UNC SCHOOL OF GOVERNMENT

2025 Guardianship Proceedings for Appointed Counsel

January 16, 2025/ Chapel Hill, NC
Co-sponsored by UNC School of Government
& NC Office of Indigent Defense Services

AGENDA

8:45 to 9:00am	**Welcome** *Timothy Heinle, Teaching Assistant Professor* UNC School of Government, Chapel Hill, NC
9:00 to 10:00am	**What Recent Statutory Changes Mean for GALs** *Meredith Smith, Associate Professor of Public Law and Gov't* UNC School of Government, Chapel Hill, NC
10:00 to 10:15am	*Break*
10:15 to 11:15am	**Common Challenges and Ideas for Handling Them** *Adam Hopler, Partner*, Hopler, Wilms, & Hanna, PLLC, Durham, NC
11:15 to 11:30am	*Break*
11:30am to 12:30pm	**Let's Talk About Appeals** *Timothy Heinle, Teaching Assistant Professor* UNC School of Government, Chapel Hill, NC
12:30 to 1:15pm	*Lunch*
1:15 to 2:45pm	**Navigating Differences: Practical Communication Strategies for GAL Attorneys** *Dr. Mina Ratkalkar, Forensic Psych.* New Spark Therapy, Durham, NC
2:45 to 3:00pm	*Break*
3:00 to 4:00pm	**Whose Eyes and Ears? The True Role of the GAL** [Ethics] *Timothy Heinle, Teaching Assistant Professor* UNC School of Government, Chapel Hill, NC
4:00pm	*End of program*

Estimated 5.5 hours of CLE, including 1.0-hour ethics credit, pending bar approval.

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

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

Changes Applicable to Less Restrictive Alternatives

Definition of "Less Restrictive Alternative." The law adds and defines the term "less restrictive alternative." S.L. 2023-124, sec. 7.1, amending G.S. 35A-1101(11a). A "less restrictive alternative" is "an arrangement enabling a respondent to manage his or her affairs or to make or communicate important decisions concerning his or her person, property, and family that restricts fewer rights of the respondent than would the adjudication of incompetency and appointment of a guardian." S.L. 2023-124, sec. 7.1, amending G.S. 35A-1101(11a). The definition includes a *non-exhaustive* list of examples of less restrictive alternatives. They are:

- supported decision-making,
- appropriate and available technological assistance,
- appointment of a representative payee, and
- appointment of an agent for the respondent, including under a power of attorney for health care or finances.

Revised Definition of Incompetent Adult and Child. The law revises the definition of incompetent adult and incompetent child in G.S. 35A-1101 and expressly incorporates the term LRA in those definitions. Both definitions add a critical new clause: An adult, emancipated minor, or incompetent child "**does not lack capacity** if, by means of a **less restrictive alternative**, he or she is able to **sufficiently** (i) manage his or her affairs and (ii) communicate important decisions concerning his or her person, family, and property." S.L. 2023-124, sec. 7.1, amending G.S. 35A-1101(7), (8) (emphasis added).

New Purpose in G.S. Chapter 35A. Another notable change is to G.S. 35A-1201, a key section in G.S. Chapter 35A that describes the purpose of guardianship in North Carolina. A new subsection (7) provides that "[f]or adults, guardianship should

1. always be a **last resort**, and

2. should **only be** imposed after **less restrictive alternatives** have been considered and found to be insufficient to meet the adult's needs." S.L. 2023-124, sec. 7.8, G.S. 35A-1201(7) (emphasis added).

New Roles and Responsibilities

Now you've read the changes, the inevitable next question is: what do I do differently in my role starting January 1, 2024?

The Petitioner

Consider LRAs Before Filing. Any person who intends to file an incompetency petition should, prior to filing the petition, consider whether the respondent has LRAs in place and whether those LRAs are sufficient to meet the needs of the respondent. If a petitioner knows the respondent has sufficient LRAs in place at the time of filing and still proceeds to file the petition, a court may, after a hearing, find that (i) the respondent is not incompetent, and (ii) the petitioner did not have reasonable grounds to bring the petition. If there were no reasonable grounds to bring the petition, the court is required to tax costs of the proceeding to the petitioner. S.L. 2023-124, sec. 7.6, amending G.S. 35A-1116(a).

Make a Statement About LRAs in the Petition. The petitioner must include a statement in the petition that, to the extent known:

- identifies what LRAs have been considered prior to seeking adjudication, and
- explains why those LRAs are insufficient to meet the needs of the respondent. S.L. 2023-123, sec. 7.2, amending G.S. 35A-1106(4a).

The petition should include more than a bare assertion that LRAs were considered. It should identify the alternatives considered ***and*** include a description of why they were found to be inadequate to meet the respondent's needs. The petition could include, for example, a statement that the respondent has a representative payee managing their Social Security benefits, but the arrangement does not adequately address the respondent's other financial needs. Due to the respondent's severe dementia, the respondent does not have the capacity to understand and execute a power of attorney or engage in supported decision-making to manage the remainder of their finances. Therefore, the petitioner may allege, the respondent is incompetent and needs a guardian of the estate.

Present Evidence at the Hearing. The petitioner must be prepared to present evidence at the adjudication hearing that not only shows that the respondent lacks the capacity to manage their affairs and to make and communicate important decisions but also addresses LRAs. The petitioner should present evidence at the hearing about whether there are LRAs in place and, if so, why those LRAs are insufficient to enable the respondent to manage their affairs and to make and

communicate important decisions.

The Guardian ad litem Attorney (GAL)

Conduct Investigation and Report to the Court on LRAs. The GAL should not rely solely on the petitioner's statements in the petition and should conduct their own investigation as to whether the respondent has LRAs in place. If there are LRAs, the GAL should examine whether the LRAs are sufficient. If there are not LRAs, the GAL should examine whether LRA options exist that could feasibly be implemented and enable the respondent to sufficiently manage their affairs and communicate decisions, thus negating or limiting the need for guardianship. The GAL should request a continuance of the hearing for good cause if more time is needed by the respondent to implement an LRA prior to the adjudication hearing.

The GAL's investigation necessarily starts with a conversation with the respondent during their personal visit with them as well as conversations with next of kin, service providers, and others involved in the respondent's life. The GAL should include the results of their investigation as part of their representation of the respondent in the proceeding, including in any report to the court.

Advocate for LRAs and the Respondent's Autonomy. Guardianship should "always be a last resort." S.L. 2023-123, sec. 7.8, amending G.S. 35A-1201(7). Part of the GAL's role in effectuating that purpose is advocating for LRAs on behalf of the respondent, when appropriate. If LRAs are in place for the respondent that negate the need for plenary guardianship, the GAL should advocate for a finding by the court that the respondent is not incompetent. If there are LRAs in place that enable the respondent to manage some affairs but not others, or communicate some decisions but not others, then the GAL should advocate for a limited guardianship that allows the LRAs to remain in place and work in tandem with the guardianship.

Be Informed About LRAs. To carry out these responsibilities, the GAL needs to be informed about the various types of LRAs to guardianship and how they work. The list included in the new G.S. 35A-1101(11a) is non-exhaustive. As part of their representation of the respondent, the GAL should be prepared to discuss the various types of LRAs with the respondent and the court.

Present Evidence at the Hearing. The GAL must present evidence at the adjudication hearing about LRAs and whether those LRAs are sufficient. The GAL should keep in mind their obligation to represent the respondent's express wishes and their authority to make recommendations regarding the respondent's best interests. G.S. 35A-1107(c). It may be, for example, that the respondent believes that a power of attorney (POA) is sufficient to enable the respondent to manage their affairs and make and communicate decisions. The GAL's representation of the respondent reveals that the agent under the POA is exploiting the respondent and that the respondent lacks capacity and insight into their own deteriorating condition. In that scenario, the GAL should present the respondent's express wishes—the continued operation of the POA without guardianship—but the GAL may support adjudication and appointment of a guardian as a part of the

GAL's best interest recommendations.

Respondent

Contest the Proceeding if There are Sufficient LRAs in Place. The respondent has a right to contest the incompetency proceeding. One way the respondent may elect to do that, either directly or through the GAL or other counsel, is by putting LRAs in place and raising the sufficiency of those LRAs as a defense to the adjudication proceeding.

Clerk of Superior Court

Do Not Adjudicate a Respondent Incompetent Unless LRA Standard Met. As of January 1, 2024, a respondent is not incompetent unless the petitioner shows by clear, cogent, and convincing evidence that the respondent either

- does not have LRAs or
- the LRAs in place for the respondent do not enable the respondent to sufficiently manage their affairs and make and communicate decisions. S.L. 2023-124, amending G.S. 35A-1101(7), (8).

For all petitions filed on or after the effective date, the court will need to ensure the existence and sufficiency of LRAs are addressed in every proceeding before entering an adjudication order.

The mere existence of an LRA does not automatically mean that the respondent is not incompetent under the revised G.S. Chapter 35A definition. Courts will need to consider the facts of each case and specifically the sufficiency of the LRA. For example, a respondent may have significant capacity limitations due to severe dementia. Prior to their incapacity, the respondent executed a financial power of attorney (POA) and a health care power of attorney (HCPOA). The evidence presented at the respondent's adjudication hearing shows that the petitioner is seeking to change the respondent's incapacity planning because the petitioner is dissatisfied with the fact that they were not appointed as the agent or the petitioner is otherwise unhappy with the agent's decisions. There is no evidence of abuse or exploitation by the agent under the POA or HCPOA. The evidence demonstrates that the respondent lacks capacity due to dementia but the respondent is able to sufficiently manage their affairs and to make and communicate decisions through the LRAs. The respondent is not incompetent as a matter of law.

It may also be the case that the POA, HCPOA, or other LRA is operating sufficiently regarding some decisions but does not cover other decisions where the respondent lacks capacity, such as selling real estate or consenting to a certain medical procedure. In those instances, it may be appropriate for the court to adjudicate the respondent incompetent but to appoint a limited guardian with narrow authority tailored to cover only those specific gaps. This would allow the LRA to remain in place but also ensure that the incompetent adult has the necessary decision-making surrogate

(the guardian) to cover those areas that the LRA does not address.

Consider Continuing the Adjudication Hearing. If LRAs would be appropriate but the respondent needs time to implement the LRAs after the petition is filed and before the incompetency adjudication hearing, the court may continue the hearing to allow time for the respondent to put LRAs in place. G.S. 35A-1108 (providing that the clerk may extend the time for the hearing for good cause). If there are concerns about an imminent risk of harm to the respondent or their property and the other requirements for interim guardianship in G.S. 35A-1114 are met, the court may appoint an interim guardian to act on the respondent's behalf while the LRAs are explored.

