AGENDA

SUPREME COURT'S ADVISORY COMMITTEE
ON THE
RULES OF JUVENILE PROCEDURE

WebEx Virtual Conference
October 2, 2020
Noon – 2:00 p.m.

12:00-12:10	**Welcome and Approval of Minutes** *(Draft Minutes of August 7, 2020 —Tab 1)*	David Fureigh
12:10-12:15	**Introduction of New Member and Professional Practice Disclosures**	David Fureigh
12:15-12:35	**Rule 48-Post-judgment motions** *(Tab 2)*	Arek Butler
1:35-1:05	**Discussion of Appointment of a Guardian ad Litem for an Incompetent Parent** *(Tab 3)* (*50-State Survey regarding appointment of a guardian litemfor an incompetent parent)*	David Fureigh Meg Sternitzky Xen Fedison
1:05-1:25	**Appellate Rules 19 and 20** *(Tab 4)* *The Committee will discuss Appellate Rules 19 and 20 regarding if both rules needs to include reference to juvenile court and not just district court.*	Bridget Koza
1:25-1:50	**Venue Transfer** *(Tab 5)* *The Committee will discuss venue transfer covered in Utah Code 78A-6-110 and if Rule 16 needs to be updated.*	Bridget Koza
1:50-2:00	**Old or New Business/Adjourn**	All

TAB 1

Utah Rules of Juvenile Procedure Committee- Meeting Minutes

August 7, 2020	Noon to 2:00 p.m.	Virtual WebEx Conferencing
MEETING DATE	TIME	LOCATION

MEMBERS:	Present	Absent	Excused	MEMBERS:	Present	Absent	Excused
David Fureigh	☒	☐	☐	Michelle Jeffs	☒	☐	☐
Judge Elizabeth Lindsley	☒	☐	☐	Sophia Moore	☐	☐	☒
Judge Mary Manley	☒	☐	☐	Mikelle Ostler	☒	☐	☐
Arek Butler	☐	☐	☒	Jordan Putnam	☒	☐	☐
Monica Diaz	☐	☐	☒	Janette White	☐	☐	☒
Kristin Fadel	☒	☐	☐	Chris Yannelli	☒	☐	☐
	☐	☐	☐	Carol Verdoia (Emeritus)	☒	☐	☐
AOC STAFF:	**Present**	**Excused**		**GUESTS:**	**Present**	**Absent**	
Bridget Koza	☒	☐		Jacqueline Carlton	☒	☐	
Xen Fedison	☒	☐		Christopher Williams	☒	☐	
Meg Sternitzky	☒	☐			☐	☐	

AGENDA TOPIC

I. Welcome & Approval of Minutes	**CHAIR: DAVID FUREIGH**
David Fureigh welcomed members. Bridget Koza introduced the two new juvenile law clerks, Zen Fedison and Meg Sternitzky, to the members. The Committee approved the minutes of June 5, 2020.	
Motion: to approve the minutes of June 5, 2020.	By: Mikelle Ostler Second: Kristin Fadel
Approval	☒ Unanimous ☐ Vote: In Favor_____ Opposed _____

AGENDA TOPIC

II. Rules 5, 17, 31, 52, and 56	**DAVID FUREIGH**
Rules 5, 17, 21, 31, 44, 52, and 56 were sent out for comment period in June. The comment period closed and no written comments were received. Rules 5, 17, 21, 31, 44, and 56 will be taken to the Supreme Court for approval to publish the rules. Rule 52 was already approved by the Supreme Court and issued as an emergency rule, effective immediately.	
Action Item:	Request that the Supreme Court approve Rules 5, 17, 21, 31, 44, and 56 for final publication.

AGENDA TOPIC

III. Rule 22-Initial appearance and preliminary examination in cases under Utah Code § 78A-6-703.3	**DAVID FUREIGH**
Rule 22 was sent out for comment period in June. The comment period closed and there was one	

written comment received regarding paragraph h. The members reviewed the comment and agreed that paragraph h needs to be rewritten. Judge Lindsley made to motion to amend paragraph h (lines 61-65) to read - "If from the evidence the court finds probable cause to believe that the crime charged has been committed, that the minor has committed it, and the information has been filed under Utah Code section 78A-6-703.3, the court will proceed in accordance with Rule 23A to hear evidence regarding the factors contained Utah Code section 78A-6-703.5." Michelle Jeffs seconded the motion and it passed unanimously.	
Action Item:	Request that the Supreme Court reviewed Rule 22 with the amended language to paragraph h will be presented to the Supreme Court to determine if the proposed rule needs to be sent out for public comment.
Motion: to approve the May 28, 2020 draft of Rule 22 with the further revisions proposed by the committee at lines 61-65 based on written comments received.	By: Judge Lindsley Second: Michelle Jeffs
Approval	× Unanimous □ Vote: # In Favor_____ # Opposed _____

AGENDA TOPIC

IV. Rule 23A-Hearing on condition of Utah Code § 78A-6-703.3 bind over to district court	**DAVID FUREIGH**
Rule 23A was sent out for comment period in June. The comment period closed and there was one written comment received. The committee discussed the comment regarding probation providing a certification report as was practice before the statute was changed. Judge Lindsley made a motion that the committee considered the comment and took no action as to the comment because statute governs the presentation of evidence and probation no longer required to complete certification reports. Chris Yanelli seconded the motion.	
Action Item:	Request that the Supreme Court approve Rule 23A for final publication.
Motion: the committee considered the comment and took no action as to the comment because statute governs the presentation of evidence and probation no longer required to complete certification report.	By: Judge Lindsley Second: Chris Yanelli
Approval	× Unanimous □ Vote: # In Favor_____ # Opposed _____

AGENDA TOPIC

V. Rule 48 – Post-Judgment Motions	**CAROL VERDOIA**
Arek Butler was looking at Rule 48 and if it needed a cross-reference to Utah Code 78A-6-1108.	

Arek was excused from the meeting and the committee agreed that this item will be added to the agenda for the October 7, 2020 meeting. Carol Verdoia did provide the committee with background information regarding Rule 48 and Utah Code 78A-6-1108 since the language and the statute are different with regarding to standing and post-judgment motions when there is newly discovered evidence. Bridget will review meeting minutes to see if Arek had proposed language for Rule 48 and will include in the agenda for the October 7, 2020 meeting.	
Action Item:	Rule 48 added to the agenda for the October 7, 2020 meeting.

AGENDA TOPIC

VI. H.B. 33	**DAVID FUREIGH**
The committee discussed H.B. 33 and language added to Utah Code 78A-6-304 regarding a request for a hearing on whether reunification service are appropriate when an abuse and neglect petition is filed and a termination of the parental rights petition is filed before the disposition hearing. The committee agreed that at this time a rule was not necessary.	
Action Item:	No action taken by the committee on adding a rule to address new language in Utah Code 78A-6-304.

AGENDA TOPIC

VII. In re G.J.P.	**DAVID FUREIGH**
David informed the committee his discussion with Supreme Court on June 24, 2020. The Supreme Court is looking for guidance around the due process rights of incompetent parents in child welfare cases as well as the procedures to appoint a guardian ad litem. The committee agreed that the juvenile court law clerks should do a 50-state-survey regarding the appointment of guardians ad litem for incompetent parents. Bridget will discuss with Nancy Sylvester if the Supreme Court's Committee on the Civil Rules of Procedure has discussed *In re G.J.P.* and find out if guardians ad litem are appointed in district court cases. This information is helpful to determine next steps in addressing the Supreme Court's footnote in *In re G.J.P.* as well as provide guidance around the appointment of guardians ad litems for incompetent parents.	
Action Item:	Request that juvenile court law clerks do a 50-state-survey regarding the appointment of guardians ad litem for incompetent parents and Bridget provide information about if guardians ad litem are appointed in district court cases

AGENDA TOPIC

VIII. Old or New Business	**ALL**
The Committee discussed potential future agenda items: 1. Kristin will send over language about possible changes to rules based on new case law from Martha Peirce and Bridget will distribute to the committee.	

