



NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

Rock v. Hard Place: Appointment & Role of the Rule 17 Guardian ad Litem for Parents



Topics to be Covered

The following issues will be addressed during this session:

- Statutory Provisions for Appointment of Rule 17 GAL for Parents
- Applicable Case Law
 - Circumstances and Procedure for Appointment
 - Roles and Duties
- Ethical Considerations



Statutory Language: Minor Parent G.S. § 7B-602 (b) & G.S. § 7B-1101.1 (b)

- Mandatory Appointment of GAL per G.S. § 1A-1, Rule 17
 - If under age 18
 - Not married or otherwise emancipated
 - Appointment does not affect entitlement to “best interest” GAL pursuant to G.S. § 7B-601 if the minor parent is also subject of a separate juvenile petition



Statutory Language: Diminished Capacity

G.S. § 7B-602 (c) & G.S. § 7B-1101.1 (c)

- Discretionary Appointment of Rule 17 GAL for Parent
 - ✓ On motion of *any* party or *sua sponte*
 - ✓ Court must determine if there is a reasonable factual basis to believe the following:
 - 1) Parent is incompetent *or* has diminished capacity AND
 - 2) Cannot *adequately* act in his or her own interest





What constitutes incompetent or diminished capacity?

- Not Defined by the Juvenile Code—may look to other sources
- “Incompetent Adult” means an adult or emancipated minor who lacks sufficient capacity to manage the adult’s own affairs or to make or communicate important decisions concerning the adult’s person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition. G.S. § 35A-1101(7)
- “Diminished Capacity” related to a legal proceeding is when the party’s capacity is lessened due to minority, mental impairment, or another reason. See e.g. RPC Rule 1.14; *In re M.H.B.*, 664 S.E.2d 583 (2008).

Statutory Responsibilities

- ✓ GAL may engage in the following practices:
 1. Help parent enter consent orders, if appropriate
 2. Facilitate service of process on the parent
 3. Assure necessary pleadings are filed
 4. Assist parent & parent's attorney, if requested by the parent's attorney, to ensure that procedural due process requirements are met.

GAL v. Respondent's Attorney

- ✓ Parent's attorney may NOT be appointed GAL
- ✓ Privileged Communications between GAL and Parent and between GAL and Parent's Attorney
 - NOTE: These statutory provisions contradict 2004 Formal Ethics Opinion 11 which was decided before the amendments effective October 1, 2005.

Role of GAL for Respondent Parent

GAL is:

- Protector of parent's due process rights with parent's attorney by assisting in the explanation and execution of the parent's rights.
- Spokesperson for the parent who works with parent to understand the gravity of the situation.

GAL is NOT:

- Another attorney for respondent parent
- Guardian of the person whose duties include providing for care, maintenance, employment, etc.
- Guardian of the estate with authority to receive money or administer property.
- Authorized to sign notice of appeal.

What is the standard for appointment?

In re L.B., 187 N.C. App. 326, 653 S.E.2d 240 (2007), *affirmed per curium*, 362 N.C. 507, 666 S.E.2d 751 (2008).

- ✓ The threshold to determine whether a parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest is significantly lower for appointment of a GAL under G.S. § 7B-1101.1 than is required for appointment of a guardian under Chapter 35A.
- ✓ Standard of review on appeal is abuse of discretion

Need for Hearing or Judicial Determination

In re M.H.B., --- N.C. App. ---, 664 S.E.2d 583 (2008).

- COA held that trial court abused its discretion in failing to hold a hearing or make a determination about parent's need for Rule 17 GAL where specific findings of fact in order on appeal related to mental health history and parent broke down on the stand.
- Trial court has a duty to inquire into the competency of a civil litigant if questions raised about whether the litigant is *non compos mentis*.

See also *In re N.A.L.*, --- N.C. App. ---, 666 S.E.2d 768 (2008).

- TPR order reversed where trial court failed to hold hearing where petition based on incapability to parent due to anger outbursts and the mother had an IQ of 74 and diagnosed personality disorder.

The Key: Consider the Issue of Appointment



Failure to Appoint does not necessarily lead to reversal...

- Where father's incapacity was due in large part to repeated incarceration and nothing in his conduct at the TPR hearing raised issues of competency, it was in the court's discretion NOT to appoint a GAL. *In re C.G.A.M.*, 671 S.E.2d 1 (2008).

Role of GAL for Parent?

I. Substituted Judgment

In one a case decided under old law (pre-October 1, 2005):

“The trial court should always keep in mind that the appointment of a GAL will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination.”

In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45 (2005).

Role of GAL for Parent?

II. Role of Assistance—Not Replacement

“We do not imply that a GAL's actions are limited to those enumerated in the statute... However, the language of the General Assembly is clear that the GAL's role is limited to one of assistance, not one of substitution. The General Assembly could have stated that the GAL was authorized to enter consent orders, accept service of process, file pleadings, or otherwise act on a parent's behalf, but it did not.”

-In re L.B. (majority opinion affirmed by Supreme Court)

Role of GAL for Parent

III. Somewhere in the Middle?

- The Court in *In re L.B.* placed great significance on the fact that G.S. § 7B-1101.1 did not include a reference to Rule 17 in the amendments effective October 1, 2005.
- S.L. 2009-311 effective October 1, 2009 amends G.S. § 7B-1101.1 to include a reference to Rule 17 in conformity with G.S. 7B-602.
- Where does that leave the future role of the parents' GAL?



Best Practice: Articulate Reasons for Appointment and Role of Parent GAL

The Court, attorneys, and parties should be clear regarding:

1. The reason for appointment of the GAL.
 2. The role of the GAL appointed for a parent.
- ✓ There is a range of reasons that a GAL may be needed for a parent similar to the range of Guardians appointed under Chapter 35A.
 - ✓ For instance, one parent may need substituted judgment regarding the litigation due to severe mental health issues while another may only need some assistance in understanding the proceedings due to a lower IQ.

Ethical Considerations

Appointment of a GAL for a parent could impact:

- Lawyer-Client Relationship
- Social Worker-Client Relationship
- Court's View on Parenting Capacity

Rules of Professional Conduct

- Applies to the Lawyer-Client Relationship
- Rule 1.14: Client with Diminished Capacity
 - ✓ Take reasonably protective action, including appointment of GAL
 - ✓ Maintain normal client-lawyer relationship as possible



Case Plan Considerations

- ✓ In entering a case plan with a parent who is appointed a GAL, social worker should consider reason for appointment and review case plan with both the parent and GAL.
- ✓ In ordering a parent to remedy conditions that led to court intervention, trial judge should bear in mind reasons he or she appointed a GAL.

Rock v. Hard Place

Appointment & duties of a GAL for a parent for a parent should “shed light” on the case...



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