewed both parents and the child in a termination of parental rights action but does not discuss how the appointment came about. Other cases discuss the appointment of experts pursuant to G.S. 7A-454, which provides for state payment of the fees of experts and other necessary expenses for an indigent respondent or defendant entitled to appointed counsel. See, e.g., *In re D.R.*, 172 N.C. App. 300 (2005).

77. See, e.g., *In re P.D.R.*, 365 N.C. 533, 534 (2012) (stating that the trial court ordered a mental health evaluation to determine respondent's "capacity to proceed with the neglect and dependency petition"); *In re A.Y.*, ___ N.C. App. ___, 737 S.E.2d 160 (2013) (referring to the trial court's order that a respondent, who already had a guardian ad litem, undergo a psychological evaluation to assist the court in ruling on her motion to be allowed to proceed pro se).

78. See *In re James F.*, 42 Cal. 4th 901, 174 P.3d 180 (2008) (describing the split among lower California appellate courts on that question and holding that a harmless error analysis was appropriate).

79. See, e.g., *In re J.L.S.*, 168 N.C. App. 721 (2005) (reversing for failure to appoint a guardian ad litem for the child in a contested termination of parental rights action, as required by statute); *In re Fuller*, 144 N.C. App. 620 (2001).

80. See, e.g., *In re A.R.D.*, 204 N.C. App. 500 (holding that the trial court did not abuse its discretion by not appointing a guardian ad litem for respondent mother), *aff'd per curiam*, 364 N.C. 596 (2010).

5. What is the meaning of “incompetent” for purposes of appointing a guardian ad litem?

The court may appoint a guardian ad litem for a respondent who “is incompetent.”⁸¹ In discussing the term “incompetent” in connection with the appointment of guardians ad litem for respondent parents, the courts have adopted the definition of “incompetent adult” found in G.S. 35A-1101(7).⁸² That definition reads as follows:

‘Incompetent adult’ means an adult or emancipated minor who lacks sufficient capacity to manage the adult’s own affairs or to make or communicate important decisions concerning the adult’s person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

The courts use this broad definition despite the fact that a guardian ad litem is appointed by the court only to appear on behalf of an incompetent (or minor) party in a particular lawsuit.⁸³ By contrast, a guardian appointed in an incompetency proceeding under G.S. Chapter 35A has a broad range of powers and responsibilities with respect to the ward’s person, the ward’s property, or both.⁸⁴

Appointment of a guardian ad litem based on incompetence “will divest the parent of their [sic] fundamental right to conduct his or her litigation according to their [sic] own judgment and inclination.”⁸⁵ But appointment of a guardian ad litem does not affect the party’s control over any other aspect of his or her life or property. For that reason it seems logical to assess the person’s competence in the more narrow terms of his or her understanding of the nature and importance of the litigation and his or her ability to make and communicate important decisions about the litigation. The court of appeals suggested something like that when it said in a 2005 case, “[T]he trial court must determine whether the parents are incompetent within the meaning of N.C. Gen. Stat. § 35A–1101, such that the individual would be unable to aid in their [sic] defense at the termination of parental rights proceeding.”⁸⁶

The standard for determining capacity to proceed in a criminal case specifically focuses on a defendant’s ability to understand and participate in the court proceeding. For purposes of a criminal prosecution, a defendant lacks the capacity to proceed if “by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.”⁸⁷ In discussing the appointment

81. G.S. 7B-602, G.S. 7B-1101.1.

82. See, e.g., *In re P.D.R.*, ___ N.C. App. ___, 737 S.E.2d 152 (2012); *In re A.R.D.*, 204 N.C. App. 500; *In re M.H.B.*, 192 N.C. App. 258 (2008).

83. See *Roberts v. Adventure Holdings, LLC*, 208 N.C. App. 705, 708 (2010) (citing BLACK’S LAW DICTIONARY 774 (9th ed. 2009) to note that the Latin phrase *ad litem* means “for the purposes of the suit”).

84. See G.S. 35A-1241 (powers and duties of guardian of the person) and G.S. 35A-1250 to -1253 (powers and duties of guardian of the estate).

85. *In re J.A.A.*, 175 N.C. App. 66, 71 (2005) (citation omitted).

86. *Id.* See also *Laura B. Bartell, Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?*, 78 AM. BANKR. L.J. 339, 365 (2004) (stating that a federal court, in applying Rule 17 of the Federal Rules of Civil Procedure, should avoid “a mechanical application of state guardianship law” and expressing the view that because the consequences of appointing a guardian and appointing a guardian ad litem are different, “the grounds for the appointment should also be different”).

