

## Guardian ad Litem Attorney Challenges in the Era of COVID-19

The goal of this post is to identify key challenges facing Chapter 35A Guardian ad Litem (GAL) Attorneys in the COVID-19 era and to propose strategies for addressing those challenges.

### GAL Access to Respondents

A fundamental responsibility of GALs in incompetency proceedings is that they “shall personally visit the respondent as soon as possible” after being appointed. G.S. 35A-1107(b). With many facilities restricting visitors currently, GALs are finding it difficult, if not impossible, to meet respondents in person. GALs attempting to visit a respondent should bring with them their appointment paperwork and a copy of G.S. 35A-1107 to show the facility. If a GAL feels it is vital to meet the respondent in person, but is denied access by a facility, consider filing a motion to address access issues with the clerk and subpoena the facility staff to the hearing.

GALs may need to consider alternatives to traditional in-person meetings with respondents. If it can be safely done, propose to the facility that you be allowed to meet with the respondent outside, while still on premises, maintaining a safe distance. It may sound odd, but GALs are used to adapting to challenging circumstances. As a GAL, I once met a respondent through the window of her car, as her phobias would not allow her to meet elsewhere.

Some facilities may allow a GAL to meet remotely with a respondent, discussed next.

**Issues and Concerns with Remotely Meeting a Respondent.** If meeting remotely is the only option, a GAL should do it. Communicating with a respondent remotely is better than not meeting at all, but there are issues that a GAL should consider before doing so.

- What access to audio-video technology does the respondent have? GALs should insist that the facility arrange for both video and audio if possible. If the respondent or facility do not have adequate equipment, GALs may want to consider loaning the facility a device.
- Is the respondent able to communicate privately with the GAL? The GAL should make clear to staff the need for privacy and should ask the respondent whether anyone else is in the room or is listening.
- Does meeting remotely satisfy the requirement, in G.S. 35A-1107(b), that a GAL “personally visit the respondent as soon as possible”? Video communication is arguably *more like* personally visiting than audio alone, such as by telephone, as video at least offers the GAL the opportunity to observe the respondent. But, the law does not specifically say.
- How well can a GAL assess a respondent remotely? Under G.S. 35A-1107(b), a GAL must “make every reasonable effort to determine the respondent’s wishes,” “present to the

clerk the respondent's express wishes at all relevant stages of the proceedings," and "make recommendations to the clerk concerning the respondent's best interests if those interests differ from the respondent's express wishes" If a respondent is difficult to understand during a remote meeting, it may be difficult to determine how much of that is attributable to the person's unfamiliarity with technology versus how much is because of the respondent's inability to process conversation. Additionally, a GAL in a remote meeting can only see what the camera shows them. A GAL may not as easily be able to observe signs of distress, such as bruises on the respondent or poor living conditions.

On April 6, the NC State Bar released [Professional Responsibility in a Pandemic](#), stressing the need for lawyers to continue to meet their ethical responsibilities including diligence, professionalism, confidentiality, and communication, in representing clients. The piece includes a discussion on video conferences. Of relevance to GAL Attorneys:

"A video conference can be an effective tool to speak with a new client about potential representation, but may not be sufficient if attempting to determine whether a client has capacity to make decisions about his or her affairs. Such situations will need to be assessed on a case-by-case basis by the lawyer exercising his or her professional judgment."

**Holding a Hearing without a Prior Meeting.** A clerk may decide that the requirement that a GAL meet the respondent after being appointed is a requirement of the GAL alone and not a prerequisite to proceeding with the case. What should a GAL do if the clerk moves forward when the GAL feels a remote meeting with the respondent was insufficient or if they were unable to meet at all? The GAL should consider objecting to holding a hearing until a meaningful meeting with the respondent can occur. Sometimes meaningful meetings with a respondent are not possible because of the respondent's cognitive limitations or personality traits; that is normal and may be unavoidable. What is happening now are that outside influences, such as facility restrictions or technology deficiencies, are interfering with the GAL's ability to meaningfully meet with the respondent. The objection should be made both orally at the hearing and in writing, which can be done in the GAL Report filed with the clerk. The filed GAL Report should detail the GAL's efforts to meet with the respondent, the barriers to meeting, and what the GAL wants the clerk to do instead (such as continuing the case). A written objection will document the GAL's efforts and also help the respondent in the event of an appeal.