Unresolved Questions

Session Law 2023-123 is a significant shift for G.S. Chapter 35A proceedings. This post scratches the surface of the questions that will inevitably arise in the implementation of this new law.

The consideration of LRAs is one component of the law but there are other changes. My colleague, Timothy Heinle, has a post available on other changes resulting from this law related to the requirements surrounding a new notice of rights.

We will continue to identify and work through questions and issues related to S.L. 2023-124 here on the blog and in other arenas. In the meantime, feel free to reach out with your questions and feedback. I can be reached at meredith.smith@sog.unc.edu.

Less Restrictive Alternatives and Incompetency Restoration Proceedings

In North Carolina, when an adult is adjudicated incompetent and guardianship is ordered, guardianship is permanent until the first of these two developments occur: (i) the ward's competency is restored, or (ii) the ward dies. G.S. 35A-1295(a).

The recently enacted Session Law 2023-124 amended the definition of incompetency and introduced requirements to ensure the consideration of less restrictive alternatives (LRAs) before a petition for incompetency can be granted. These statutory changes are born out of a recognition of the seriousness of declaring someone incompetent, and to encourage, where appropriate, the use of alternative arrangements that impose less restrictions than plenary guardianship. The changes are effective as to petitions filed on or after January 1, 2024.

This post considers how newly added LRA requirements may affect not just the beginning of a new case, but also later in guardianship, in an action to restore a ward's competency resulting from a petition for adjudication filed on or after January 1, 2024.

Brief Overview of LRAs

S.L. 2023-124 added the term 'less restrictive alternative' to the definitions section of G.S. Chapter 35A. An LRA is "[a]n arrangement enabling a respondent to manage his or her affairs or to make or communicate important decisions concerning his or her person, property, and family that restricts fewer rights of the respondent than would the adjudication of incompetency and appointment of a guardian." G.S. 35A-1101(11a). A non-exhaustive list of examples is provided in the statute, including

- supported decision making,
- appropriate and available technological assistance,
- representative payees (for example, with Social Security Income), and
- health care or financial power of attorney agents appointed by the respondent.

The definition of an incompetent adult was also amended to read that someone "does not lack capacity" and is not incompetent "if, by means of a less restrictive alternative, he or she is able to sufficiently (i) manage his or her affairs and (ii) communicate important decisions concerning his or her person, family, and property." G.S. 35A-1101(7). (Note that the definition of an incompetent child, meaning someone who is at least 17 1/2 years of age, was similarly amended by S.L. 2023-124. For ease of reading, this post uses the term incompetent adult to refer to both groups of individuals.)

For LRA-related requirements and suggested steps for clerks, appointed guardian ad litem (GAL) attorneys, and others, see this post by my colleague, Meredith Smith.

Restoration, Generally

The possibility that a ward could have their competency restored by the court is provided for in G.S. Chapter 35A, Article 3. The guardian, the ward, or any other interested person may seek restoration of the ward to competency by petitioning the clerk exercising jurisdiction in the case. G.S. 35A-1130(a). (Note, that while the restoration statute uses the word "petition," the process is initiated by a verified motion in the cause, filed in the original special proceeding—meaning in the SP file in which the individual was declared incompetent. The motion must allege facts tending to show that the ward is competent. *Id*.)

A ward has a right to be represented by counsel or an appointed GAL in the restoration matter. G.S. 35A-1130(c). The same GAL who previously represented the individual may be reappointed for the restoration proceeding. This is not always possible as the passage of time and the availability of the previous attorney may result in the appointment of a new attorney as the ward's GAL in the restoration proceeding.

If the clerk or a jury finds by the preponderance of the evidence that the ward is competent, the court enters an order restoring the person's competency. Once the ward's competency is restored, they can once again make decisions and manage their affairs as before guardianship, with one exception—the right to purchase firearms. G.S. 35A-1130(d). For information about the firearm exception, and for more on restoration generally, see Restoration to Competency under G.S. 35A-1130: Common Issues and Questions (firearm discussion at 19 n.113), by Meredith Smith.

The Relevance of LRAs in a Restoration Proceeding

The legislative changes reflected in S.L. 2023-124 did not directly amend G.S. Chapter 35A, Article 3, Restoration to Competency. Yet it seems that restoration proceedings will be affected by LRAs and the amended definition of an incompetent adult.

As I referenced earlier, the definition of an incompetent adult now says that someone does not lack the capacity to communicate important decisions or to manage their affairs if they can do so with the assistance of an LRA. Because a restoration depends on proof of a ward's competency, and because competency may be supported by a sufficient LRA, it seems that LRAs will be relevant to some restoration proceedings. This is consistent with the stated purposes of guardianship. *See,*

e.g., G.S. 35A-1201(a)(2) (someone is only incompetent if they cannot act effectively on their own); G.S. 35A-1201(a)(3) (the "essential purpose of guardianship…is to replace" the decision-making authority of someone who "does not have capacity to make such decisions").

If a less-restrictive arrangement exists that is practical and accessible to the ward, and that arrangement enables the ward to manage their affairs and communicate important decisions, they do not lack capacity and the guardianship should be dissolved.

What to Expect Regarding LRAs at a Restoration Hearing

The moving party and other participants in favor of restoration should be prepared to offer evidence that demonstrates the ward's competence, including, potentially, LRAs that enable the ward to communicate decisions and manage their affairs.

Legal devices. Just like at an incompetency hearing, at a restoration hearing there may be documentary or testimonial evidence of LRAs, including legal arrangements. For example, consider a situation where it is discovered that the ward granted rights to a person or agency to act as their agent under a valid power of attorney *before* they were incompetent, and that the now uncovered power of attorney would give the ward capacity under the amended definition of incompetency. Participants in favor of restoration should offer evidence as to the existence, validity, and sufficiency of the power of attorney or another legal arrangement.

Other arrangements. Not all LRAs need be a legal assignment of rights or designation of authority and the formality (or informality) of the arrangement may dictate the form the evidence takes. For example, "appropriate and available technological assistance" is one possible LRA. G.S. 35A-1101(11a). Examples may include adaptive equipment, like accessible furniture, talking devices, video monitors, medical alert bracelets, or FaceTime-capable communication tools, depending on the ward's needs and abilities. Evidence about the technology—its availability and functions, the plan for its use, and how it empowers the ward—could be offered as part of a larger showing as to competency.

The statute also gives as an example of an LRA the concept of supported decision making. *Id*. According to the American Bar Association, supported decision-making "describes the process by which most individuals make decisions - by consulting with friends, family, social services, community organizations, or other sources of support to weigh the pros and cons of a decision, review potential outcomes, and finally make a choice. The practice of supported decision-making takes many forms - from recognition of organic decision-making networks to formal, written supported decision-making agreements." *Less Restrictive Alternatives*, Am. Bar Ass'n (November 21, 2023). Those in favor of restoration should be prepared to offer documentation, where appropriate, and testimony as to any supported decision-making arrangements.

Regardless of the nature of the LRA being implemented, the movant should address at the restoration hearing the availability and feasibility of the proposed alternative and the expected effect on the ward's capacity to communicate decisions and manage their affairs. The movant should offer specific details about the LRA whenever possible.

Wards Executing Agreements While under Guardianship: A Word of Caution

Given that an LRA may affect whether a person is incompetent, a likely question is whether a legal arrangement such as a power of attorney entered into by a ward while under guardianship is valid. This topic is complex enough that it could be the subject of its own publication and is too broad to fully do justice here. I added this note, however, because the issue could arise in the context of a restoration proceeding, and attorneys should proceed thoughtfully and cautiously.

Case law is somewhat limited. The cases we do have are instructive but can be a challenge to reconcile. *See, e.g.*, *Medical College of Virginia v. Maynard*, 236 N.C. 506, 508-09 (1952) (holding that wards are conclusively presumed to lack capacity to manage their affairs as to parties and privies to the guardianship proceeding, but as to others that presumption is rebuttable with evidence of the ward's ability to understand and communicate about the agreement and its consequences); *Matter of Will of Maynard*, 64 N.C. App. 211, 225-27 (1983) (holding that a prior adjudication of incompetency did not create a conclusive presumption that the ward lacked testamentary capacity for a subsequently executed will); *O'Neal v. O'Neal*, 254 N.C. App. 309, 313-15 (2017) (holding that a power of attorney executed by a ward while under guardianship was void *ab initio* where the agent was a party to the incompetency proceeding, reasoning that (i) the execution of a power of attorney is different from the ability to marry or to make a will, (ii) the execution of a power of attorney is contractual in nature and relates to a person's ability to manage their affairs, and (iii) a ward is conclusively presumed to lack the capacity to manage their own affairs and contract with those who were parties or privity to the incompetency proceeding).

It is significant then that at the restoration stage of a proceeding, as opposed to the time before an adjudication of incompetency, the person is known to be incompetent by those who are parties or privies to the guardianship proceeding. A ward's ability to enter into at least some LRAs prior to entry of a restoration order would seem under the case law to be limited. Where a power of attorney is executed and grants authority to an agent who was a party or privy to the incompetency proceeding, the power of attorney is void *ab initio*. *O'Neal* at 313-15. GALs and others should bear this in mind when considering available steps prior to restoration.

Lawyers must be mindful of their ethical responsibilities where client capacity is concerned. *See generally*, N.C. Rules of Prof'l Conduct R. 1.14 (representing clients with diminished capacity); N.C. Rules of Prof'l Conduct, CPR 314 (where a lawyer believes his or her client is not competent to make a will, that lawyer is prohibited from preparing or overseeing the execution of a will by that

client). Before advising on or assisting with alternative arrangements, a lawyer should carefully consider both the individual's capacity to understand and agree to an arrangement, and their best interests.

Parting Thoughts

Recent legislation pertaining to LRAs and the definition of incompetency have clear implications for newly filed incompetency petitions. While not expressly amended by S.L. 2023-124, restoration proceedings will be affected by those statutory changes. Where appropriate, parties seeking to have a ward's competency restored should consider and offer evidence of viable alternatives that will enable the ward to communicate important decisions and manage their own affairs once again.

If you have thoughts or questions about the issues raised in this post, I can be reached at Heinle@sog.unc.edu.