87. G.S. 15A-1001(a).

of guardians ad litem in civil cases, North Carolina appellate courts have not explicitly adopted the standard for determining a defendant's capacity to proceed in a criminal case.⁸⁸ However, a California appellate court considering this question (under a statutory scheme similar but not identical to North Carolina's) held that a guardian ad litem should be appointed if a preponderance of the evidence showed either that the party was incompetent for purposes of the appointment of a conservator/guardian or that the party could be found incompetent to proceed in a criminal proceeding.⁸⁹

North Carolina courts have referred only to the broad definition of "incompetent adult" in G.S. 35A-1101(7) and have not considered specifically the criminal standard for capacity to proceed. Nevertheless, it seems appropriate for a court, when determining whether a party is incompetent for purposes of appointing a guardian ad litem, to consider the particular aspects of competence relevant to the party's ability to rationally direct and control his or her civil litigation. That approach could result in the appointment of guardians ad litem for parties who would never be adjudicated incompetent under G.S. Chapter 35A but whose physical or mental condition renders them unable to participate meaningfully in a civil case. This might be someone whose attorney has requested the appointment of a guardian ad litem because the attorney "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."⁹⁰ In other words, the distinctions the court made in *P.D.R.* between incompetence and diminished capacity, and between substitution and assistance, may not be necessary.

Assessing competence in relation to a person's ability to participate meaningfully in the litigation also leaves open the possibility that someone who could be adjudicated incompetent in a proceeding under G.S. Chapter 35A—based on the inability to manage his or her affairs or to make or communicate important decisions about health care or property, for example—could participate meaningfully and assist the attorney in a juvenile case without the involvement of a guardian ad litem.⁹¹ Even if the court determines that the party is incompetent, whether to appoint a guardian ad litem is in the court's discretion.⁹²

Regardless of the meaning one attaches to the term "incompetent," appointing a guardian ad litem for a party on the basis of incompetence carries at least the potential for

88. *But see J.A.A.*, 175 N.C. App. at 71; *In re P.D.R.*, 365 N.C. 533, 534 (2012) (in reciting the facts of the case, the supreme court referred to the trial court's having ordered the respondent "to undergo a mental health evaluation to determine her capacity to proceed with the neglect and dependency petition").

89. *In re Sara D.*, 104 Cal. Rptr. 2d 909, 914, 87 Cal. App. 4th 661, 667 (2001). This issue and the *Sara D.* case are discussed more fully in Donna S. Harkness, "Whenever Justice Requires": Examining the Elusive Role of Guardian Ad Litem for Adults with Diminished Capacity, 8 MARQ. ELDER'S ADVISOR 1 (2006). Harkness opines that the criminal competency standard, "with its emphasis on navigating the courtroom environment, . . . should be the standard used to inform the court's sound discretion" when it is deciding whether to appoint a guardian ad litem. *Id.* at 13. See also *In re Christina B.*, 23 Cal. Rptr. 2d 918, 924, 19 Cal. App. 4th 1441, 1450 (1993) (holding that the proper standard for assessing competency in a dependency proceeding is "whether the person is able to take part meaningfully in the proceedings").

90. See Rule 1.14(b) of the North Carolina State Bar's Rules of Professional Conduct. Although this language is similar to wording that has been removed from the Juvenile Code, it remains relevant in the context of an attorney's professional responsibility when representing a client with diminished capacity.

91. See, e.g., *Pepper v. Bentley*, 59 So. 3d 684 (Ala. Civ. App. 2008) (holding that the trial court did not abuse its discretion by declining to appoint a guardian ad litem or conduct a hearing on competence when the defendant in an ejectment action was represented by counsel).

92. G.S. 7B-602(c), G.S. 7B-1101.1(c).

removing from the party some degree of control over the litigation and placing that control in someone else's hands. The court, therefore, should take extreme care before appointing a guardian ad litem and should make clear findings to support its decision to do so.

The following cautionary statement made by the state supreme court more than forty years ago continues to be apt:

Many a man has prosecuted a lawsuit to his detriment or ruin, his ordinary caution and good judgment warped by prejudice, spite, or a stubborn purpose to vindicate 'the principle of the thing.' His attorneys and the court may have been entirely convinced that he was blindly and contumaciously refusing to settle his case upon terms which were obviously advantageous to him—and they may have been right. Yet 'no man shall be interfered with in his personal or property rights by the government, under the exercise of its parental authority, until the actual and positive necessity therefor is shown to exist.' *Schick v. Stuhr*, 120 Iowa 396, 398, 94 N.W. 915, 916 (1903). . . .