TAB 2

Rule 48. Post judgment motions.

(a) Except as provided in paragraph (c), new hearings shall be available in accordance with Utah R. Civ. P. 52, 59 and 60.

(b) If a new hearing is granted, the same burden of proof shall apply.

(c) Motions filed under Utah R. Civ. P. 52 and/or Utah R. Civ. P. 59 must be filed no later than 14 days after entry of the judgment.

Effective Date: May 1, 2018

TAB 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

September 23, 2020

Hon. Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

TO: Supreme Court's Advisory Committee on the Rules of Juvenile Procedure

FROM: Meg Sternitzky & Xen Fedison, Juvenile Law Clerks

RE: Appointment of Guardians ad Litem to Incompetent Parents

This memorandum is a fifty state survey of case law, statutes, regulations, and other rules that allow states to appoint a guardian ad litem to incompetent parents in civil cases, and more specifically, in family law or child welfare proceedings. It examines how states determine incompetence, how the parents' due process rights are protected, and the process of appointing a guardian ad litem. This memorandum is divided into two sections: (1) states with specific laws, regulations, or rules that allow the court to appoint a guardian ad litem to incompetent parents in family law or child welfare proceedings and (2) states with general laws, regulations, or rules that allow the court to appoint a guardian ad litem to incompetent persons in civil proceedings.

I. States that specifically allow for appointment of a guardian ad litem to incompetent parents in child welfare proceedings.

Alabama:

Rule 17(c) of the Alabama Rule of Civil Procedure provides: The court shall appoint a guardian ad litem (1) for a minor defendant, or (2) for an incompetent person not otherwise represented in an action and may make any other orders it deems proper for the protection of the minor or incompetent person.

Determination of Incompetence:

- Pursuant to the Alabama Rules of Criminal Procedure, following a mental examination, the trial court may, in its discretion, order a defendant to be examined again when the evaluating

psychologist or psychiatrist deems that such examinations may be necessary. Brown v. State, 982 So. 2d 565, 571 (Ala. Crim. App. 2006)

Due Process Rights:

- In proceedings on a petition to terminate parental rights to a dependent child, the parent's right to voluntarily relinquish parental rights, which would permit the parent to enter into an open-communication adoption agreement with prospective adoptive parents. RCW 26.33.295. The parent's fundamental right to parent that is protected by substantive due process of law and may not be taken away on the basis of incompetency or on the basis of counsel's waiver of competency absent a hearing to determine competency or a determination that counsel was authorized by the parent to concede incompetency.

- *In re Welfare of H.Q.*, 182 Wash. App. 541, 544, 330 P.3d 195, 197 (2014): The mere fact that a guardian or guardian ad litem has been appointed for a parent who is the subject of a petition for termination of parental rights does not negate the parent's ability to voluntarily relinquish parental rights. A parent with an appointed guardian may voluntarily relinquish parental rights after the guardian investigates and reports to the court concerning whether the parent is able to voluntarily relinquish parental rights with an understanding of the consequences thereof.

Process of Appointing Guardian ad Litem:

- Code of Ala. § 26-52 provides: At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor or other person if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests.

Alaska:

Rule of Civil Procedure 17(c): The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Determination of Incompetence:

- *Adkins v. Nabors Alaska Drilling*, 609 P.2d 15 (Alaska 1980): The court noted that the standard for mental incompetency is "whether a person could know or understand his legal rights sufficiently well to manage his personal affairs." *Id.* (quoting *Timothy G. v. State*, 372 P.3d 235, 237 (Alaska 2016)).

Due Process Rights:

- *In re C.L.T.*, 597 P.2d 518, 520 (Alaska 1979): If the court finds that the minor is dependent, it shall by order, terminate parental rights and responsibilities of one or both parents and commit the child to the Department of Health and Social Services or to a legally appointed guardian of the person of the child, if each parent, or the surviving parent, or one parent if the other has been judicially deprived of custody and visitation rights, has demonstrated by his conduct, proven by

clear and convincing proof amounting to more than a preponderance of the evidence that he is unfit to continue to exercise his parental rights and responsibilities. Alaska Stat. § 47.10.080(c)(3)(D).

Process of Appointing Guardian ad Litem:

- Alaska Stat. § 47.10.050: (a) Whenever in the course of proceedings instituted under this chapter it appears to the court that the welfare of a child will be promoted by the appointment of an attorney to represent the child, the court may make the appointment. If it appears to the court that the welfare of a child in the proceeding will be promoted by the appointment of a guardian ad litem, the court shall make the appointment. Appointment of a guardian ad litem or attorney shall be made under the terms of AS 25.24.310.

Arizona:

17B A.R.S. Juv. Ct. Rules of Proc., Rule 40(B): "[i]n a proceeding where a parent, guardian or Indian custodian is under eighteen (18) years of age, the court may appoint a guardian ad litem to protect the interests of such parent."

17B A.R.S. Juv. Ct. Rules of Proc., Rule 40(C): "[i]f the court has reason to believe a parent, guardian or Indian custodian may be incompetent, the court shall appoint a guardian ad litem to conduct an investigation and report to the court as to whether the parent, guardian or Indian custodian may be incompetent and in need of protection. The court shall conduct hearings and enter orders as determined to be necessary to protect the interests of the parent, guardian or Indian custodian."

Determination of Incompetence:

- Whether the parent is unable to understand the nature and object of the proceedings or assist in his or her defense. *Kelly R. v. Ariz. Dep't of Econ.* Sec., 213 Ariz 17, 22, 137 P.3d 973 (Ct. App. 2006).

Due Process Rights:

- 17B A.R.S. Juv. Ct. Rules of Proc., Rule 40(C): "If the court has reason to believe a parent, guardian or Indian custodian may be incompetent, the court shall appoint a guardian ad litem to conduct an investigation and report to the court as to whether the parent, guardian or Indian custodian may be incompetent and in need of protection. The court shall conduct hearings and enter orders as determined to be necessary to protect the interests of the parent, guardian or Indian custodian."

- "[D]ue process does not require the juvenile court to suspend a severance hearing until a mentally incompetent parent can be restored to competency, if ever...A parent's right to attend and meaningfully participate in a severance hearing cannot be afforded at the expense of a child's right to a stable parenting situation." *Cecilia A. v. Ariz. Dep't of Econ. Sec., A.G.*, 229 Ariz. 286, 291, 274 P.3d 1220, 1225 (Ct. App. 2012)

Process of Appointing Guardian ad Litem:

- Ariz. Rev. Stat. § 8-535(F): "On the motion of any party or on its own motion, the court shall appoint a guardian ad litem if it determines that there are reasonable grounds to believe that a party to the proceeding is mentally incompetent or is otherwise in need of a guardian ad litem."

- Pursuant to Rule 40(C), a GAL appointed to an adult "parent, guardian, or Indian custodian" must "conduct an investigation and report to the court as to whether the [person] may be incompetent and in need of protection." Only then can the GAL act on the adult's behalf. *Castro v. Hochuli*, 236 Ariz. 587, 590, 343 P.3d 457, 460 (Ct. App. 2015).