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

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

Notice of Rights

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

What? The law creates the new G.S. 35A-1117 and entitles respondents and wards to notice of nearly twenty enumerated rights. You can read the full notice and list of rights here, beginning at the bottom of page 7. Some of the rights listed for respondents include the right to

- notice of the incompetency petition, the initial notice of hearing, and the notice of rights before the hearing,
- an attorney,
- gather and present evidence,
- have a hearing on a petition for incompetency within 10 and 30 days after service on the respondent unless the court finds good reason to continue the hearing,
- attend the hearing,
- have the hearing be closed to anyone who is not directly involved or testifying at the hearing,
- have a jury hear the case,
- tell the court what rights the respondent would like to keep in the event the clerk grants the incompetency petition,
- express their wishes about their rights and who serves as guardian,
- appeal a decision adjudicating the respondent incompetent by filing written notice of appeal within 10 days of the clerk entering the order, and
- appeal a decision about who is appointed as guardian by filing a written notice of appeal within 10 days of the order being served on the respondent.

Several of the enumerated rights apply after an individual is adjudicated incompetent, like the right to

- a qualified, responsible guardian,
- seek a transfer to another county for good reason,
- seek a modification to the guardianship due to a change in circumstances, and
- request a restoration of competency where circumstances have changed such that the ward believes they can show to the court that they have regained their competency.

The notice of rights also addresses an incompetent person's right to drive and to marry. G.S. 35A-1117(7), (8).

Note that GALs are required to explain the notice of rights under G.S. 35A-1117 as part of their representation of a respondent or ward, regardless of what stage in the proceeding they are appointed. GALs appointed to represent allegedly incompetent respondents in response to the filing of a petition are required to explain the notice of rights pursuant to modified G.S. 35A-1107. GALs appointed following the adjudication of incompetence to represent a ward—for example, on the appointment of a guardian or on a motion to modify guardianship—are required to explain the notice of rights to the ward pursuant to modified G.S. 35A-1217. If the same GAL represents the individual named in the petition at both the incompetency and guardianship stages of the proceeding, the GAL must address the notice of rights with their client at each stage.

The enumerated rights provided in G.S. 35A-1117 are not new. Under current laws, respondents already have each of these rights. For example, respondents have a right to counsel, to a trial by jury on an incompetency petition, and to present documentary and testimonial evidence to the court. G.S. 35A-1107, -1110, -1112(b). What is new is that respondents are entitled to receive *notice* of these rights. As a result, there are also new requirements and processes surrounding the notice of rights.

How? Currently, respondents must be personally served with a copy of the petition and the initial notice of hearing. G.S. 35A-1109. This will still be required moving forward. For all incompetency petitions filed on or after January 1, 2024, however, a copy of the notice of rights of respondents must be included in the personal service on the respondent. *Id*. A notice of rights form will be created by the Administrative Office of the Courts, in both English and Spanish. G.S. 35A-1117(b). GALs must be served with a copy of the notice of rights, the petition, and the initial notice of hearing pursuant to G.S. 1A-1, Rule 4 of the Rules of Civil Procedure. Within five days of filing the petition, the petitioner must also serve by first-class mail copies of the notice of rights, the petition, and the initial notice of hearing on the respondent's next of kin and anyone else designated by the clerk. *Id*. Clerks presiding over these proceedings should confirm that all service requirements, including service of the notice of rights of the respondent, were complied with before beginning a hearing on an incompetency petition.

As has been the case, appointed GALs must personally visit the respondent as soon as possible to determine the respondent's wishes regarding incompetency and guardianship. G.S. 35A-1107(c). For petitions filed on or after January 1, GALs must explain the notice of rights to the respondent as part of that initial visit. *Id*. It is common for respondents to have questions for GALs throughout the life of a proceeding, beyond that initial meeting. Respondents may want to know whether they get a say in who will serve as guardian. Or respondents may ask GALs what to expect on the day of the hearing. GALs should continue to provide information and to advise respondents throughout the course of the proceedings. As part of that representation, GALs are now specifically required to explain the notice of rights to a respondent during the initial visit and at any time upon request by the respondent. G.S. 35A-1117.

Practical considerations for GALs. New duties for GALs bring questions about how to effectively carry out these responsibilities. How do GALs inform respondents of their rights in a way that respondents will understand? Again, the rights are not new. But by compiling and codifying the notice requirements for the rights of a respondent, the legislation has the effect of highlighting these rights. As always, GALs will need to be mindful of how they most effectively can inform and empower their clients. A lot of information is contained in the notice and respondents allegedly lack capacity. What language should GALs use to summarize the information? What else should GALs be prepared to do to effectively carry out their role considering this new legislation?

There are other considerations, too. As discussed above, GALs must explain the notice of rights to their client at both the adjudicatory phase and guardianship phase, and at any time the client requests explanation. G.S. 35A-1107; G.S. 35A-1217. But GALs are not limited to only those times to discuss these important issues with their client. For example, if the individual is adjudicated incompetent, some rights, like the right to an appeal or the effect of an adjudication of incompetency on an individual's right to marry or to vote, may make sense to discuss again near or at the conclusion of the GAL's representation. Lastly, reviewing the notice of rights may be a good opportunity to reconsider some of the points a GAL is responsible for discussing with a respondent that may be easily overlooked—like the possibility of a closed hearing—and how to incorporate those discussions into your work.

Upcoming SOG resources for GALs and clerks

Over the coming months and before the legislation's effective date of January 1, 2024, Meredith Smith and I will publish blog posts and offer webinars focused on this new legislation. These resources will be of particular interest to GALs, clerks of superior court who preside over incompetency and guardianship proceedings, and other professionals whose work touches on these proceedings. Here is a schedule of our upcoming resources designed to help you navigate these changes in your work:

- **October 25** – my blog on the new notice of rights for respondents. (That is this post! You're already reading it. Nice work.)

- **November 8** – Meredith's post on less restrictive alternatives to guardianship requirements.
- **December 7** – our first webinar will dive deeper into the practical implications of the notice of rights and will work through some commonly raised questions about the new requirements.
- **December 14** – our second webinar will focus on strategies for meaningful implementation of the consideration of less restrictive alternatives to guardianship.
- **December 15** – Meredith and I will publish a blog that covers the remaining guardianship changes from S.L. 2023-124 and answers additional questions raised during the webinars.

Mark your calendars! Both webinars will be scheduled for **3:00 p.m.** and we expect them to last roughly 75 minutes each. Registration details will be announced soon on the various SOG listservs as well as on the SOG's upcoming courses webpage and our Public Defense Education microsite under Upcoming Trainings.

Please email us at Heinle@sog.unc.edu or Meredith.Smith@sog.unc.edu with questions, concerns, or ideas that you have about the new legislative changes to guardianship and that you would like for us to address. Hope to see you on the webinars!

Guardians: Don’t Forget to File a Notice of Change of Address with the Court

Adult guardianship law in North Carolina underwent several significant changes effective January 1, 2024. My colleague, Timothy Heinle, and I previously blogged about two of these changes resulting from Session Law 2023-124, available here (notice of rights) and here (less restrictive alternatives). One change that may have slipped under your radar is found in G.S. 35A-1242(e) and imposes a new obligation on guardians to file a notice of change of address with the court.

Who is Obligated to File the Notice

Every guardian of the person and general guardian appointed by the court pursuant to G.S. Chapter 35A must file the notice of change of address. G.S. 35A-1242(e).* The amended statute only references “guardian of the person,” but because a general guardian includes guardianship of the person, the obligation to file extends to both general guardians and guardians of the person. *See* G.S. 35A-1202(7) (defining the term general guardian). A guardian of the estate is not required to file the notice. For purposes of this post, “guardian” includes a guardian of the person and a general guardian; it does not include a guardian of the estate.

The statutory changes in S.L. 2023-124 are effective as to “petitions filed on or after” January 1, 2024. S.L. 2023-124, sec. 7.13. A petition for adjudication of incompetency (and application for appointment of a guardian) initiates the process that ultimately results in the appointment of a guardian. The obligation to file a notice of change of address applies if the petition was filed on or after January 1, 2024. It does not apply to guardians who were appointed as the result of a petition filed before January 1, 2024. For example, a petitioner files a Petition for Adjudication of Incompetence and Application for Appointment of a Guardian on December 15, 2023, alleging Lily Perez lacks capacity and needs a guardian. The court enters an order adjudicating Lily incompetent and appoints a county department of social services as her guardian of the person on January 15, 2024. If Lily later moves to a new address, the guardian is not obligated to file a notice of change of address because the changes enacted by Session Law 2023-124 do not apply to Lily’s case. The petition for adjudication in her case was filed before January 1, 2024.

When and Where is the Notice Filed

The duty to file the notice is triggered when the guardian has knowledge of the ward’s change in residence. G.S. 35A-1242(e). For example, on the date the ward is adjudicated incompetent and a guardian is appointed by the court, the ward is living at home. Two years later, due to the ward’s deteriorating dementia, the guardian moves the ward to a long-term memory care facility. The guardian’s duty to file the notice of change of address is triggered when the guardian has knowledge of the change in residence, which in this case would be the date the ward moves to the facility.

The guardian has 30 days from the date the guardian has knowledge of the ward's change in residence to file the notice with the court. *Id.* The notice is filed with the court in the ward's existing guardianship ("E") file. There is no duty imposed on the guardian or the court to serve the notice of change of address on any party or other interested person in the guardianship proceeding. *See* G.S. 35A-1242(e).

Content and Form of the Notice

The notice filed with the court must contain the

1. ward's previous address,
2. ward's new address, and
3. date the ward moved to the new address. G.S. 35A-1242(e).

A sample form notice of change of address may be downloaded here and used as a guide.

Guardians who are required to file status reports under G.S. 35A-1242(a1)(3) may wonder whether their obligation to include in that report an update on the ward's residence satisfies this new notice of change of address requirement. The requirement to file notice of change of address under G.S. 35A-1242(e) is separate from this obligation. However, it seems that this notice could be included in a status report, provided that the status report includes the information required under G.S. 35A-1242(e) and is filed within 30 days of the guardian's knowledge of the ward's change of address. The sample notice provided in this post is a standalone form, but it could be incorporated into a status report.

How to Ensure Compliance and Oversight

It may be easy to overlook this new legal requirement given the other significant changes that were enacted by S.L. 2023-124. Guardians, including county departments of social services who serve as guardian, should make note of this duty, and ensure they comply with the law going forward. Individuals who are appointed as guardians, such as family members, may be especially unfamiliar with the new requirements under G.S. 35A-1242(e). Clerks may want to consider adopting a practice of informing guardians of this duty at the guardianship hearing or at the time the guardian qualifies and receives their letters of authority to act as guardian from the court.