We have found no completely satisfactory definition of the phrase 'incompetent from want of understanding to manage his own affairs.' Furthermore, we do not believe it is possible to frame a definition which will include every aberration which might produce the incompetency to which reference is made. The facts in every case will be different and competency or incompetency will depend upon the individual's 'general frame and habit of mind.' . . . [M]ere weakness of mind will not be sufficient to put a person among those who are incompetent to manage their own affairs.⁹³

6. Who may be appointed as a respondent's guardian ad litem?

There is no requirement that a guardian ad litem appointed for a parent in a juvenile case be an attorney.⁹⁴ Nevertheless, the lack of other obvious candidates often has resulted in the appointment of attorneys to serve as guardians ad litem for respondents. The Juvenile Code makes clear that an attorney cannot serve in a dual role as both the attorney and the guardian ad litem for a respondent parent.⁹⁵ The only directive in G.S. 1A-1, Rule 17, about who may be appointed as a guardian ad litem refers to the court's appointment of "some discreet person."⁹⁶

The court's selection of a person to serve as guardian ad litem should take into account the nature of the party's incompetence, the extent to which an individual knows and can communicate with the respondent, and the ability of an individual to cooperate with the attorney representing the respondent and act on behalf of the party.

7. What are the duties and authority of a respondent's guardian ad litem?

The recently discarded distinction between a guardian ad litem of assistance and a guardian ad litem of substitution grew out of the former wording of the statutes and case law interpreting that wording.⁹⁷ The 2013 amendment of the statutes to delete references to "diminished capacity," which the court of appeals had said was the basis for appointment

93. *Hagins v. Redevel. Comm'n of Greensboro*, 275 N.C. 90, 105 (1969).

94. Questions regarding payment of a guardian ad litem who is not an attorney should be directed to the Assistant Director of the Office of Indigent Defense Services (919.354.7200).

95. See G.S. 7B-602(c), G.S. 7B-1101.1(c).

96. G.S. 1A-1, Rule 17(b)(2).

97. See *In re P.D.R.*, ___ N.C. App. ___, 737 S.E.2d 152 (2012).

of a guardian ad litem of assistance, suggests that now there are only “guardians ad litem of substitution.” That conclusion and the former distinction itself are troubling, because a guardian ad litem’s role is fundamentally one of assistance even though it may involve substitution of the guardian ad litem’s judgment for that of the party the guardian ad litem represents. “The duty of a guardian ad litem, and in fact the object of his appointment, is to protect the interest of his wards.”⁹⁸

Under G.S. 1A-1, Rule 17(b), a party to a civil action who is incompetent must appear by general guardian if he or she has one or, if the party has no general guardian, by a guardian ad litem. It would seem, then, that a guardian ad litem appointed for an incompetent party would participate in the litigation in the same role and with the same authority that a court-appointed general guardian would have in relation to the litigation if the party were appearing through that guardian. As noted earlier, a guardian appointed for an adult under G.S. Chapter 35A following an adjudication of incompetence has very broad authority.⁹⁹ However, a general guardian’s broad authority to act in the place of a ward is not absolute. A clerk’s order appointing a guardian must specify the guardian’s powers and duties, and the clerk may create additional duties or limit those set out in the statutes. The statutory duties of a guardian of the person are effective only to the extent that they are “not inconsistent with the terms of any order of the clerk or any other court of competent jurisdiction.”¹⁰⁰ The powers and duties of a guardian in relation to a ward’s estate are subject to any “express terms or limitations set forth in any court order creating or limiting [those] powers and duties.”¹⁰¹ When appointing a guardian under G.S. Chapter 35A, the court may consider the “nature and extent of the needed guardianship” and order a “limited guardianship,” specifying legal rights and privileges the ward retains despite an adjudication of incompetence.¹⁰²

Thus, even after a determination in a juvenile case that a respondent is incompetent, the proper role of a guardian ad litem may not be the same in every case. A court might address any limitations or expectations in the order appointing the guardian ad litem. The Mississippi Supreme Court, after discussing the “diverse duties and responsibilities” a court might assign to a guardian ad litem, encouraged judges to “set forth clearly the reasons an appointment has been made and the role the guardian ad litem is expected to play in the proceedings.”¹⁰³ When a court does not do that, the guardian ad litem, the party for whom he or she is appointed, and the party’s attorney will be left to figure that out during the course of the proceeding.