California:

The general authority for appointment of a guardian ad litem is Code Civ. Proc., § 372, which concentrates on the kinds of persons for whom a guardian may be appointed, and the authority of the guardian. The bases for appointment are treated in two other statutes, Prob. Code, § 1801, and Pen. Code, § 1367. Either of these laws may apply to parents in child dependency proceedings.

Determination of Incompetence:

- Whether the parent has the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case. *In re Sara D.*, 87 Cal. App. 4th 661, 667, 104 Cal. Rptr. 2d 909.

Due Process Rights:

- Before appointing a guardian ad litem for a parent in a dependency proceeding, the juvenile court must hold an informal hearing at which the parent has an opportunity to be heard. *In re Sara D.*, 87 Cal. App. 4th 661 at 667.

- The court or counsel should explain to the parent the purpose of the guardian ad litem and the grounds for believing that the parent is mentally incompetent. *Id.* at 672.

- If the parent consents to the appointment, the parent's due process rights are satisfied. *Id.* at 668. A parent who does not consent must be given an opportunity to persuade the court that the appointment of a guardian ad litem is not required. *Id.* at 672.

- If the court appoints a guardian ad litem without the parent's consent, the record must contain substantial evidence of the parent's incompetence. *Id.* at 673.

Process of Appointing Guardian ad Litem:

- Penal Code Section 1367 or Probate Code section 1801 or Code Civil Procedure section 372: The court appoints a guardian ad litem for a parent if the parent is under the age of 18 years, if the parent agrees, or if the courts finds after contested hearing that the parent is incompetent *See* Code Civ. Proc., § 372; *In re Jessica G.*, 93 Cal. App. 4th 1180, 113 Cal. Rptr. 2d 714 (2001).

- There should be notice, and the court should give a parent an opportunity to object and hold a hearing if the parent does object. *In re Sara D.*, 87 Cal. App. 4th 661 at 672.

Colorado:

Colo. Rev. Stat. § 19-1-111(2)(c): "a juvenile court may appoint a guardian ad litem for a respondent parent who has an intellectual or developmental disability."

Determination of Incompetence:

- Whether the parent lacks the intellectual capacity to communicate with counsel or is mentally or emotionally incapable of weighting the advice of counsel on the particular course to pursue in his or her interest. *People ex rel T.M.S.*, 2019 COA 136,¶ 9, 454 P.3d 375 (quoting *People in Interest of M.M.*, 726 P.2d 1108, 1120 (Colo. 1986)).

Due Process Rights:

- The GAL does not participate as a party or a party's advocate in dependency or neglect proceedings. Instead, the GAL has an assistive role: to facilitate communication between the parent and counsel and help the parent effectively participate in the proceeding. *People ex rel T.M.S.*, 2019 COA 136,¶ 9.

- In other words, appointment of a GAL only acts to further preserve a parent's due process rights.

Process of Appointing Guardian ad Litem:

- Colo. R. Civ. P. 17(c): "a court should appoint a guardian ad litem for a litigant when the court is reasonably convinced that the party is not mentally competent effectively to participate in the proceeding."

- Decisions regarding the appointment of a guardian ad litem for the parent lie within the discretion of the juvenile court. A court abuses its discretion when its ruling rests on a misunderstanding or misapplication of the law. *People ex rel T.M.S.*, 2019 COA 136,¶ 9.

Connecticut:

- Conn. Gen. Stat. § 45a-708: When, with respect to any petition for termination of parental rights filed under section 17a-112, section 45a-715 or section 45a-716, it appears that either parent of the child is a minor or incompetent, the court shall appoint a guardian ad litem for such parent. The guardian ad litem shall be an attorney-at-law authorized to practice law in Connecticut or any duly authorized officer of a child-placing agency if the child-placing agency is not the petitioner.

Determination of Incompetence:

- *In re Brendan C.*, 89 Conn. App. 511 (Ct. App. 2005): Conn. Gen. Stat. § 45a-708(a) directs the court to appoint a guardian ad litem for any parent in a termination proceeding when it appears that the parent is incompetent. Although that statutory provision does not define "incompetent," the Supreme Court of Connecticut has defined a mentally incompetent person as one who is unable to understand the nature of the termination proceeding and unable to assist in the presentation of his or her case.

- A competency hearing would provide the trial court with a clearer understanding of the parent's capabilities and of the best available avenues along which to proceed. Accordingly, the availability of a competency hearing in a termination proceeding would significantly improve upon the present statutory procedure, which provides only for the appointment of a guardian ad litem, and would reduce the risk that a parent's rights might be erroneously terminated.

Due Process Rights:

- To determine whether due process requires a competency hearing when the State seeks to terminate the parent-child relationship, the court must consider and weigh three factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. In re Alexander V., 223 Conn. 557, 558, 613 A.2d 780, 782 (1992)

Process of Appointing Guardian ad Litem:

- Conn. Gen. Stat § 45a-132: The judge or magistrate may appoint a guardian ad litem for any minor or incompetent, undetermined or unborn person, or may appoint one guardian ad litem for two or more of such minors or incompetent, undetermined or unborn persons, if it appears to the judge or magistrate that one or more persons as individuals, or as members of a designated class or otherwise, have or may have an interest in the proceedings, and that one or more of them are minors, incompetent persons or persons undetermined or unborn at the time of the proceeding.

Hawaii:

HRS § 587A-16: allows the court to appoint a guardian ad litem for an incapacitated[1] adult party.

Determination of Incompetence:

- Whether a person who, even with the appropriate and reasonably available assistance, is unable to substantially: (1) Comprehend the legal significance of the issues or nature of the proceedings. . . (2) Consult with counsel; and (3) Assist in preparing the person's case or strategy. *In the Interest of JM*, 138 Haw. 137, 5, 377 P.3d 1055 n.6 (Ct. App. 2016) (quoting HRS § 587A-4 (Supp. 2015)).

Due Process Rights:

- HRS § 587A-16(b)(2)(B)(i)-(ii) (Supp. 2020): "Upon the request of any party or sua sponte, and after such hearing as the court deems appropriate, the court may appoint a guardian ad litem for an adult party only after a determination, by clear and convincing evidence, that (1) the party is

[1] Note that Hawaii uses the term incapacitated instead of incompetent. Most states distinguish between the terms incompetent and incapacitated. The term, as used in this statute, means incompetent as applied by other sister states.

an incapacitated person; and (2) the party's identified needs cannot be met by less restrictive means, including the use of appropriate and reasonably available assistance."

- HRS § 587A-16(d)(1)(2): The Court shall grant a guardian ad litem only those powers necessitated by the incapacitated adult's limitations and demonstrated needs; and made appointive and other orders that will encourage the development of the incapacitated adult's maximum self-reliance and independence.

- Incapacitated parents must receive: (1) notice of a trial concerning parental rights, (2) notice from the guardian ad litem what his or her recommendation will be, (3) notice from counsel whether he or she is joining guardian ad litem's recommendation, (4) advice on the effect of the guardian's recommendation by the guardian ad litem or by counsel, (5) information on consequences of waiving to appear and disposition of hearing. *See In the Interest of Doe*, 108 Haw. 144, 158, 118 P.3d 54 (2005).