It may become known to the court, either through a status report or other evidence presented to the court in a proceeding related to the guardianship, that the guardian failed to comply with the duty to file a notice of change of address. Alternatively, the guardian may have complied with the duty to file the notice, but the court or others interested in the proceeding may have questions or concerns related to the change of address, including whether the guardian applied the required statutory preferences under G.S. 35A-1241(a)(2) when deciding on the ward's residence. This includes preferences for in-state over out-of-state residences, residences that are not treatment facilities

over residences that are treatment facilities, and residences that are community-based treatment facilities over ones that are not community based. G.S. 35A-1241(a)(2). Any interested person or the clerk, on the clerk's own motion, may file a motion in the cause under G.S. 35A-1207(a) to consider any matter pertaining to the guardianship. This may include a motion to address the failure of the guardian to comply with the requirements under G.S. 35A-1242(e) or to consider the appropriateness of the change in the ward's address.

Going Forward

The new obligation to file a notice of change in the ward's address serves the purpose of bringing greater transparency and oversight to guardianship proceedings. It is a small change in the scope of changes brought about by S.L. 2023-124 but one that is important to note for guardians, clerks, and others interested in guardianship in North Carolina.

* Many of the changes enacted by S.L. 2023-124 are specific to adult guardianship. It is unclear whether the obligation to file a notice of change of address applies to guardians of minors. The obligation to file the notice of change of address applies to "every guardian of the person" upon knowledge of "a ward's change of residence." G.S. 35A-1242(e). A "ward" is defined to include both incompetent adults and minors. G.S. 35A-1101(17) (defining a ward as "a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction"). However, subsection (e) was added to section G.S. 35A-1242, which pertains to requirements applicable to a guardian for an incompetent person. An incompetent person, as defined in G.S. 35A-1202(11), includes adults, emancipated minors, and minors who are at least 17.5 and by a reason other than minority are incompetent. It specifically does not include minors who are incompetent under the law due solely to their minority. Clarification of whether the requirement to file a notice of change of address extends to guardians for minors may require a technical correction to the statute.

Common Challenges and Ideas for Handling Them

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University of North Carolina
School of Government CLE
January 16, 2024

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The Challenges

1. Written GAL Reports
2. GALs and Personal Safety
3. Communicating with "Interested Parties"
4. Obtaining and Introducing 3rd Party Records
5. Securing Respondent/Ward's Presence at Hearing
6. Single Protective Transactions/Arrangements and When to Recommend Them

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1. Written GAL Reports

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2. GALs and Personal Safety

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3. Communicating with "Interested Parties"

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6. Single Protective Transactions/Arrangements and When to Recommend Them

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Thank you for Tolerating!

Remember, opinion and advice on practice given today (no legal advice was given) was heavily based on personal experience and the experience of others as shared with me in preparation for this CLE, thus are not legal requirements without other supporting law.

I welcome differing viewpoints on practice, I hope you do too!

Opinions and advice on practice are not necessarily shared by the UNC SOG.

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Common Challenges and Ideas for Handling Them

Adam Hopler
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UNC School of Gov't CLE
January 16, 2025

1. Written GAL reports

Issue: Practice varies across the state. Some jurisdictions use these regularly, some do not. There are benefits and challenges.

Discussion: Upon information and belief, the Clerk's of Superior Court of Durham, Orange, and Wake Counties require GALs appointed in guardianship cases to prepare GAL reports prior to a hearing on adjudication at least. More "rural" counties like Lee & Harnett, do not. There is not a statutory requirement for a report to be filed prior to an adjudication hearing. Some county GAL reports in practice will look something like an answer to the Petition, if an actual answer isn't in fact filed in some cases.

The Clerk of Court in Durham County requires such GAL reports to be filed the Friday prior to a hearing (guardianship hearings are only on Tuesdays, Wednesdays, and Thursdays). Other county Clerk's may not specify how close to the hearing a GAL can wait before filing. Upon information and belief, there is not a "consequence" for failing to file a GAL report as it pertains to the specific case (e.g. I've never heard of a Clerk continuing a case and order GAL to file a report in advance of the next setting for instance), though presumably (and to be clear I've never heard this overtly stated) a GAL may stand to be removed from rotation on a list for appointment. Even in the counties with the most formal rules about reports, service of the same is interesting issue. I've never heard of a requirement beyond Rule 5 service, which often means that a report may not arrive in the hands of other parties prior to hearing. Even under Durham County's rule, if mailed the Friday before that could be case, but in practice many times without a requirement regarding the timing of completion of a GAL report, a GAL may not even be filed until the day of the hearing, let alone served in advance. That being said, many GALs, including yours truly, will ask parties about their desire to receive the report via email and then obtain email addresses from those that do and send the GAL report that way as well.

GAL reports tend to be involved and sometimes can be difficult in regards to making an ultimate recommendation, especially if making a recommendation against Respondent's expressed wishes, Petitioner's relief, or even other interested party concerns.

That being said, the GAL report can be a good "work in progress" right from the beginning, especially in building out the facts of the situation, and then actually help in working out recommendations once the GAL has obtained all information that can be reasonably obtained within the time allowed. In some cases, it can be fair to say in a report that you as GAL are not ready to make a recommendation on an issue (say there is a contest as to who should be GOP and not a clear "winner"), but you can still build out the situation for the Clerk so that the Clerk can quickly absorb the crux of the complexity and time in court is as efficient as possible.

2. GALs and Personal Safety

Issue: Unlike a lot of legal work, this field may require going into neighborhoods and homes you are unfamiliar with; and to encounter people who don't understand (and maybe cannot) why you are looking to meet with them.

Discussion: As a general matter, it is important to get a basic understanding of the situation you are facing before heading into in person encounters. There is no rule or principal that you should, and in my opinion, no point generally in trying to, "catch" a party unawares when you go to meet them, especially a Petitioner or Respondent. I have heard some GALs indicate that they like to visit unannounced in order to see how things "really are." As a general matter, a Petitioner has already had the head's up of filing the petition, and other parties have been served with the petition just as the GAL has been, so if adjustments are going to be made, they've probably already been made. Even when a case is filed by DSS, there is very often extensive investigation that has already gone on giving parties a "head's up." That's not to say that it is impossible to surprise parties, but there are serious questions about the value of doing so, especially when considering the potential risk of how a party might "surprise" you back.

Generally, be aware and smart about how you schedule meetings. Consider taking someone with you when you see red flags, or having someone who waits in the car if you're uneasy. Definitely let someone know where you are going, when you are going. If DSS has been involved already, consider asking someone with prior experience with the situation to accompany you the first time you visit Petitioner or Respondent, as concern merits. If Petitioner is a represented party, see if the attorney involved has helpful information or suggestions about any safety concerns. If it is the Respondent him or herself that is the concern, but you can establish prior contact with a person familiar with him or her first to help you in meeting, that can help with safety concerns. Once contact is made, a better assessment can then be made as to how to have private conversation with Respondent if possible. Some GALs have had success obtaining sheriff assistance. This seems to be "hit or miss" as to how successful you may be, depending on the county, and even personal relationship. Wellness checks can be employed if access generally is difficult to establish and it is unknown why, but the information that gets shared is sometimes limited to whether the person is there and "well" or not. Besides safety, sanitation can be a concern with visitation (and may not be apparent upfront). There are not always perfect solutions, but visits outside a house, completely remote/neutral locations, or even via WebEx, may need to be employed, not to mention the last resort of a meeting immediately prior to a hearing (which runs a high risk of warranting a continuance).

3. Communicating with "Interested Parties"

Issue: Sometimes family members think the GAL is their attorney, or a shared attorney. Or they think the GAL has power to decide the outcome of the case. Or they don't appreciate the difference between being GAL for the Respondent and being attorney for the Respondent.

Discussion: So, how should GALs approach family members and collaterals (fact finding, forming opinions about possible resources/guardians, explaining role and setting boundaries, etc.). What happens if a family member feels strongly that they want something that the client does not? Or that the GAL does not think is in the client's best interest?

You are probably going to repeat yourself. A lot. Know the statutes. You are appointed by the Clerk of Superior Court to represent the Respondent's express wishes to the Court and to make recommendations to the Clerk that are in the best interests of the Respondent, even if potentially different from the Respondent's express wishes. I often have to further explain, that as a result, unlike with attorneys, there is not a guarantee of confidentiality for those communicating with me as GAL. Of course, respect can be given. If someone tells you they don't want something shared in a report, or volunteered, you can offer that, but it is important that YOU know, that in the most contentious of

situations, a GAL is not beyond being compelled to testify by a party. Navigating tough conversations and sticky situations is part of the job.

Sometimes in the "nicest" of circumstances, maybe you have a Petitioner, maybe a mother seeking guardianship for a child turning 18 with down syndrome, or an adult only child seeking guardianship for a father with advanced Alzheimer's, you can have the greatest of misunderstanding. When it is "clear" what should happen, but the Petitioner just needs help getting across the finish line, you may have a great desire to help the Petitioner, and rightfully so. If it is right for the Respondent, it's certainly not bad to do so. Still, even with the best of intentions, the misunderstandings about who you represent, or what your role is, can creep in all the same. If the clear but awkward conversation is not had with family, and maybe even several times, it maybe a few days later, or years, and you are being sought out for more help. (Though even repeating yourself numerous times may still not avoid this, maybe you won't mind, but all the same, one never knows how more complex situations can become.)

Where there is contention between parties, whether with the Respondent, or parties besides the Respondent, great care should be taken not to "align" yourself with any particular person besides the Respondent. Even if it appears that one party is "clearly" the person to be guardian, if there is a fight amongst the family about that, for the Respondent's sake, you need to be able to work with all sides. Family generally need to be as cohesive as possible, and being neutral may enable you to help encourage family to work together, even when they see a person as guardian later they didn't desire. Being neutral will generally allow you to hear and observe more, which may be helpful at a final hearing in giving your recommendations. As clear as a situation may seem to you, the Clerk of Superior Court ultimate makes the call, and coming to a conclusion early, may just impede your own usefulness to the Clerk. Remind the family often in contentious situations that you don't make the final decision, the Clerk does, and your recommendation, genuinely, should be held with an open hand for as long as you can. Don't forget about the potential of formal mediation.