### Remote Hearings

In her [April 2, 2020 Order](#), Chief Justice Beasley ordered that no superior court or district court proceedings, including those before the clerk, should be scheduled before June 1, 2020 unless, among other conditions, the proceedings are conducted remotely or are for the purpose of obtaining emergency relief. See Emergency Directive 1. This provision implies that interim guardianship hearings, for example, can be held in person before June 1, because they are designed for "immediate intervention to address conditions that constitute imminent or foreseeable

risk of harm to the person's physical well-being or to the person's estate." G.S. 35A-1101(11).

The Chief Justice further ordered that judicial officials may hold remote hearings, but "a remote proceeding may not be conducted without the consent of each party." See Emergency Directive 3. This possibility raises a number of issues.

**Complexity of Chapter 35A Hearings.** Incompetency and guardianship proceedings often involve complex hearings. A variety of people, including social workers, service providers, and friends and family may testify. Several other interested people may attend as well. The number of potential witnesses may make it difficult to coordinate remote hearings in Chapter 35A cases. Further, in any court, the judicial official observes witnesses and parties, and those observations can help shape their rulings. This is especially true in Chapter 35A hearings. The clerk's observations of a respondent in an incompetency proceeding may be crucial to his or her ruling. Having the chance to personally observe, unfiltered, how the respondent moves and communicates and how well the respondent understands what is happening around him or her, may affect the clerk's decision.

**Respondent Consent to a Remote Hearing.** Given the Chief Justice's Order allowing for remote proceedings if all parties consent, a question sure to arise is who consents for the respondent. Does a respondent have to consent, or can a GAL consent on the respondent's behalf? There is not a clear answer. Understanding the unique role of a Chapter 35A GAL is important in analyzing these questions. (This post does not address the additional question of who else may need to consent to a remote proceeding.)

In a variety of civil contexts, Rule 17(b)(1) of the North Carolina Rules of Civil Procedure authorizes the appointment of a GAL for an incompetent adult. There is no requirement that a Rule 17 GAL, as commonly referred to, be an attorney, and the Rule 17 GAL is not being appointed to act as the adult's attorney. See N.C. State Bar, Formal Ethics Op. 11 (2004) (differentiating between the ethical obligations and responsibilities of a ward's attorney versus a lawyer acting strictly as a GAL). In a civil action, a Rule 17 GAL substitutes his or her own judgment for that of the adult. *In re P.D.R.*, 224 N.C. App. 460, 467 (2012) (quoting *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 71 (2005)). When an adult has a Rule 17 GAL appointed, that adult no longer possesses the "fundamental right to conduct his or her litigation according to their own judgment and inclination." *J.A.A. & S.A.A.*, 175 N.C. App. At 71. It seems reasonably likely, therefore, that a Rule 17 GAL can consent to a remote proceeding on an adult's behalf, including, for example, in an Adult Protective Services proceeding, discussed briefly below.

Chapter 35A GALs are appointed pursuant to Rule 17 of the Rules of Civil Procedure. See G.S. 35A-1101(6). A Chapter 35A GAL has a different role, however. A Chapter 35A GAL must be an attorney and "shall represent the respondent" and "make every effort to determine the respondent's wishes regarding the incompetency proceeding. . . ." G.S. 35A-1107. The GAL "shall present to the clerk the respondent's express wishes at all relevant stages of the proceedings" and "may make recommendations to the clerk concerning the respondent's best