Process of Appointing Guardian ad Litem:

- HRS § 587A-16(b)(1)(A)-(C): The court may appoint a guardian ad litem for an incapacitated adult party upon request of any party or sua sponte. The court may order a professional evaluation of an adult party to determine the party's capacity to substantially: (1) comprehend the legal significance of the issues and the nature of the proceedings under this chapter; (2) consult with counsel; and (3) assist in preparing the party's case or strategy.

- HRS § 587A-16(b)(2): If the court orders a professional evaluation, the party shall be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the party's alleged impairment.

- HRS § 587A-16(b)(2)(A)(i)-(iv): Unless otherwise directed by the court, the examiner shall promptly file with the court a written report which shall contain: (1) a description of the nature, type, and extent to the party's specific cognitive and functional capabilities and limitations; (2) an evaluation of the party's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills; (3) a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and (4) the dates of any assessments or examinations upon which the report is based.

Idaho:

Idaho Code § 16-2007(5): "[w]hen the termination of the parent and child relationship is sought and the parent is determined to be incompetent to participate in the proceeding, the court shall appoint a guardian ad litem for the alleged incompetent parent. The court may in any other case appoint a guardian ad litem, and may be deemed necessary or desirable, for any party. . ."

Determination of Incompetence:

- Whether the parent's lack the capacity to understand the proceedings against him or her or to assist in his or her own defense. *In re Termination of Parental Rights of Doe*, 161 Idaho 393, 396, 386 P.3d 916 (2016) (citing *Ridgley v. State*, 148 Idaho 671, 677, 227 P.3d 925 (2010)).

Due Process Rights:

- "[I]ncompetency in a termination proceeding does not have the same consequences as incompetency in a criminal proceeding. In a criminal case, a defendant determined to be incompetent cannot 'be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures.' In a termination case, a guardian ad litem must be appointed for the parent but the proceedings can proceed." *Termination of Parental Rights of Doe,* 161 Idaho at 396 (quoting Idaho Code § 19-210).
- Representation by counsel throughout proceedings, service and notice of the proceedings are sufficient to protect a parent's due process rights. *See Id.* at 395-96.

Process of Appointing Guardian ad Litem:

- Under the first provision of Idaho Code § 16-2007(5), upon request of a party or sua sponte, the court must make a finding of fact regarding the parent's incompetence based on testimony and other evidence. A court's finding will only be overturned if it is clearly erroneous. *Id.* at 396.

- Under the provision, "the court may in any other case. . ." whether to appoint a guardian ad litem is within the discretion of the court. A court's decision will be overturned if they abused their discretion. *Id.* at 396-97.

Kansas:

K.S.A. § 38-2205(b)(3): "the court shall appoint an attorney for a parent who is mentally ill or disabled [in a child welfare case]."

Additionally, under K.S.A. § 60-217(c)(D)(2): "[t]he court must appoint a guardian ad litem, or issue another appropriate order, to protect a minor or incapacitated person who is unrepresented in a [civil] action."

Determination of Incompetence:

- K.S.A. § 77-201: an incompetent person is a person who is disabled and/or incapacitated.

- An incapacitated individual is one whose ability to receive and evaluate relevant information, or to effectively communicate decisions, or both,. . . is impaired to the degree that the person lacks the capacity to manage the person's estate, or to meet essential needs for the person's physical health, safety or welfare,. . . whether or not a guardian or a conservator has been appointed for that person. *S.L.M. v. Dickerson*, 263 P.3d 223, 7* (Kan. Ct. App. 2011) (unpublished) (citing K.S.A. 2010 Supp. 77-201 Thirty-first).

- K.S.A. § 50-676(b): Disabled person means a person who has physical or mental impairment, or both, which substantially limits one or more of such person's major life activities.

Due Process Rights:

- Although it is not essential that adjudication occur to render a person incapacitated, it is a factor in determining whether a guardian ad litem should be appointed. *Bautts v. Bautts*, No. 63,097, 1989 Kan. App. LEXIS 561, at *5.

- K.S.A. 60-304(c)(1)(A),(C): "[s]ervice must be made on the incapacitated person, unless the court otherwise order, and the person's guardian, conservator or competent adult member of the person's family with whom the person resides."

- K.S.A. § 60-225(a): "[d]efault judgment may be entered against a minor or incapacitated person only if represented by a guardian, conservator or other legally authorized representative who has appeared in the action, or by guardian ad litem."

Process of Appointing Guardian ad Litem:

- The decision whether to appoint a guardian ad litem is left to the trial court's discretion. The court can appoint a guardian ad litem any time it becomes aware of a person's incompetence. *See In re Marriage of Bower*, No. 74,628, 1997 Kan. App. Unpub. LEXIS 696 (Ct. App. 1997).

Maryland:

MD R. 9-105(b)(1): In an adoption, guardianship or TPR case, "if the parties agree that a party who is not represented has a disability that makes the party incapable of consenting or participating effectively in the proceeding, the court shall appoint an attorney who shall represent the disabled party throughout the proceedings."

Determination of Incompetence:

- MD R. 9-105(b)(1):whether the party is incapable of consenting or participating effectively in the proceeding.

Due Process Rights:

- MD R. 9-105(b)(2)(A)-(D): "[i]f there is a dispute as to whether a party who is not represented has a disability that makes the party incapable of consenting or participating effectively in the proceeding, the court shall:
    A. Hold a hearing promptly to resolve the dispute;
    B. Appoint an attorney to represent the alleged disabled party at that hearing;
    C. Provide notice of that hearing to all parties; and
    D. If the court finds at the hearing that the party has such a disability, appoint an attorney who shall represent the disabled party throughout the proceeding.

- MDC, Family Law § 5-307(a)(2): "[t]o determine whether a disability makes a parent incapable of effectively participating in a case, a juvenile court, on its own motion or motion of a party, may order examination of the parent."

- Order to show cause [for guardianship/adoption/TPR], should be served on the parent and on an attorney by personal service or certified mail. *See* MDC, Family Law § 5-316(c)(1),(c)(2).

Process of Appointing Guardian ad Litem:

- MD R. 9-106(a): "[t]he court shall appoint an attorney for a party when required by Code, Family Law Article."

Minnesota:

Minn. Court Rules, Rule 903.02(3): "[t]he court can appoint a guardian ad litem for a parent who is a party or the legal custodian if: (a) the court determinants that the parent or legal custodian is incompetent to assist counsel in the matter or understand the nature of the proceedings; or (b) it appears any any stage of the proceedings that the parent is under eighteen (18) years of age and is without a parent or legal custodian, or that considered in the context of the matter the minor parent's parent or legal custodian is unavailable, incompetent, indifferent to, hostile to, or has interests in conflict with the interest of the minor parent."

Determination of Incompetence:

- Minn. Court Rules, Rule 903.02(3)(a),(b): whether the individual is unable to assist counsel in the matter or is unable to understand the nature of the proceedings; or is a parent under 18 without a parent or legal custodian.

Due Process Rights:

- Minn. R. Civ. P. 17.02: "[i]f the appointment is applied for by the party or by a spouse, parent, custodian or testamentary or other guardian of the party, the court may hear the application with or without notice. In all other cases written notice of the hearing on the application shall be given at such time as the court shall prescribe, and shall be served upon the party, the party's spouse, parent, custodian and testamentary or other guardian, if any, and if the party is an inmate of a public institution, the chief executive officer, thereof. If the party is a nonresident or, after diligent search, cannot be found within the state, notice shall be given to such persons and such manner as the court may direct."