4. Obtaining and introducing 3rd party records

Issue: Records that GALs will commonly want to seek (medical, emergency room, bank, copy of a lease, police reports, DSS records); how to get those records

Discussion: As a general matter I will ask the Clerk of Superior Court to issue an order making it clear that I have personally been appointed at GAL and that I have authority to obtain records. That often helps with third parties who are unclear about the role and what, if anything, they can do to assist me. Most of the time, there is just one Notice of Hearing and Order Appointing Guardian ad Litem in which your name appears. In Durham specifically, that order appoints the Public Defender's Office who appoints an attorney off the public defender's list of attorneys that have qualified with them for service as a GAL. As a result, I often had only a fax cover sheet making it clear that I specifically was appointed, which was where the idea of a separate order came from. Once I started going through the trouble of getting any kind of order, I started requesting the order make clear that financial and medical records could also be obtained. As a practical matter, medical and financial record requests take a LONG time if you don't know exactly what you are looking for and know exactly who you want the record from, so I don't employ the use of the order often, but it does the trick from time to time, when I have a doctor for instance that provided limited information and more is needed. Sometimes, there is no affidavit, the Respondent is not cooperative, but it is believed there is already a diagnosis in the medical record and the Petitioner is needing help getting it. An order like I might obtain at the start could work, but there's

also the possibility that the Respondent will voluntarily sign a release for records. A general form has been provided as well as one specific to UNC. Generally, each hospital has its own form and it is best to use that when at all possible. There can be some concern here, about whether a person alleged incompetent can sign a medical form with full understanding of what is being released. This might make the most sense if the Respondent believes he or she is competent and that the medical record will make that clear, but still, if the Respondent is wrong, that would be very uncomfortable to say the least.

A subpoena is a viable mechanism for compelling not only records, but at times, a doctor who refuses to notarize an affidavit. At least, in the latter case, a subpoena can do the job of getting the doctor to finally notarize an affidavit in lieu of appearing in court. With medical records though, it is important to note that HIPAA still applies and a medical record keeper will still likely require a qualified protective order to secure the records. If you don't have the ability in your county to get one on the front end, a motion for such an order will likely need to be made.

All that being said, don't underestimate the potential of having a close family member ask nicely for what the Respondent needs, or approaching other family that may be able to get access due to prior granted authority, or if DSS is already involved. Working with them. (Note that DSS will NOT release internal documents related to an investigation without a court order. Best practice is to communicate with your county's DSS attorney for getting a consent order in place regarding the release of such records if necessary.)

5. Securing respondent/ward's presence at hearing

Issue: The GAL is not responsible for providing transportation—and likely should not—but GAL does have a role to play in (1) informing the client they have a right to be present, and (2) helping coordinate transportation.

Discussion: In a hearing on adjudication, many cases will be such that the question of incompetency is clear (comatose, non-verbal/expressionless, clearly psychotic, etc.). Thus is it "normal" for a Respondent not to attend a hearing on adjudication. That being the case, sometimes the question is much harder, and especially when the Respondent expresses that he or she is competent, seeing to it that person attends the hearing is important. Possibilities include asking client's relatives/friends; asking DSS, if social services is involved; asking the facility; seeking paid transportations services (maybe making a motion for such expense to be allowed for reimbursement if necessary), and making motion to continue if necessary until an answer is reached.

No GAL with experience that I have spoken to has recommended or supported personally transporting a Respondent or Ward yourself as GAL. Not only does this go beyond your obligations, and potentially confuse the Respondent or Ward as to your relationship to him or her, but it creates a massive liability in the instance that there is an accident of any kind between pick up and arrival. This should be avoided and never even implied as a possibility to avoid the prospect of the issue.

WebEx in recent years has picked up in use, and cannot be immediately discounted as a way to get around a hindrance the Respondent may have in attending. Being bedridden but verbal would be good example. Things to consider are the Respondent's technological limitations, not to mention potential disadvantages if the hearing is split between in person and remote. In my experience this tends to disadvantage the participants who are remote under "normal" court circumstances, let alone those in

which the remote participant has any medical issues. You might consider being physically present with the Respondent if possible, so at least if there is a disadvantage you will be best able to pick up on it, highlight it, and seek remedy.

6. Single protective transactions/arrangements and when to recommend them

Issue: The Single protective arrangements or transactions ("SPAT") statute presents itself as a "less restrictive" option to a guardianship of the estate, but the formulation and creation of one is not standard and thus not obvious as to when and how to use.

Discussion: As a general matter SPATs can seem like a catch 22. It looks like the Respondent is indigent, very close to nothing in the way of assets that would warrant a guardianship of the estate, but if you do a SPAT, and it turns out you are wrong about how little there is, then your new guardian will not have authority to deal with the situation because you limited authority to the specific SPAT that was set up. As a general matter, you want to have a full understanding of the Respondent's financial situation so you can figure out a SPAT, but under normal circumstances with Letters of Guardian of the Estate already in hand, it can take 90 days to 6 months, easy to really determine the full situation of even a "simple" estate.

As a point of encouragement, in talking with GALs, it seems that SPATs are NOT being set up on a routine basis by any means. Clerks and GALs are aware of, and fascinated by, the potential for use, but generally, not seeing clear circumstances for employing them. Additionally, not as a rule necessarily, it appears that "clear" instances arrive when private counsel represents a Petitioner, who is fully aware of the Respondent's or Ward's situation, and then is specifically is targeting the creation of a SPAT from the get-go.

SPATs should definitely be considered by GALs, but with the initial focus on the issue of incompetency, the difficult questions of who should be guardian and how many guardians should there be, it can be difficult, and potentially cause delay, trying to also strategize a SPAT. Even under the circumstance where one is discussed, say the hypo where you learn there is only one car that needs to be sold and the money paid to facility (or past hospital debt), I would caution a GAL to be wary about "pushing" for a SPAT. Family are often stressed, looking for quick turnarounds, and prone to thus see things as easier than they are, out of a "fight or flight" response that keeps them from seeing any more problems than they already have. So when you are asking "so there really is nothing more out there, a bank account, an old grave site for the family they bought from an aunt two decades ago . . . " what that person may hear, whether they mean to or not, is "so is there some way I can make this more complicated for you . . . ?" I would lay out the potential for any SPAT in court as something for the Clerk to consider, making clear to all present the risks involved, particularly that the new guardian might have to come back to court for modification, but not put more stress on the potential SPAT than that. Consider as well that there are standard forms for changing a GG to a GOP later, but not for SPAT modification.

Generally, if you don't have a petitioner with an unusually complete and confident command of the situation, or maybe unless you are dealing with a minor with down syndrome crossing the age of majority (and thus asset accumulation really has been limited), SPATs should be avoided at the adjudication level, and reserved for strategizing for AFTER time with GOE or GG letters.

NORTH CAROLINA DURHAM COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION BEFORE THE CLERK File No. ___ SP / E _____-310
IN RE: XXNAMEXX Respondent	**REPORT OF ATTORNEY GUARDIAN AD LITEM**

REPORT OF ATTORNEY GUARDIAN AD LITEM

On _____, I was appointed as Attorney Guardian Ad Litem for XXNAMEXX, the Respondent. After reading the petition, file stamped on _____, reading the medical documentation attached thereto, speaking with _____, the Petitioner, and meeting with the Respondent in person, I recommend that Respondent be declared incompetent and Petitioner be declared ##GUARDIAN## for him.

[JURISDICTION OR OTHER PROCEDURAL ISSUES]

[Discuss jurisdiction or other procedural issues as necessary.]

MEDICAL AFFIDAVIT

[Supply court with relevant portions, particularly concerning parts if any, parts that help make clear the mental/cognitive/neurological situation, if any. If there was not one initially, or if other medical records were supplied or obtained, or an MDE employed, lay out the history accordingly.]

RESPONDENT

I visited with the Respondent at [location] on [Date]. He had a pleasant affect and appeared clean and well-kept [or otherwise describe appearance and demeanor]. I explained that I was appointed by the Clerk of Superior Court to represent the Respondent's express interests to the Court and to make recommendations to the Clerk that are in the best interests of the Respondent, even if potentially different from the Respondent's express wishes. I explained that as a result, unlike with attorneys, there is not a guarantee of confidentiality for those

communicating with me as GAL. When I asked the Respondent if he had been served by the Sheriff, he could / could not confirm whether he had been served. I informed the Respondent of his rights under the Notice of Rights. I particularly made it clear that this upcoming hearing (then set for [Date]) was going to determine whether he made decisions for himself going forward, or if others would for him. I let him know that he had a right to counsel, and encouraged him to call to retain counsel if he wanted to avoid the loss of his rights. I told him that the medical record painted a very compelling picture that he is not able to handle his own affairs and make his own decisions [or otherwise initial impressions of the affidavit or absence thereof]. Respondent was not particularly troubled by what I said; he was very calm and seemed contemplative. The Notice of Rights was attached to the package that he received with the initial petition in this matter, and while I brought a copy for him, I was able to refer to the Notice of Rights he already had so that he could refer to the same later after I left. While there, I also reviewed the entire petition with him.

[After asking about family history, past medical issues, trusted individuals, otherwise relay information obtained.]

PETITIONER

I met with the Petitioner at [location] on [Date]. I explained that I was appointed by the Clerk of Superior Court to represent the Respondent's express interests to the Court and to make recommendations to the Clerk that are in the best interests of the Respondent, even if potentially different from the Respondent's express wishes. I explained that as a result, unlike with attorneys, there is not a guarantee of confidentiality for those communicating with me as GAL. [Relay conversations that help court understand situation, need for guardianship (particularly the need for GOE authority), and appropriateness of any particular persons as guardian(s).]

INTERESTED PARTIES

##INTERESTED PARTIES##

DISCUSSION

[Discuss first all relevant issues regarding jurisdiction, if any, then Respondent's competency, then, if recommending an adjudication of incompetency or think it a possibility that needs to be discussed, who should be considered as potential guardian(s).]

CONCLUSION

For the reasons set forth herein, it is currently my intention to recommend at hearing, whenever that may be, that the Respondent be declared incompetent and that [NAME] be appointed as General Guardian [or otherwise specify b/t GOP & GOE]. This recommendation is subject to me obtaining additional information prior to and during the hearing and there being no competing applications submitted. Upon information and belief, the Respondent is indigent at the present time, and thus court costs and the fees of this Guardian ad Litem should be taxed to the Indigency Defense Services and the undersigned intends to file a fee petition for an order on the issue.

Respectfully submitted this the _____ day of _____, _____.

NORTH CAROLINA
DURHAM COUNTY

Acknowledged before me by [Attorney]
this _____ day of _____,
_____.