interests if those interests differ from the respondent's express wishes." G.S. 35A-1107. When a respondent expresses that he does not consent to a remote proceeding, I do not believe the GAL can consent on his behalf. Whether the same is true if the client lacks capacity to consent or cannot express his position on the issue is a more difficult question. "Neither G.S. Ch. 35A nor N.C. R. Civ. P. Rule 17 authorizes an attorney who is serving as the *guardian ad litem* for an allegedly incapacitated respondent in a guardianship proceeding to waive, compromise, or settle the respondent's substantive legal rights or to consent to the entry of a judgment against the respondent *without* the respondent's consent." John L. Saxon, [North Carolina Guardianship Manual](#) § 2.3F, at 25 (UNC Sch. Gov't, 2008). However, "the Restatement (Third) of the Law Governing Lawyers states that when a lawyer determines that a client is unable to make adequately considered decisions regarding the matter of legal representation, the lawyer may pursue her reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions—even if the client expresses no wishes or gives contrary instructions." *Id.* at 33. The question of whether a GAL in an incompetency proceeding can consent to a remote proceeding on behalf of a client who lacks the capacity to consent is really a question of whether waiving an in-person hearing is a substantive legal right or is a decision regarding the matter of legal representation. I think it is more likely a substantive legal right, and I am reluctant to say that a GAL could consent to a remote incompetency hearing on behalf of a respondent who lacks the capacity to consent.

**Balancing Health Concerns with Due Process.** There are competing interests at play here. On one hand, there exist now very real public health concerns. Facilities need to keep patients and their staff safe, and courthouse officials are understandably concerned with the same for themselves. Petitioners, including Departments of Social Services, may be eager to move cases forward, and some facilities, particularly hospitals, may need to move patients to free up beds.

On the other hand, this post has considered issues and concerns with limited access to respondents and with remote Chapter 35A hearings. A GAL may be the only real shield a respondent has in the entire process. GALs need to advocate for respondents wherever possible to protect them against overly restrictive limits being placed on the process, or any unnecessary efforts to push cases forward if the facts do not justify doing so. It is a dangerous precedent, and potentially a due process violation, to declare a person incompetent and take away his or her autonomy without that person actually meeting the GAL and having an in-person hearing on such a critical, life-altering decision.

There are steps a GAL can take that acknowledge the health risks of COVID-19 while protecting a client's rights.

- Consider requesting a courtroom for in-person hearings, rather than where most Chapter 35A hearings take place, usually the clerk's office or conference room. More courtrooms may be available given the suspension of so many courthouse operations, and they are larger, allowing people to maintain safer distances.

- Propose a less restrictive alternative to what is being sought by the petitioner. If there are valid concerns for the respondent's safety, but COVID-19 complications are affecting the process in a way that is harmful to the respondent's due process rights, an interim guardianship may be preferable. Interim guardianship offers any needed protection for an incompetent respondent and may satisfy the clerk that the respondent is safe without a final adjudication that the respondent is incompetent. As interim orders are valid for up to ninety days (if extended by the clerk for good cause), the pandemic restrictions may be lifted by the time the full guardianship hearing arrives. The time limited nature of interim orders lessens the severity of the consequences for the respondent.
- Issue records requests and subpoenas for documents as soon as possible, as offices and staff are experiencing their own pandemic-related issues and turnaround time may be slower. GALs should arrange for alternative delivery of records when possible, including electronically or by mail, to avoid in person contact.
- When interviewing witnesses, including next of kin, make efforts to do so remotely if possible.

### **Adult Protective Services (APS) and Chapter 108A in the COVID-19 Era**

During the pandemic, GALs should anticipate the possibility of an increased number of APS petitions under Chapter 108A being filed. There are several reasons for this, including relaxed service requirements and the availability of emergency and ex parte orders that DSS's may determine offer sufficient protection to a disabled adult in risk, at least long enough for COVID-19 restrictions to be lifted and a Chapter 35A proceeding to be an option again. In a later post, I will address the differences between APS and guardianship proceedings and their potential impact in the current climate. In the meantime, you can find an overview of APS under Chapter 108A, and a comparison with incompetency and guardianship under Chapter 35A, in a three-part blog by my colleague Meredith Smith. See Protecting Against Elder Abuse, [Part I](#) (June 14, 2017), [Part II](#) (June 23, 2017), and [Part III](#) (Aug. 4, 2017), On the Civil Side, UNC Sch. Gov't Blog. For a comprehensive guide to incompetency and guardianships under G.S. 35A, see John L. Saxon, [North Carolina Guardianship Manual](#) (UNC Sch. Gov't, 2008).

Please remember that the content found in this post could change with any new executive, judicial, or legislative changes in response to COVID-19. Many of the updates can be found on the [NC Courts website](#). If you have questions or concerns, please feel free to contact at [Heinle@sog.unc.edu](mailto:Heinle@sog.unc.edu).