- The protections offered by the appointment of a guardian ad litem for incompetent persons ensure that the interests of that person are sufficiently represented and considered, but when an adverse party requests the appointment of a guardian ad litem for a party who has never been adjudicated incompetent, rule 17.02 entitles the party to notice and an opportunity for a hearing before a guardian ad litem is appointed. *Wiel v. Wahlgren*, 934 N.W.2d 125, 130 (Minn. Ct. App. 2019).

Process of Appointing Guardian ad Litem:

- Minn. Court Rules, Rule 903.02(3): "[t]he court may appoint a guardian ad litem sua sponte or upon the written or on-the-record request of a party or participant."

- Minn. Court Rules, Rule 903.02(1)(a)-(c): "[a] guardian ad litem shall not be appointed or serve except upon written order of the court. The order shall set forth: (a) the statute or rule providing for the appointment of the guardian ad litem; (b) the provisions for parental fee collection []; (c) in an adoption proceeding, authorization for the guardian ad litem to review and receive a copy of the adoption study report and the post-placement assessment report."

- Minn. Court Rules, Rule 903.01: "[w]hen the court orders the appointment of a guardian ad litem in a particular case, the district guardian ad litem manager or the manager's designee shall

promptly recommend a guardian ad litem for appointment. If in the exercise of judicial discretion the court determines that the guardian ad litem recommended is not appropriate for appointment, and communicates the reasons for that determination to the district guardian ad litem manager or the manager's designee, the district guardian ad litem manager or the manager's designee shall promptly recommend another guardian ad litem for appointment."

Nebraska

R.R.S. Neb.§ 43-292.01: "[w]hen termination of the parent-juvenile relationship is sought under subdivision (5) of section 43-292, the court shall appoint a guardian ad litem for the alleged incompetent parent. The court may, in any other case, appoint a guardian ad litem, as deemed necessary or desirable, for any party. The guardian ad litem shall be paid a reasonable fee set by the court and paid from the general fund of the county."

Determination of Incompetence:

- The test of mental competency to stand trial is whether the defendant now has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. *State v. Guatney*, 207 Neb. 501, 502, 299 N.W.2d 538, 540 (1980).

Due Process Rights:

- R.R.S. Neb.§ 43-292.01: "[t]he court shall appoint a guardian ad litem for the alleged incompetent parent. The court may, in any other case, appoint a guardian ad litem, as deemed necessary or desirable, for any party. The guardian ad litem shall be paid a reasonable fee set by the court and paid from the general fund of the county."

- No other due process rights specified.

Process of Appointing Guardian ad Litem:

- R.R.S. Neb. § 43-272 (3): "[t]he court shall appoint an attorney as guardian ad litem. A guardian ad litem shall act as his or her own counsel and as counsel for the [parent]. . ."

- Appointing a guardian ad litem is within the trial court's discretion.

Nevada:

The only binding authority on competency in civil cases is that the court must either appoint a guardian ad litem for an incompetent party or issue any other order it deems appropriate. Nev. R. Civ. P. 17(c); *Mistie P. v. State* (In re M.M.L.), 393 P.3d 1079, 1080 (Nev. 2017).

Determination of Incompetence:

- Nev. Rev. Stat. § 178.415(1) requires the district court to appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the defendant. Thereafter, § 178.415(2) requires that the district court receive the report of the examination at a hearing in open court unless otherwise provided in the statutory provisions governing the procedures for inquiring into a defendant's competency. *Olivares v. State*, 124 Nev. 1142, 1143, 195 P.3d 864, 865 (2008)

Due Process Rights:

- There is currently no statutory authority requiring a district court to continue a parental rights termination trial so that a parent may regain competence. In fact, to require all proceedings halted until a parent regains competence conflicts with potential grounds to terminate the parent's rights. Moreover, the district court considered all of the necessary due process interests before proceeding with the trial and appointed a guardian ad litem pursuant to NRCP 17(c); *Mistie P. v. State* (In re M.M.L.), 393 P.3d 1079, 1083 (Nev. 2017).

Process of Appointing Guardian ad Litem:

- A proposed protected person, a governmental agency, a nonprofit corporation or any interested person may petition the court for the appointment of a guardian. Nev. Rev. Stat. Ann. § 159.044

New Hampshire:

RSA 170-C:8: When termination of the parent-child relationship is sought under RSA 170-C:5, IV, the court shall appoint a guardian ad litem for the alleged incompetent parent.

Determination of Incompetence:

- Although competency is ultimately governed by a legal standard, the determination is largely based upon medical observation and testimony. RSA 135:17.State v. Veale, 158 N.H. 632, 634, 972 A.2d 1009, 1011 (2009)

Due Process Rights:

- Appointment of guardian ad litem acts to preserve a parent’s due process rights.

Process of Appointing Guardian ad Litem

RSA 464-A:41. Appointment of Guardians Ad Litem.

- When before or during the hearing on any proceeding in any court it appears to the court that the interest or rights of a legally incapacitated person by age or other cause or circumstance are not fully represented or upon the request of any interested person, the court may appoint a competent and disinterested person to act as guardian ad litem for such legally incapacitated person and to represent such person’s interest in the case.

New Mexico:

Under SCRA 1-017(C), when an infant defendant is without representation, it is the duty of the court to "appoint a guardian ad litem for [such] infant or incompetent person not otherwise represented in [the] action or shall make such other order as it deems proper for the protection of the infant or incompetent person." *State ex rel. Children, Youth & Families Dep't v. Lilli L.*, 1996-NMCA-014, ¶ 11, 121 N.M. 376, 378, 911 P.2d 884, 886

Determination of Incompetence:

- Under New Mexico's statutory scheme, when a defendant's competence is at issue, he or she must be evaluated by a qualified professional, such as a psychologist or psychiatrist, whom the district court recognizes as an expert. N.M. Stat. Ann. § 31-9-1.1 (1993). *State v. Gutierrez*, 2015-NMCA-082, ¶ 1, 355 P.3d 93, 95

Due Process Rights:

- Under N.M. R. Civ. P. Dist. Ct. R. 1-017(C): when an infant or incompetent defendant is without representation, it is the duty of the court to appoint a guardian ad litem for such infant or incompetent person not otherwise represented in the action or shall make such other order as it deems proper for the protection of the infant or incompetent person. *State ex rel. Children, Youth & Families Dep't v. Lilli L.*, 1996-NMCA-014, ¶ 1, 121 N.M. 376, 377, 911 P.2d 884, 885.

Process of Appointing Guardian ad Litem:

- N.M. Stat. Ann. § 32A-5-33. Upon the motion of any party or upon the court's own motion, the court may appoint a guardian ad litem for the adoptee or for any person found to be incompetent or a child who is a party to the proceeding. In any contested proceeding, the court shall appoint a guardian ad litem for the adopted.

North Carolina:

The North Carolina General Assembly has amended N.C. Gen. Stat. § 7B-1101.1(c) to authorize the appointment of a parental **guardian ad litem** for a parent who is incompetent in accordance with N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 17. As a result, following the enactment of the 2013 amendment to N.C. Gen. Stat. § 7B-1101.1, a parent would only be entitled to the appointment of a **guardian ad litem** in the event that she is incompetent and would not be entitled to the continued assistance of a **guardian ad litem** who has been appointed based solely on a finding of diminished capacity. *In re T.L.H.*, 368 N.C. 101, 101, 772 S.E.2d 451, 452 (2015)

Determination of Incompetence:

- An "incompetent adult" is defined as one who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy,

cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. N.C. Gen. Stat. § 35A-1101(7) (2013).