_____
Notary Public

My Commission Expires: _____

_____
[Attorney]
NC Bar No. #####
[Law Firm]
[Address]
Email: [email@emailaddress.com]
Phone: [###]
Fax: [###]

CERTIFICATE OF SERVICE

I have this day mailed a copy of this report to the Petitioner, and other interested parties, by first class mail, to the following address(es):

Respondent **Petitioner/Respondent's Mother** **Respondent's Father**

This the _____ day of _____, _____.

_____
[Attorney]
NC Bar No. #####

NORTH CAROLINA COUNTY OF DURHAM		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION BEFORE THE CLERK YEAR SP 000
In the Matter of: [RESPONDENT], Respondent.	)	ORDER APPOINTING GUARDIAN AD LITEM

Pursuant to N.C. Gen. Stat § 35A-1107, and rules adopted by the Office of Indigent Defense Services, this Court is to appoint an attorney as Guardian Ad Litem over the Respondent.

In accordance with such law this Court has appointed attorney ADAM J. HOPLER, N.C. Bar No. 42913, as Guardian Ad Litem over the Respondent on [DATE].

An order is needed to make clear that third party financial institutions may legally provide financial records for the respondent to ADAM J. HOPLER as Guardian ad Litem for the Respondent.

An order is needed to make clear that third party medical providers and holders of medical record information can share such medical records and information, in compliance with HIPAA pursuant to 45 C.F.R. § 164.512(e)(2) by way of a qualified protective order.

It is hereby ORDERED, pursuant to N.C. Gen. Stat § 35A-1107 that the Guardian Ad Litem, ADAM J. HOPLER, shall have unfettered access to the Respondent's medical and financial records in order to make recommendations to this Court concerning the Respondent's competency and, if appropriate, guardianship, but shall be limited in use of the same for the above captioned matter. Moreover, justice requires that the Guardian Ad Litem shall not be denied by any third-party, access to medical, financial, or other type of documentation, records, files, papers or medium stored which describe, pertain to or concern the Respondent's medical or financial condition as this order is a qualified protective order to release third party recipients from liability for compliance herewith, and thus shall also comply with any discovery processes to the extent that there is no other valid and timely objection.

This the ____ day of _____, 2025.

_____
The Honorable Durham County
□ Clerk of Superior Court
□ Assistant Clerk of Superior Court

AUTHORIZATION TO RELEASE MEDICAL INFORMATION

I, [Respondent], give permission for [ATTORNEY] of Hopler, Wilms, & Hanna, PLLC and their employees or agents, upon presentation of a copy of this Authorization to Release Medical Information as signed by me, to obtain from any medical provider and their employees, agents, or other persons authorized to release information from the medical records of or disclose protected health information for:

[RESPONDENT]
Date of birth: [DOB]

Such disclosure is for legal purposes.

Send Information to:

Adam J. Hopler, Attorney at Law
Hopler, Wilms, & Hanna, PLLC
2314 S. Miami Blvd. Ste. 151
Durham, NC 27703
P: (919) 244-2019
F: (919) 244-2755
E: adam@hoplerwilms.com

Unless otherwise specified, a complete copy of any medical record for [RESPONDENT] is to be disclosed.

☐ (if checked, the following period of time limits the medical record: _____ to _____)

I understand the medical information to be disclosed may include information regarding psychological or psychiatric impairment, a communicable disease (such as sexually transmitted diseases, HIV/AIDS, tuberculosis, or hepatitis), mental illness, alcohol or substance abuse. I understand that I may revoke this authorization except to the extent that the information has already been released pursuant to this authorization and before I have revoked authorization. Otherwise this authorization shall continue to be valid for two years from the date signed. I understand that information disclosed pursuant to this authorization may be subject to re-disclosure by the recipient of such information and would no longer be protected under the terms of the federal privacy rule.

_____ _____
[RESPONDENT] Date

North Carolina
County of _____

Sworn to and subscribed before me, this the _____ of _____, 20_____.

_____
Notary Public

My Commission Expires: _____

UNC HEALTH CARE

Patient Request for Access to Protected Health Information (PHI)

HIM# 1409s

Patient's Name (print)	*Phone Number* n/a	*Date of Birth*
Patient's Address		*Medical Record #*

INFORMATION THAT CAN BE RELEASED: If specific dates only, list dates: _____

Type of Records Being Requested (*check all that apply*):

☒ **All My Medical Records**
☐ Urgent Care Center Notes
☐ Operative/Procedure Notes
☐ Discharge Summaries
☐ Laboratory Reports
☐ Radiology Reports
☐ Film/CD (Imaging Support)
☐ Clinic Notes (outpatient)
☐ Other (describe in detail): _____
_____
☐ Emergency Dept. Notes
☐ History and Physical
☐ Provider Orders
☐ Consultations
☐ Progress Notes (inpatient)
☐ Patient Billing Records
☐ Nursing Notes

Person/Company that you wish to receive your records

Name: Adam J. Hopler
Address: 2314 S. Miami Blvd., Suite 151
Durham, NC 27703
Phone Number: 919-655-7662
Fax (if applicable): 919-244-2755

Please check if you wish to authorize the release of sensitive medical information: ☒ Mental Health/Psychiatric Treatment ☒ Genetic Testing Information ☒ Alcohol or Substance Abuse Treatment ☒ STD/HIV/AIDS Treatment(s) or Test(s)

Format Requested / Delivery Method

☐ Mail paper records to address listed above
☐ Review or pick up paper records in Health Information Management (HIM) Department
☐ Verbal release to person identified above
☐ Fax to number listed above (Health care providers only; no personal faxes)
☐ Other: (*describe*) _____

Fees: A reasonable cost-based fee may be charged for copies of records being requested. Patients may request a cost estimate from HIM in advance.

☒ Receive electronically via email (*check one and print email address*)
☐Unsecure/unencrypted* ☒ Secure/encrypted *(may be size limitations)* Email: adam@hoplerwilms.com
*communication by unencrypted email presents a risk that personally identifiable information contained in the email, may be intercepted by unauthorized third parties
☐ Release to web portal via MyUNC Chart in electronic format. (Access will only be available for 30 days; you may print and/or save a copy for personal use) **This option is only available for records that were created in Epic.
If you do not have a MyUNC Chart you may sign up for an account here: https://myuncchart.org/mychart/

Expiration: Unless previously revoked, this Authorization will expire on the following date, event or condition: (*list date, event or condition*) _____. If I fail to specify an expiration date or event or condition, this Authorization shall remain in effect for **one (1) year** from the date I sign it.

Signature of Patient	*Date*	*Time*
OR Signature of Authorized Representative	*Date*	*Time*
Printed Name of Authorized Representative	*Phone Number of Authorized Representative*	

Explain Representative's authority to act on behalf of the Patient:
Administrator CTA of the Estate of Betty Stallings (Durham County File No. 21 E 399)

REQ12345

UNC HEALTH CARE

Patient Request for Access to Protected Health Information (PHI)

HIM# 1409s

Please send your completed Request for Patient Access to Protected Health Information (PHI) Form by fax or mail to the entity listed below (If only requesting film please send request to applicable facilities radiology department):	
For:	**Send to:**
UNC Hospitals	UNC Health Information Management Attn: Release of Information 500 Eastowne Drive, Chapel Hill, NC 27514 (fax) 984-974-0471; (phone) 984-974-3226 Email: relmedinfo@unchealth.unc.edu
UNC Hospitals Radiology Department	(fax) 984-974-8814; (phone) 984-974-9362 Email: FILMmail@unchealth.unc.edu
Rex Healthcare / Rex Hospital	Rex Health Information Management Attn: Release of Information 4420 Lake Boone Trl, Raleigh, NC 27607 1st Floor, Main Hospital (fax) 919-784-3343; (phone) 919-784-3158
Rex Healthcare / Rex Hospital Radiology Department	(fax) 919-784-3497; (phone) 919-784-3023
Caldwell Memorial Hospital	Caldwell Health Information Management Attn: Release of Information 321 Mulberry St SW, Lenoir, NC 28645 (fax) 828-757-5169 (phone) 828-757-5100
Caldwell Memorial Hospital Radiology Department	(fax) 828-757-5206; (phone) 828-757-5204
Chatham Hospital	Chatham Hospital Health Information Management Attn: Release of Information 475 Progress Blvd. Siler City, NC 27344 (fax) 919-799-4801; (phone) 919-799-4804
Chatham Hospital Radiology Department	(fax) 919-799-4601; (phone) 919-799-4600
UNC Physicians Network	Return directly to UNC Physicians Network Clinic
Johnston Health	Johnston Health, Attn: Health Information Management – Release of Information, PO Box 1376, Smithfield, NC 27577; (fax) 919-934-9266; (phone) 919-938-7705
Margaret R. Pardee Memorial Hospital	Pardee, ATTN: HIM – Release of Information, 800 North Justice Street, Hendersonville, NC 28791 (fax) 828-696-1097; (phone) 828-696-1094
Nash Healthcare System / Nash Hospitals	Nash UNC Health Care, 2460 Curtis Ellis Drive, Health Information Management, Rocky Mount, NC 27804 (fax) 252-962-8291; (phone) 252-962-8130
Lenoir Memorial Hospital	UNC Lenoir Health Care, ATTN: Health Information Services-ROI 100 Airport Rd, PO Box 1678, Kinston, NC 28503-1678 (fax) 252-522-7099; (phone) 252-522-7185
Wayne UNC Health Care	Wayne UNC Health Care, Health Information Management 2700 Wayne Memorial Drive, Goldsboro, NC 27534 (fax) 919-587-2975; (phone) 919-731-6117
UNC Rockingham Health Care / Rockingham Hospital	UNC Rockingham Health Care, ATTN: Health Information Management Department 117 E Kings Hwy, Eden, NC 27288 (fax) 336-623-6902; (phone) 336-627-6194

Appeals (GAL Conference Jan. 2025)

Brainstorm Activity

Patty petitions to have her husband, Roger, adjudicated incompetent and to have Patty appointed as Roger's general guardian. Roger does not hire a lawyer. You are appointed as the GAL for Roger, who opposes the petition. After a hearing, the clerk grants the petition, adjudicating Roger incompetent and appointing Patty as his general guardian.

1. Are you still Roger's GAL on appeal? When does a GAL's appointment end?

2. Are the clerk's orders on incompetency and guardianship in effect while the appeal is *pending*? What are Roger's options and how may you advise him?

3. What standard of review will the judge apply to the incompetency order? And to the order appointing Patty as guardian? Will there be a new hearing?

