

## Incompetent Wards and the Sex Offender Registry

I received an interesting question recently when I taught about the intersection of criminal defense and Chapter 35A incompetency. Suppose a person is adjudicated incompetent in a Chapter 35A proceeding and a guardian is appointed. Suppose that same person had been convicted of a crime requiring registration as a sex offender and compliance with the other obligations of Chapter 14, Article 27A. The person is required to register changes to their address (including providing notice to law enforcement of an intention to move out-of-state), to their academic and employment status, and to notify the State of changes to their name or online identifiers, including e-mail addresses. G.S. 14-208.7; G.S. 14-208.9. What effect does declaration of incompetency have on these registration requirements? Who is responsible for ensuring that the incompetent adult complies with these registration obligations—the adult or their guardian?

### Incompetency and the Guardian's Role

**What being incompetent means.** An incompetent adult “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.” G.S. 35A-1101(7). A person who is at least seventeen-and-a-half-years-old and has been adjudicated incompetent is known as a ward. G.S. 35A-1101(17). Depending on the capacity, needs, assets, and liabilities of the ward, the court may appoint one of three types of guardians. When considering the potential obligations of a guardian in ensuring a ward's compliance with sex offender registration obligations, the focus is on a guardian of the person or general guardian, both of whom may make decisions regarding the ward's medical, educational, habitation, employment, and other needs. G.S. 35A-1202(10), G.S. 35A-1241. A guardian of the estate is unlikely to have any such responsibility. G.S. 35A-1202(9), G.S. 35A-1251.

**A guardian's role.** Wards have a right to a “qualified, responsible guardian” to assist in exercising their rights and managing their personal affairs. G.S. 35A-1201(a)(1), (2). A guardian's powers and duties can be broad and may affect many aspects of daily life. The statutes enumerating those powers and duties do not specifically refer to a guardian's role in ensuring compliance with sex offender registration requirements. A guardian's powers and duties, however, are not limited to those specifically identified in Chapter 35A, and additional obligations of the guardian include “any other duties imposed by law.” G.S. 35A-1253; *See also* G.S. 35A-1201, G.S. 35A-1241(a), G.S. 35A-1251.

Regardless of the legal principles that apply, discussed below, the guardian has a role to play in assuring compliance. A guardian may assist the ward by scheduling an appointment with law enforcement, providing transportation, reviewing paperwork, and helping to ensure that the ward understands and complies with ongoing requirements.

### Is a Ward Required to Comply with Registration Requirements?

**The defendant's state of mind.** North Carolina sex offender registration laws have been amended multiple times regarding the knowledge of a defendant who fails to register. Initially, a person had to act "knowingly and with intent to violate" the registration requirements to be guilty of an offense. G.S. 14-208.11(a) (1995). Later, the legislature removed the specific intent requirement. G.S. 14-208.11(a) (1997). This would not be the final amendment, but it was at this time the courts weighed in.

In 2000, the North Carolina Court of Appeals considered the constitutionality of requiring a ward who is also a convicted sex offender to register when changing addresses. *State v. Young*, 140 N.C. App. 1 (2000). There the defendant, who had been convicted of an offense requiring registration, was also adjudicated incompetent, and his mother was appointed as his guardian. *Id.* at 2, 4. Based on conversations the defendant had with law enforcement, the defendant had "actual knowledge" enough to satisfy due process requirements for any reasonable and prudent man"; however, as a ward he was "not a reasonable and prudent man," so actual notice on its own was insufficient. *Id.* at 9. Due process does not merely require providing notice to a person of the registration requirements. The court held that due process requires "that notice be synonymous with the ability to comply." *Id.* at 10. Without proof of his ability to comply, the defendant was denied due process and thus the registration requirements were unconstitutional "as applied to [him.]" *Id.* at 14. The Court took exception with the sheriff failing to contact the guardian, who the sheriff was aware of. "[I]t is impermissible (if not impossible) to solely give notice to the actual incompetent person himself, expecting then to enforce rights against him." *Id.* at 9-10. Law enforcement knew the defendant was incompetent and living with his guardian and "could easily have avoided the extreme time and cost of litigation" by informing the guardian that the ward had failed to register. *Id.* at 14.