Due Process Rights:

- The Court further stated that: A parent has a right to counsel and to appointed counsel in case of indigency, if not waived by the parent. The Act also provides for the appointment of a guardian ad litem to represent the parent who suffers a diminished mental capacity. "We believe the provisions of this statute adequately assure respondent[], and those similarly situated, of procedural due process protection. Thus, our Supreme Court considered the appointment of a guardian ad litem a critical factor in the protection of procedural due process rights for parents who suffer diminished mental capacity." *In re R.A.L.*, No. COA05-50, 2005 N.C. App. LEXIS 2577, at *11-12 (Ct. App. Dec. 6, 2005)

Process of Appointing Guardian ad Litem:

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

    - (1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.

    . . .

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

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

Ohio:

Both R.C. 2151.281(A) and Juv.R. 4(B) require a juvenile court to appoint a guardian ad litem in certain circumstances. R.C. 2151.281(A) provides: The court shall appoint a guardian ad litem to protect the

interest of a child in any proceeding concerning an alleged or adjudicated delinquent child or unruly child when either of the following applies: (1) The child has no parent, guardian, or legal custodian. (2) The court finds that there is a conflict of interest between the child and the child's parent, guardian, or legal custodian. Juv.R. 4(B) provides: The court shall appoint a guardian ad litem to protect the interests of a child or incompetent adult in a juvenile court proceeding when: (1) The child has no parents, guardians, or legal custodian; or (2) The interests of the child and the interests of the parent may conflict. *In re D.A.G., 2013-Ohio-3414,* ¶ 1.

Determination of Incompetence:

- A defendant is presumed competent to stand trial, unless it is proved by a preponderance of the evidence in a hearing under this section that because of his present mental condition he is incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense. 142 Ohio Laws, Part I, 755-756.

Due Process Rights:

- Ohio Rev. Code Ann. § 2151.281(C) and Ohio R. Juv. P. 4(B)(3) require that the court appoint a guardian ad litem to protect the interests of an incompetent adult in a juvenile proceeding where the parent appears to be mentally incompetent. *In re Amber G.*, 2004-Ohio-5665, ¶ 1 (Ct. App.)

- Ohio Rev. Code Ann. § 2151.281(C) allows the appointment of a guardian ad litem to be made liberally, which does not infringe on a parent's due process rights but in fact works to ensure that the parent's rights are not compromised. A guardian ad litem is expected to provide an additional level of protection for an incompetent parent. *In re Amber G.*, 2004-Ohio-5665, ¶ 1 (Ct. App.)

Process of Appointing Guardian ad Litem:

- Ohio Cuyahoga Cty. Juv. Div LR 15: After a petition is filed, the court shall appoint a guardian ad litem upon the request of the child or the attorney of the child, and may appoint a guardian ad litem sua sponte or upon the request of the Department of Human Services, a licensed child-placing agency, or another party to the action.

Oregon:

ORS § 419B.231(1): "[t]he court, on its own motion or on the written or oral motion of a party in the proceeding, may appoint a guardian ad litem for a parent involved in a [dependency] proceeding, including a proceeding for the termination of parental rights."

Determination of Incompetence:

- ORS § 419B.231(1): whether the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding due to the parent's mental or physical disability.

Due Process Rights:

- ORS § 419B.231(2)(a)-(b):"[t]he court must conduct a hearing to determine whether to appoint a guardian ad litem if a party's motion would establish that it is more probable than not that the parent lacks substantial capacity and the appointment of a guardian ad litem is necessary; or the court has reasonable belief that the parent lacks substantial capacity and the appointment of a guardian is necessary."

- ORS § 419B.231(3)(a)(A)-(B): "A court may not appoint a guardian ad litem unless the court conducts a hearing. At the hearing, the court may receive testimony, reports and other evidence without regard to whether the evidence is admissible . . . if the evidence is:
    A. Relevant to the findings required under this section; and
    B. Of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs."

- ORS § 419B.231(4)(a)-(b): "[a]court may not appoint a guardian ad litem for a parent unless the court finds by a preponderance of the evidence presented at the hearing that:
    A. Due to the parent's mental or physical disability of impairment, the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decision eh parent must make in the proceedings and
    B. The appointment of a guardian ad litem is necessary to protect the parent's rights in the proceeding during the period of the parent's disability or impairment."

- ORS § 419B.231(5): "[t]he fact that a guardian ad litem has been appointed under this section may not be used as evidence of mental or emotional illness in any juvenile court proceeding, any civil commitment proceeding or any other civil proceeding."

Process of Appointing Guardian ad Litem:

- ORS § 419B.231(1): "[t]he court can appoint a guardian ad litem on its own motion or on the written or oral motion of a party in the proceeding."

Pennsylvania:[2]

Pa. Sup. Orph. Ct. R. 15.4(c)(1): "[w]hen the termination of parental rights of a parent who has not attained the age of 18 years is sought, unless the court finds the parent is already adequately represented, the court shall appoint a guardian ad litem to represent the parent."

Determination of Incompetence:

- Pa. Sup. Orph. Ct. R. 15.4(c)(1): Whether the parent has not attained the age of 18.

Due Process Rights:

- Pa. Sup. Orph. Ct. R. 15.4(c)(1): "[t]he appointment of a guardian ad litem may be provided for in the preliminary order attached to the petition for involuntary termination of parental rights."

[2] Pennsylvania is limited to minor parents.

- Pa. Sup. Orph. Ct. R. 15.4(c)(2): "[t]he decree appointing a guardian ad litem shall give the name, date of birth and address (if known) of the individual whom the guardian ad litem is to represent and the proceedings and period of time for which the guardian ad litem shall act."

Process of Appointing Guardian ad Litem:

- 23 Pa.C.S.A § 2313: "[i] is within the trial court's discretion to appoint a guardian ad litem for a child who has not reached the age of 18 years in an involuntary termination proceeding."

South Carolina:

SCRCP R. 17(c): "[i]n a civil action, the court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the minor or incompetent person."

Case law as explicitly applied this to incompetent parents in family court proceedings. *See S.C. Dep't of Soc. Servs. v. McDow*, 276 S.C. 509, 280 S.E.2d 208 (1981).

Determination of Incompetence:

- A mental deficiency so great as to render one unable to comprehend or transact the ordinary affairs of life. It must be shown by credible evidence that the subject, because of mental impairment, has become incapable of managing his own affairs, whether from age, disease, or application. *Thompson v. Moore*, 227 S.C. 417, 422, 88 S.E.2d 354 (1955) (internal citation omitted).

Due Process Rights:

- SCRCP R. 17(d)(5): "[n]otice of an application for the appointment of a guardian ad litem must be given to the incompetent person if made by a relative or friend."

- The court should make a finding of incompetency. To justify an appointment of a guardian ad litem, the fact of incompetency should be specifically alleged, and the court should be satisfied from the proof that the status of incompetency actually exists at the time the appointment is made. *Thompson v. Moore*, 227 S.C. 417, 421, 88 S.E.2d 354 (1955) (internal citation omitted).

- The burden of proving mental incompetence of the subject is upon the appellant who seeks to establish it. *Id.* at 423.

- Where a court adjudicates the rights of a person who is not mentally competent without appointing a guardian ad litem, any judgment rendered by the court adverse to the person who is not competent is defective. *Rouvet v. Rouvet*, 388 S.C. 301, 311, 696 S.E.2d 204 (Ct. App. 2010).