4. If the judge grants Roger's appeal of the incompetency order, what is the effect?

5. If the judge denies Roger's appeal of the incompetency order, but grants his appeal of Patty's <u>appointment as guardian</u>, what is the effect? Who is Roger's guardian?

Timothy Heinle, Faculty
UNC School of Gov't

Appeals (GAL Conference Jan. 2025)

Brainstorm Activity

6. If you are Roger's GAL on appeal, what is your role? Describe your duties.

7. Can you anticipate any challenges that you may face as a GAL on an appeal? What issues, involving the court, your client, the proceeding, or others, can you foresee?

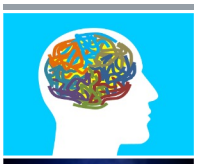
8. Additional space to take notes during the session, if desired.

Timothy Heinle, Faculty
UNC School of Gov't

NAVIGATING DIFFERENCES: PRACTICAL COMMUNICATION STRATEGIES FOR GUARDIAN AD LITEM (GAL) ATTORNEYS

Mina Ratkalkar, Ph.D., LCSW
Forensic Psychologist
Durham, NC

January 16, 2025



1

LEARNING OBJECTIVES

- Attendees will be able to identify challenges in gauging clients' competencies, including the role of potential bias.
- Attendees will be able to utilize practical interviewing strategies to gather relevant information when communicating about clients' mental health.
- Attendees will be able to discuss functional and mental health concerns with clients in a strengths-based way to promote autonomy and well-being.

2

YOU ARE HERE FOR A REASON.

You could practice any type of law, but you were drawn to this. Why?

3

WHAT ARE SOME OF YOUR DAILY CHALLENGES?

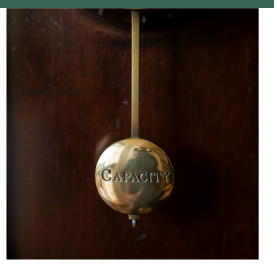
As a GAL attorney, you have the difficult task of balancing expressed interests and best interests.

What are some challenges that come up?

4

CAPACITY IS DYNAMIC!

- Capacity is fluid and can change over time
  - Capacity can be temporary
  - Ex: Individuals with dementia may have fluctuations in their competencies
- Fluctuations, medications, delirium, infections, drowsiness, and sundowning can affect competencies



5

WHERE THE BAR IS FOR DIFFERENT TYPES OF CAPACITY

G.S. 35A-1101(7) defines an "incompetent adult" as an adult or emancipated minor who lacks sufficient capacity to manage his or her own affairs or to make or communicate important decisions concerning his or her person, family, or property, due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.
Will differ significantly for each client/case

Inherent grey area

E.g., What if someone can rationally communicate about important decisions regarding their finances but not their medical decisions?

6

CAPACITY EXISTS ON A CONTINUUM

Minimal or "Sufficient" Capacity in NC

I.e., Even if a cognitive impairment limits ability to make or communicate important decisions or manage affairs or property, your client should not be determined to be "incompetent" unless lacking the understanding or mental capacity minimally required to manage their affairs or property

Consider OPTIMAL vs. SUFFICIENT

Partial Incapacity and Limited Guardianship

Temporary and Permanent Incapacity

7

COGNITIVE BIAS

What you already know or what you are expecting to happen will influence how you interact with and evaluate new information, and how you feel about your evaluation of that new information.

Important: Cognitive biases are **not** bad.

8

TYPES OF COGNITIVE BIAS

Confirmation Bias: Seek out evidence to confirm what we already believe or expect and ignore contradictory info.

Contextual Bias: Suggestions from irrelevant or tangentially relevant info sway judgments and opinions.

What elicits it?

9

THE DANGERS OF BIAS

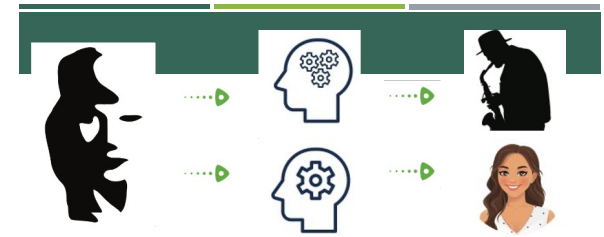
Bias can color how we assess someone's abilities (especially re: best interest when clients may need help)

Our personal experience can both help AND hinder objectivity

Note: take online information about diagnoses with a grain of salt!

E.g., How impairing depression or substance use can be

10



Same Ambiguous Information

Different Mindsets

Different Interpretations

11

WHAT IS EXECUTIVE FUNCTION, AND WHY DOES IT MATTER?

12

BRIEF ASSESSMENT OF COGNITIVE CAPACITIES

- Awareness - extent of person's capacity to perceive, concentrate, remember information
- Orientation to reality
- Insight: If you had a candle burning at home, what would you do before you leave the house? Why?
- Reasoning - ability to integrate and rationally evaluate information
- Memory

13

DIFFERENT TYPES OF CAPACITIES

- Financial Management
- Health Care
- Communication
- Cognitive Functioning
- Social Functioning
- Safety and Self-Protection
- Legal Decision-Making
- Personal Care

14

STRATEGIES FOR SPEAKING WITH CLIENTS WITH LIMITED LANGUAGE/COMPREHENSION ABILITIES

Take diagnoses into account
- E.g., Alzheimer's disease, consider meeting early in morning or after meal

Provide extra time for discussions & schedule regular breaks during long interviews

Use clear and simple language without "talking down." Avoid jargon

Use shorter, more focused questions (rather than long, multi-part questions) and concrete examples

Provide information in multiple formats
- E.g., Visual aids

Help with organization and follow-up
- E.g., written summaries with key points and upcoming deadlines

Empower client to express their needs, ask for clarification, or request accommodations
- E.g., Ask if drawing a timeline helps

Confirm understanding periodically, and reiterate key points
- E.g., After explaining a concept, ask them to explain it back to you.

15

COMMUNICATION REMINDERS!

- **You're human too! It's okay to take breaks and be frustrated.**
- Validation goes a long way - "I can't imagine how tough that must be" or "Remember, there are no right or wrong answers"
- Include family or caregivers (with client's consent), as they can help provide support and improve communication
- **Involve mental health professionals when needed**
  - Mental health professionals may offer insights into how best to communicate with the client or manage symptoms during interviews

16

STRATEGIES TO APPROACH CLIENTS USING STRENGTHS-BASED PERSPECTIVE

Focus on Client Capabilities

- Start interviews by asking about the client's strengths, talents, and past successes rather than problems
- Use solution-focused questions: "What's worked well for you in the past when facing X or Y challenge?"
- Highlight resilience by noting/asking how the client has overcome difficulties

Reframe Challenges Positively

- Help clients view setbacks as opportunities for growth and learning
- Discuss how overcoming current difficulties can build useful skills for the future
- Brainstorm creative solutions that leverage the client's existing strengths

17

WHEN REFERRING TO EVALUATORS

What to communicate or share:

- Existing diagnoses and medical records
- Collateral info (e.g., family contacts)
- **Your interactions with and behavioral observations of your client**
- Questions about factors affecting temporary or permanent capacity
- Is it possible that a client can both have and not have capacity? (e.g., checking both boxes and specifying "when not having a psychotic episode)

18

THANK YOU!

QUESTIONS/COMMENTS?

19

CONTACT INFORMATION

- **Mina Ratkalkar, Ph.D., LCSW**
  - Licensed Psychologist
  - Forensic Evaluator
  - Phone: (215) 882-9949
  - Email: mina@newsparktherapy.com

20

Whose Eyes and Ears? The True Role of the GAL
Handout for Taking Notes

Appointment of GAL

The GAL shall

The GAL may

Constitutional and due process considerations

Rules of Professional Conduct

Keys for GALs

Whose Eyes and Ears? The True Role of the GAL
Handout for Taking Notes

Case Scenario – Notes

Notes from Fact Pattern

Conflict Regarding Capacity

Conflict Over Guardianship

Conflict Over Placement

Miscellaneous

STATE OF NORTH CAROLINA

Wake County

File No.
23 SP 50

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

IN THE MATTER OF

Name And Address Where Respondent Is Located
Wendy Darling
WakeMed - Emergency Department
3000 New Bern Avenue
Raleigh, NC 27610

County
Wake

Name And Address Of Attorney Guardian Ad Litem
Timothy Heinle
321 Evans Street
Raleigh, NC 27604

NOTICE OF HEARING ON INCOMPETENCE AND ORDER APPOINTING GUARDIAN AD LITEM

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

State Bar No.
12345

NOTE: *Form AOC-E-211 is available to be used as a Notice of Hearing form for a hearing on a motion to modify guardianship.*

NOTICE

You are notified to appear before the Clerk of Superior Court on the date and at the time and place specified below for a hearing on the attached Petition/Motion. You may file a written response in the office of the Clerk on or before the time set for the hearing.

A petition has been filed alleging that the respondent is incompetent and requesting that a guardian be appointed.

If, at the hearing, the Court finds by clear, cogent and convincing evidence that the respondent is incompetent, an adjudication of incompetence will be entered and a guardian of the person or a guardian of the estate or a general guardian or a limited guardian may be appointed.

Date Of Hearing	*Time*		*Place To Appear*
01/22/2023	11:00	☒ AM ☐ PM	Wake Co. Courthouse, Clerk of Superior Court's Office

☐ **A motion for the appointment of an interim guardian has also been made** *(applies only for incompetence hearings)***.**

You are further notified to appear before the Clerk on the earlier date and at the time and place specified below for a hearing on the motion for the appointment of an interim guardian contained in the attached petition. *(Disregard if box above is not checked.)*

Date Of Hearing On Interim Guardian	*Time*		*Place To Appear*
		☐ AM ☐ PM	

ORDER APPOINTING GUARDIAN AD LITEM

It is ORDERED that the attorney named above be and hereby is appointed as guardian ad litem to represent the respondent at all stages of this proceeding. The respondent has the right to retain his/her own attorney, at his/her own expense, and if he/she does so, the Court may discharge the guardian ad litem.

Date	*Time*		*Signature*	
01/05/2023	11:00	☒ AM ☐ PM		☒ *Assistant CSC* ☐ *Clerk Of Superior Court*

INSTRUCTIONS TO PETITIONER:

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

(Over)

RETURN OF SERVICE

I certify that this Notice and a copy of the Petition were received and served as follows:

RESPONDENT

Date Served	*Time Served*	☐ AM ☐ PM	*Name Of Respondent*

☐ By delivering to the respondent named above a copy of the Notice and Petition.