The following statements from the purpose section of the guardianship statutes seem as relevant for a guardian ad litem as for a general guardian:

- “The essential purpose of guardianship for an incompetent person is to replace the individual’s authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.”¹⁰⁴

98. *Narron v. Musgrave*, 236 N.C. 388, 394 (1952), quoting *Spence v. Goodwin*, 128 N.C. 273, 274 (1901).

99. For powers and duties of guardians, see Articles 8 and 9 of G.S. Chapter 35A.

100. G.S. 35A-1241(a).

101. G.S. 35A-1250(b).

102. G.S. 35A-1212(a), G.S. 35A-1215(b).

103. *S.G. v. D.C.*, 13 So. 3d 269, 281 (Miss. 2009).

104. G.S. 35A-1201(a)(3).

- “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.”¹⁰⁵
- “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.”¹⁰⁶
- “Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.”¹⁰⁷

“Substitution,” if that term is used at all, should not mean depriving the party of the right to participate in and make decisions about the case to the extent he or she is able. In a personal injury action, a guardian ad litem for a seventeen-year-old party would act differently from a guardian ad litem for a six-month-old child. Teenagers have some ability to articulate their own interests and to participate in decision making. Similarly, a guardian ad litem for a parent who is in a coma should act differently from a guardian ad litem for a parent whose developmental disability prevents the managing of most of his or her own affairs but who can articulate opinions about at least some of the litigation. The guardian ad litem’s role includes assisting the parent in understanding the case and in participating to the extent he or she is able while exercising judgment about and making decisions the parent is unable to make in order to protect that parent’s interests.

8. When can a guardian ad litem withdraw or be relieved of duties by the court?

The court of appeals has said “once a parent has been appointed a GAL according to Rule 17, the presence and participation of the GAL is necessary in order for the trial court to ‘proceed to final judgment, order or decree against any party so represented. . . .’”¹⁰⁸ In the case quoted here, the trial court had appointed a guardian ad litem for the respondent mother early in a neglect and dependency proceeding, and that person assisted the respondent throughout the proceeding. Subsequently, social services filed a motion to terminate the respondent’s parental rights, alleging, among other things, the respondent’s apparent mental illness and bizarre behavior. However, when the respondent failed to appear at the termination hearing, the court allowed the guardian ad litem to withdraw.¹⁰⁹ The court of appeals held that permitting the guardian ad litem to withdraw was error because the conditions that led the court to appoint the guardian ad litem initially continued to exist. The appellate court said, “[E]ven in the absence of respondent-mother, the GAL was still required to remain and represent respondent-mother to the fullest extent feasible during the termination hearing.”¹¹⁰

Because the respondent’s attorney cannot also serve as his or her guardian ad litem, the fact that the respondent was represented by counsel did not affect the necessity of the

105. G.S. 35A-1201(a)(5).

106. *Id.*

107. G.S. 35A-1201(a)(4).

108. *In re A.S.Y.*, 208 N.C. App. 530, 540 (2010). See also *In re P.D.R.*, ___ N.C. App. ___, 737 S.E.2d 152 (2012).

109. *In re A.S.Y.*, 208 N.C. App. at 534.

110. *Id.* at 539.

guardian ad litem's continued participation in the case.¹¹¹ Unless the court, after a hearing, makes findings to support a determination that the reasons for appointing a guardian ad litem no longer exist, the court should not dismiss the guardian ad litem or permit him or her to withdraw without appointing a replacement.

Conclusion

After a long period of evolving statutes and case law relating to guardians ad litem for respondent parents in juvenile proceedings, the law appears to have arrived at a simple conclusion: Rule 17 of the North Carolina Rules of Civil Procedure applies in juvenile proceedings just as it does in any other civil action. With that conclusion, however, come a dearth of guidance about precisely how Rule 17 should be applied and a lack of clarity about the role of a guardian ad litem appointed pursuant to the rule. The courts have adopted the definition of "incompetent" in the incompetence and guardianship statutes, G.S. Chapter 35A, for purposes of interpreting the same term in Rule 17 and the Juvenile Code. Chapter 35A acknowledges that a respondent's disability may not be complete, a ward may not be completely unable to make and communicate decisions, and a guardian's role may not be one of total substitution. In juvenile proceedings courts should follow that lead when determining incompetence and appointing guardians ad litem for respondents. Persons appointed as guardians ad litem for parents should heed the purposes set out in Chapter 35A by making decisions for the respondent only when the respondent lacks the capacity to do so, protecting the respondent's opportunity to exercise rights within his or her comprehension and judgment, permitting the respondent to participate as fully as possible in decisions that affect him or her, and acting in a way that gives the respondent a fuller capacity for exercising and protecting his or her rights.

111. *Id.* at 540.

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