- Adequate legal representation for an incompetent person in a legal proceeding does not cure the defect created when the incompetent person's rights are adjudicated without the court appointing

a guardian ad litem. *See S.C. Dep't of Soc. Servs. v. McDow*, 276 S.C. 509, 511, 280 S.E.2d 208 (1981).

Process of Appointing Guardian ad Litem:

- SCRCP R. 17(d)(1): "[g]uardians ad litem may be appointed by the court in which the action is pending, the judge of probate, the clerk of court, or the master-in-equity of the county wherein the minor or incompetent or imprisoned person resides, or in the county in which the action is pending or is to be filed."

- SCRCP R. 17(d)(5): "[t]he guardian ad litem for an incompetent person shall be appointed upon the application of his guardian or committee or of a relative or friend. If application be made by the relative or friend, notice thereof must be first given to the incompetent person's guardian if he has one; if he has none, then to the person with whom such incompetent person resides."

South Dakota:

S.D. Codified Laws § 15-6-17(c) provides in part: The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person and may make such appointment notwithstanding an appearance by a guardian or conservator. *In re Guardianship of Petrik*, 1996 S.D. 24, ¶ 1, 544 N.W.2d 388, 388.

Determination of Incompetence:

- A mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation. 38 CFR § 3.353(a). *In re Estate of Berg*, 2010 S.D. 48, ¶ 1, 783 N.W.2d 831, 833.

Due Process Rights:

There are not any laws regarding due process, just that a parent has a fundamental right to parent.

Process of Appointing Guardian ad Litem:

The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person and may make such appointment notwithstanding an appearance by a guardian or conservator. S.D. Codified Laws § 15-6-17(c).

Tennessee:

Tenn. R. Civ. P. 17.03: "[t]he court shall at any time after the filing of the complaint appoint a guardian ad litem to defend an action for an infant or incompetent person who does not have a duly appointed representative, or whenever justice requires. The court may in its discretion allow the guardian ad litem a reasonable fee for services, to be taxed as costs."

Determination of Incompetence:

- The parent or guardian of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's or guardian's mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future. *In re Tanya G.*, No. E2016-02451-COA-R3-PT, 2017 Tenn. App. LEXIS 455, at *9 (Ct. App. July 7, 2017).

Due Process Rights:

- A parent's right to the care and custody of her child is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions. But parental rights, although fundamental and constitutionally protected, are not absolute. The State as parens patriae has a special duty to protect minors. Tennessee law, thus, upholds the State's authority as parens patriae when interference with parenting is necessary to prevent serious harm to a child.

- When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. Few consequences of judicial action are so grave as the severance of natural family ties. The parental rights at stake are far more precious than any property right. Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger and of severing forever all legal rights and obligations of the parent or guardian of the child. Tenn. Code Ann. § 36-1-113(l)(1). A decision terminating parental rights is final and irrevocable. In light of the interests and consequences at stake, parents are constitutionally entitled to fundamentally fair procedures in termination proceedings. *In re Carrington H.*, 483 S.W.3d 507, 511 (Tenn. 2016)

Process of Appointing Guardian ad Litem

- Tenn. 13th Jud. Dist. L.R.C.P. 8(a): “Guardian ad litems shall be appointed by the Court and a guardian ad litem will be appointed if justice so requires or if such appointment otherwise is required by statute or T.R.C.P. The Clerks of the Court in the respective counties shall maintain a roster of the active practicing attorneys in their county from which guardian ad litems may be appointed and shall make a notation of the date when a particular attorney has been so appointed in a cause.”

Texas:

Tex. Fam. Code § 51.11(b): In any case in which it appears to the juvenile court that the child’s parent or guardian is incapable or unwilling to make decisions in the best interest of the child with respect to proceedings under this title, the court may appoint a guardian ad litem to protect the interests of the child in the proceedings.

Determination of Incompetence:

- A person is legally incompetent to stand trial if the person does not have the capacity to (1) understand the nature and object of the proceedings against him, (2) consult with counsel, and (3) assist in preparing his defense. The conviction of an accused who is legally incompetent violates due process, and a trial court must inquire into the accused's mental competence once the issue is sufficiently raised.

- A court must *sua sponte* conduct an inquiry into a defendant's mental capacity if the evidence raises a bona fide doubt as to the defendant's competency.

- Evidence which shows recent severe mental illness, moderate or greater retardation, or truly bizarre acts by the defendant is sufficient to create a bona fide doubt. In determining whether there is an issue of a defendant's incompetency, the trial court must consider only that evidence tending to show incompetency, putting aside all competing indications of competency.

- Neither the fact that a motion is made which asserts "an issue" of competency or incompetency, nor the fact that a court orders a defendant to undergo a psychiatric evaluation, by themselves, are sufficient to require the trial court to inquire into a defendant's competency. *Valderas v. State*, 134 S.W.3d 330, 332 (Tex. App. 2003)

Due Process Rights:

- No provision of the Texas Family Code authorizes the appointment of a guardian ad litem for the adult respondent in a termination-of-parental-rights proceeding. *In the Interest of J.P-L*, 592 S.W.3d 559, 562 (Tex. App. 2019).

Process of Appointing Guardian ad Litem

- Tex. R. Civ. P. 173.3(a)-(c): The court may appoint a guardian ad litem on the motion of any party or on its own initiative, or an appointment must be made by written order. Any party may object to the appointment of a guardian ad litem.

Utah:

URCP R. 17(b): “[a] guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted expedient to represent the minor, insane or incompetent person in the action or proceeding.”

Case law as explicitly applied this to incompetent parents in child welfare proceedings. *See In re G.J.P.*, 2020 UT 4, 458 P.3d 982.

Determination of Incompetence:

- Whether an individual's illness or disability renders him or her unable to assist in his or her own defense or communicate meaningfully with counsel. *In re G.J.P.*, 2020 UT 4, ¶ 6, 458 P.3d 982.

Due Process Rights:

- Utah has not delineated any safeguards the court should employ before appointing a guardian ad litem for an allegedly insane or incompetent person. *In re G.J.P.*, 2020 UT 4, ¶ 20, 458 P.3d 982. However, based on statutory requirements, the court should, at a minimum:
    - Make a finding on whether a guardian ad litem is necessary ("[a] guardian ad litem may be appointed . . . when it is deemed by the court . . . [to] be expedient . . .")
    - Seek approval from OPG, if OPG is to be appointed guardian ad litem.

Process of Appointing Guardian ad Litem:

- The juvenile court has inherent authority to appoint a guardian ad litem for an incompetent party appearing before it in a matter over which it has subject matter jurisdiction. *In re G.J.P.*, 2020 UT 4, ¶ 54, 458 P.3d 982.

- A guardian ad litem can also be appointed upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding. URCP R. 17(c)(4).
- If OPG is appointed as guardian ad litem, OPG must petition the court for or agree in advance to the appointment. *In re G.J.P.*, 2020 UT 4, ¶ 49, 458 P.3d 982 (citing Utah Code § 62A-14-105(1)(a)(ii)) .

Vermont:

It is the duty of the court at all stages of a trial to see that the interests of an incompetent person are fully protected and preserved. Vermont courts have held that a guardian ad litem must be appointed for an incompetent litigant when fundamental rights are involved, even if the incompetent objects to such an appointment. *Guardianship of H.L.*, 143 Vt. 62, 460 A.2d 478 (1983) (citing *In re Raymond*, 137 Vt. 171, 400 A.2d 1004 (1979)).