Address Where Respondent Served

☐ Respondent WAS NOT served for the following reason:

GUARDIAN AD LITEM

Date Served	*Time Served*	☐ AM ☐ PM	*Name Of Guardian Ad Litem*

☐ Service accepted by guardian ad litem.

Date Accepted	*Signature Of Guardian Ad Litem*

☐ By delivering to the guardian ad litem named above personally a copy of the Notice and Petition.

☐ By leaving a copy of the Notice and Petition at the guardian ad litem's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

Name Of Person With Whom Copies Left	*Address Where Copies Delivered Or Left*

☐ Other manner of service: *(specify)*

☐ Guardian ad litem WAS NOT served for the following reason:

Date Received	*Signature Of Deputy Sheriff Making Return*
Date Of Return	*Name Of Deputy Sheriff (type or print)*
	County Of Sheriff

STATE OF NORTH CAROLINA

Wake County

File No.
23 SP 50

NOTE TO PETITIONER: ***If you are petitioning the court to accept guardianship on transfer from another state, this is not an appropriate form to use.***

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

IN THE MATTER OF

Full Name Of Respondent
Wendy Darling

Telephone No. Of Respondent
(252) 729-7716

Address Of Respondent
WakeMed - Emergency Department
3000 New Bern Avenue
Raleigh, NC 27610

County Of Residence Of Respondent	*Date Of Birth*
Wake	03/06/1911

*Race**	*Sex**	**Race and sex are collected so that this information may be transmitted to NICS in the event of a qualifying adjudication under G.S. 14-409.43(a)(6).*
W	F	

☐ *Respondent Indigent*	*Respondent's Drivers License No.*	*State*
	XXX	XX

Name And Address Of Petitioner
John Darling
337 Arthur Avenue
Cary, NC 27511

County Of Residence Of Petitioner	*Telephone No. Of Petitioner*
Wake	(607) 729-7716

Petitioner's Relationship To Respondent Or Interest In Proceeding
Brother

PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN

☐ **AND MOTION FOR APPOINTMENT OF INTERIM GUARDIAN (AOC-SP-198)**

G.S. 35A-1105, -1112, -1114, -1210; 35B-17, -18

Name And Address Of Attorney For Petitioner
Timothy Heinle
321 Evans Street
Raleigh, NC 27604

Telephone No. Of Petitioner's Attorney	*State Bar No.*

Name And Address Of Treatment Facility If Respondent Is An Inpatient
WakeMed - Emergency Department
3000 New Bern Avenue
Raleigh, NC 27610

The undersigned, being duly sworn, requests that the Court, after notice and hearing, adjudicate the respondent above to be incompetent, and also applies for the appointment of the person(s) named below to serve, in the capacity indicated, as guardian(s) of the respondent.

In support of this Petition, the undersigned states:

1. During the past twelve (12) months, the above-named respondent was physically present as follows:

Period of Physical Presence *(include up to the 12 months prior to the filing date of the petition; do not list periods of temporary absence)*		**Address**
From	**To**	
1954	Present	

2. *(check a. or check and complete b.)* (**NOTE:** *In both a. and b., "state" includes a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.*)
   - ☒ a. There is no other pending proceeding involving the respondent in any court or agency of a state or foreign country.
   - ☐ b. There is a pending proceeding(s) involving the respondent in the court or agency of a state or foreign country, as set forth below:

Location (County, State, and Country)	**Type of Proceeding**	**File Number**

3. A North Carolina court has jurisdiction to rule on this petition and application.
4. The respondent is
   - ☒ a resident of this county.
   - ☐ domiciled in this county.
   - ☐ an inpatient in the facility named above.
   - ☐ present in this county, it being impossible to determine his/her county of residence or domicile.

(Over)

5. The respondent is incompetent in that he/she lacks sufficient capacity to manage his/her own affairs or to make or communicate important decisions concerning his/her person, family, or property, as shown by the following facts: *(Set forth the facts which tend to show that the respondent is incompetent. Include cause of incompetence, which may be mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or other cause and give facts demonstrating lack of capacity. Be specific.)*

Wendy cannot take care of herself. Last month, she wandered to the grocery store late at night. The clerk called me and I ran right over. Wendy was looking for our mom (who died forty years ago). Wendy's memory is bad. Sometimes, it is like she is still stuck in childhood.

Last week, Wendy suffered a stroke. The doctor says she will never fully recover but she may be able to move home with care in place someday.

It makes sense for me to be Wendy's guardian. Our parents are both deceased and my brother, Michael, only comes around when he needs money. Wendy does not remember giving him money half the time. One withdrawal last December was for $1,500. The next day, Michael cashed a second check for $700.

Wendy has a boyfriend, Peter. He is nice enough but he is immature. He's just never really grown up. Peter plays into these stories Wendy tells about some make-believe place they used to go as kids, fighting pirates. I used to think they were sweet stories she was telling the kids (she has always had a good imagination), but as she has gotten older she seems to believe the stories really happened.

6. The respondent's next of kin, if any, and other persons known to have an interest in this proceeding are:

Name And Address		*Name And Address*	
Michael Darling 4201 Old Tar Rd. Winterville, NC 27858		Peter Panning 309 Pirate Cove Apartments Lane, Apt 21 Raleigh, NC 27604	
County Of Residence Pitt	*Telephone No.*	*County Of Residence* Wake	*Telephone No.* Unknown
Relationship To Respondent Or Interest In Proceeding Brother		*Relationship To Respondent Or Interest In Proceeding* Boyfriend	
Name And Address		*Name And Address*	
County Of Residence	*Telephone No.*	*County Of Residence*	*Telephone No.*
Relationship To Respondent Or Interest In Proceeding		*Relationship To Respondent Or Interest In Proceeding*	

7. General statement of respondent's assets and liabilities, including any income and receivables to which he/she is entitled:

Assets		Liabilities		Income and Receivables	
Real Property	$ 450,000.00	Mortgage Loans	$ 0.00	Wages & Salaries	$
Tangible Personal Property	$ 25,000.00	Other Secured Loans	$ 6,525.00	Rents	$
Other Personal Property	$ 17,550.00	Unsecured Loans	$ 0.00	Pensions	$
				Allowances	$
				Insurance & Compensation	$
				Other *(including SSI/SSDI)*	$ 750.00

There is a representative payee for government benefits.	☒ Yes	☐ No
There is a Durable Power of Attorney in place.	☐ Yes	☒ No
There is a Healthcare Power of Attorney in place.	☐ Yes	☒ No
There is a special needs or other trust in place.	☐ Yes	☒ No
The respondent has health insurance through Medicaid, Medicare, or a private insurer.	☒ Yes	☐ No

(Over)

IN THE MATTER OF	File No. 23 SP 50

Name Of Respondent

Wendy Darling

8. CAPACITY INFORMATION

☐ *Check here if in a coma, persistent vegetative state, or non-responsive and move on to Item 9.*

A. **Language and Communication** (understands/participates in conversations, can read and write, understands signs such as "keep out," "men," "women")

☒ has capacity. ☐ lacks capacity. Comment: Wendy is able to talk - some days better than others. She can answer direct questions, but sometimes her comments are random and hard to follow.

B. **Nutrition** (makes independent decisions re: eating, prepares food, purchases food)

☐ has capacity. ☒ lacks capacity. Comment: Does not remember to eat. She imagines she has eaten a lot of times; usually some big dessert.

C. **Personal Hygiene** (bathes, brushes teeth, uses proper hygiene when using the restroom)

☐ has capacity. ☒ lacks capacity. Comment: Needs assistance post-stroke.

D. **Health Care** (makes and communicates choices re: medical treatment/caregivers, notifies others of illness, follows medication instructions, reaches emergency health care)

☐ has capacity. ☒ lacks capacity. Comment: I make all her appointments for her and take her to them. I fix her medicine each time I go by the house. Sometimes prescriptions run out or go missing.

E. **Personal Safety** (recognizes danger and seeks assistance as needed, protects self from exploitation/personal harm)

☐ has capacity. ☒ lacks capacity. Comment:

F. **Residential** (makes and communicates decisions re: residence/roommates, maintains safe shelter)

☐ has capacity. ☐ lacks capacity. Comment:

G. **Employment** (makes and communicates decisions re: employment, demonstrates vocational skills such as neatness and punctuality, writes or dictates application form)

☐ has capacity. ☐ lacks capacity. Comment: Does not work.

H. **Independent Living** (follows a daily schedule, conducts housekeeping chores, uses community resources such as bank, store, post office)

☐ has capacity. ☒ lacks capacity. Comment:

I. **Civil** (knows to contact advocate if being exploited, understands consequences of committing a crime, registers to vote)

☐ has capacity. ☐ lacks capacity. Comment:

J. **Financial**

1. Makes and communicates decisions about paying bills and spending discretionary money, and makes change for $1, $5, and $20

☐ has capacity. ☒ lacks capacity. Comment: She used to be really good at math, but she cannot seem to count anymore. She gets stressed out at the register and I step in.

2. Makes and communicates decisions regarding management of a personal bank account, savings, investments, real estate, and other substantial assets

☐ has capacity. ☒ lacks capacity. Comment: Wendy does not know how much money she has or where it is. She needs someone to keep track of everything for her.

3. Can resist attempts at financial exploitation by others

☐ has capacity. ☒ lacks capacity. Comment: I am worried about how much money she gives Michael. She gave a large amount of cash to a "contractor" who came to her door, and who we never found again.

(Over)

9. RECOMMENDED GUARDIAN(S)

Name And Address Of Recommended Guardian	Name And Address Of Recommended Guardian
John Darling 337 Arthur Avenue Cary, NC 27511	
☐ Of The Estate ☐ Of The Person ☒ General Guardian	☐ Of The Estate ☐ Of The Person ☐ General Guardian

10. MOTION FOR APPOINTMENT OF INTERIM GUARDIAN

NOTE: *In certain circumstances, an interim guardian may be needed to intervene on a respondent's behalf prior to an adjudication hearing. To request that the Court appoint an interim guardian for the respondent, complete and attach form AOC-SP-198, Motion For Appointment Of Interim Guardian.*

VERIFICATION

I, the undersigned petitioner, have read this Petition and state that its contents are true to my own knowledge except those matters stated on information and belief, which I believe are true.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		Date
Date	Signature Of Person Authorized To Administer Oaths	Signature Of Petitioner
☐ Deputy CSC ☒ Assistant CSC ☐ Clerk Of Superior Court		
☐ Notary	Date My Commission Expires	
SEAL	County Where Notarized	