In 2004, the Court of Appeals considered whether a trial court must instruct a jury that the State needs to prove a defendant's knowledge of the registration requirements. *State v. White*, 162 N.C. App. 183 (2004). The Court interpreted the legislature's removal of the specific intent element in 1997 to mean that failing to register was a strict liability offense. *Id.* at 189. The Court applied *Young*, holding that because the defendant's competency was not in doubt, the constructive notice of G.S. 14-208 and the actual notice he received when a sheriff told him of the registration requirements was sufficient "to satisfy due process requirements for any reasonable and prudent man." *Id.* at 189-90. Therefore, the trial court did not need to instruct the jury regarding the defendant's knowledge. *Id.* at 190.

In 2006, the legislature again amended G.S. 14-208.11. Session Law 2006-247 made a person who *willfully* fails to comply with the registration requirements guilty of a Class F felony. This version of the law remains in effect, and its implications are discussed next.

**A ward's obligation to comply.** Following *Young* and *White*, the legislature could have added a bright line rule that a ward is not required to comply with the registration requirements. It did not. A person convicted of an offense requiring sex offender registration is not necessarily exempt from

these requirements simply because they were adjudicated incompetent.

Meaningfully, however, the legislature added language requiring that a person willfully fail to comply to be guilty. Determining the willfulness of the actions or inactions of a ward—who may not be a reasonable and prudent person—requires a case-by-case assessment. Such a determination involves consideration of the “acts and conduct of the defendant and the general circumstances existing at the time.” *State v. Humphreys*, 853 S.E.2d 789 (N.C. Ct. App. 2020) (discussing factors involving mental state). Willfulness requires a showing that “the defendant acted without justification or excuse, ‘purposely and deliberately in violation of law.’” *Id.* at 796. Like anyone else, a ward is only guilty of failing to comply with the registration requirements under 14-208.11 if the failure is willful.

The ward’s ability to understand and comply with registration requirements is relevant when determining a ward’s willfulness and whether due process requirements have been satisfied. Determining a ward’s capacity to do a specific act is an analysis employed in other areas. In some circumstances, wards have been found capable of marrying (*Geitner v. Townsend*, 67 N.C. App. 159 (1984)), making a will (*In re Will of Maynard*, 64 N.C. App. 211 (1983)), and entering into a contract (*In re Dunn*, 239 N.C. 378 (1954)). Whether law enforcement assists a ward with complying with registration requirements—e.g., communicating with the guardian—may also be relevant. A guardian’s efforts to ensure that the ward complies with registration requirements could also be of significance. For example, did the guardian review the requirements with the ward, provide transportation, or otherwise assist with the process? Such evidence may be a factor in determining willfulness, although it may not be conclusive.

### **Is a Guardian Liable for a Ward’s Failure to Comply?**

**Criminal liability.** G.S. 14-208 does not address whether a guardian is liable if a ward fails to comply with registration requirements. It seems unlikely in most situations. Guardians should be aware, however, of the duty we all have not to knowingly conceal a person required to register or help the person elude law enforcement. G.S. 14-208.11A(1)-(4). To violate G.S. 14-208.11A, a guardian would need to have knowledge of the ward’s noncompliance and intend to help the ward elude arrest. For example, a guardian may operate a home daycare and may not want law enforcement to know that the person resides in the home. If the guardian helps the ward conceal where they live, the guardian may be committing a crime.

A guardian who actively participates in a ward’s failure to comply, for example by defrauding law enforcement about a ward’s whereabouts, could also be guilty of felonious obstruction of justice. *See, e.g., State v. Ditenhafer*, 376 N.C. 846 (2021) (finding sufficient evidence to convict a defendant who interfered with a child welfare investigation on the basis that she (1) unlawfully and willfully (2) obstructed justice (3) with deceit and intent to defraud.)

**Civil consequences.** There could be consequences in the Chapter 35A proceeding for a guardian

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who does not ensure a ward's compliance with registration requirements. Clerks can enter orders ensuring "the better care and maintenance of wards." G.S. 35A-1290(a). The clerk must protect a ward's interests, which may include removal of the guardian, if the guardian "neglects to care for or maintain the ward...in a suitable manner," "has violated a fiduciary duty through default or misconduct," or is unsuitable for any reason. G.S. 35A-1290(b)(3), (b)(6), (b)(15).

These are complicated situations with a lot to consider. If you are navigating this situation, likely for the first time, please reach out to me at [Heinle@sog.unc.edu](mailto:Heinle@sog.unc.edu).