Determination of Incompetence:

- Whether the individual is able to understand the proceedings and/or communicate rationally to his or her attorney. *See Tri-Park Coop. Hous. Corp. v. Carrasquillo*, 2019 Vt. Unpub. LEXIS 125.

Due Process Rights:

- Court should order a competency evaluation when the court observes, or is notified, of an individual's alleged incompetence. *See In re T.A.*, 188 Vt. 648, 2 A.3d 1311 (2010).

- The court should then hold a competency hearing where evidence is received and a finding is made regarding the individual's incompetence. *See id.*

- If the court finds the individual is unable to understand the proceedings and/or communicate rationally with his or her attorney based on the evidence, the court may appoint a guardian ad litem to represent the interests of the incompetent person. *See id.*

Process of Appointing Guardian ad Litem:

- The court can appoint a guardian ad litem on its own motion or on the motion of a party to the proceedings. *See id.*

Washington:

The principle is well established that it is proper and desirable for courts to appoint guardian ad litem for parties when reasonably convinced that a party is not competent, understandingly and intelligently, to comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms of the best interests of such party. *Graham v. Graham*, 40 Wn. 2d 64, 66-67, 240 P.2d 564 (1952).

Determination of Incompetence:

- Does the parent understand and comprehend the significance of the legal proceedings and their effect on his or her best interest? *Graham v. Graham*, 40 Wn. 2d 64, 68, 240 P.2d 564 (1952).

- Factors relevant to a competency determination include: the parent's answers to questions, his/her appearance, his/her demeanor, his/her conduct and the reports of others. *State v. Dodd*, 70 Wn. 2d 513, 424 P.2d 302 (1967).

Due Process Rights:

- Courts are directed to afford every litigant who opposes the appointment of a guardian ad litem a full and fair hearing and an opportunity to be heard, because the interposition of a guardian ad litem could substitute his judgment, inclinations, and intelligence for an alleged incompetent's. *Graham*, 40 Wn. 2d at 68.
- Adjudication of incompetence must precede, or at least be contemporaneous with, the appointment of a guardian ad litem. *Id.* at 68

Process of Appointing Guardian ad Litem:

- A trial court on its own motion may appoint a guardian ad litem or upon an application by one of the parties to the lawsuit. *Id.* at 67.

- In making the competency determination, the trial court exercises "wide discretion." *In re Mignerey*, 11 Wn. 2d 42, 49-59, 118 P.2d 440 (1941).

West Virginia:

In abuse and neglect proceedings the appointment of a guardian ad litem is required for adult respondents who ae involuntarily hospitalized for mental illness, whether or not such adult respondents have also been adjudicated incompetent. *In re Lindsey*, 196 W. Va. 395, 406, 473 S.E.2d 110 (1995).

West Virginia has followed the common law and allows for the appointment of guardian ad litem when an incompetent person, an infant, or a convict requires representation. *Erwin v. Henson*, 202 W. Va. 137, 141, 502 S.E.2d 712 (1998) (citing W.Va. Code, 56-4-10).

Determination of Incompetence:

- Whether a party litigant can understand and comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms of the best interest of such party litigant. *State ex rel. McMahon v. Hamilton*, 198 W. Va. 575, 583, 482 S.E.2d 192 (1996).

Due Process Rights:

- When a substantial question exists regarding the mental competency of a party, a court must determine whether the party is or is not competent to proceed with the action before it. Only then will the court be able to determine if a guardian ad litem should be appointed. *State ex rel. McMahon v. Hamilton*, 198 W. Va. 575, 584, 482 S.E.2d 192 (1996) (citing *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989), *aff'd* 931 F.2d 60 (1991)).

- The court may, where there is good cause shown, require the party to undergo a mental examination in order to determine whether a guardian ad litem should be appointed to protect the party's interests. *Id.* at 585.

- To appoint a guardian ad litem, the court must be reasonably convinced of the party's incompetence. *Id.* at 583.

- W.Va. Code, 56-4-10: "[o]nce appointed, the guardian ad litem can receive service on behalf of the incompetent individual."

- A parent or custodian named in an abuse and neglect petition who is involuntarily hospitalized for mental illness but who retains all of his or her civil rights, must be effectively served with process, including, if service is personal or my mail, service of a copy of any petition or other pleading upon which an order terminating parental rights may be based. *In re Lindsey*, 196 W. Va. 395, 408, 473 S.E.2d 110 (1995).

- If the appointment of a guardian ad litem is required for a parent or custodian, the trial court may also provide in its order appointing counsel or in a later order, a direction that the appointment imposes on that counsel the additional status of guardian ad litem. *Id.* at 409.

Process of Appointing Guardian ad Litem:

- Courts should appoint guardians ad litem for parties litigant when reasonably convinced a party litigant is not competent, understandingly and intelligently, to comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms of the best interest of such party litigant. *Id.* (quoting *Buckler v. Buckler*, 195 W. Va. 705, 708, 466 S.E.2d 556 (1995) (internal quotation omitted)).

Wisconsin:

Courts dealing with the competency of a parent in a TPR proceeding should be concerned with the appointment of a GAL. *In re Kiheem L.*, 2003 WI App 111, ¶ 10, 264 Wis. 2d 895.

Determination of Incompetence:

- Whether a person understands the proceedings or is able to assist in his or her own defense. Wis. Stat. § 971.13(1).

Due Process Rights:

- Appointment of a GAL is mandatory if the court exercises its discretion and orders a competency examination, which shows that the parent needs assistance. If the court foregos a competency evaluation, the appointment of a GAL is discretionary. *In re Termination of Erika W.*, 2007 WI App 183, ¶ 7, 304 Wis. 2d 636.
- Failure to appoint a GAL for an incompetent parent is not automatic grounds for overturning a verdict absent proof of prejudice. *In re Kiheem L.*, 2003 WI App 111, ¶ 10.

- In termination of parental rights proceedings, due process is provided by the appointment of a guardian ad litem in addition to adversary counsel. *In re Termination of Erika W.*, 2007 WI App 183, ¶ 9.

- The appointment of a GAL does not necessarily enhance or diminish the adversary counsel's duty to provide the parent with an independent and vigorous defense. *In re Kiheem L.*, 2003 WI App 111, ¶ 10.

Process of Appointing Guardian ad Litem:

- A request for a GAL can be made by a party to the proceeding, but appointing the GAL is within the trial court's discretion. *See In Interest of D.S.P.*, 157 Wis. 2d 106, 458 N.W.2d 823 (Ct. App. 1990).

Wyoming:

The prevailing law with respect to the protection of the mentally ill provides: no defendant shall be tried while mentally incompetent to stand trial.

Determination of Incompetence:

- The prevailing law with respect to the protection of the mentally ill provides: (1) no defendant shall be tried while mentally incompetent to stand trial, (2) the test for determining mental competence to stand trial should be whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings, and (3) the terms competence and incompetence refer to mental competence or mental incompetence.

- A finding of mental incompetence to stand trial may arise from mental illness, physical illness, or disability; mental retardation or other developmental disability; or other etiology so long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings. *Deshazer v. State*, 2003 WY 98, 74 P.3d 1240, 1241

Due Process Rights:

- There are no specific due process protections provided for parents in statute or case law.

Process of Appointing Guardian ad Litem:

- Wyo. Stat. § 14-2-312: If the court appoints a guardian ad litem it shall approve a fee for services. When a petition is filed and presented to the judge, the judge shall set the petition for hearing. The Wyoming Rules of Civil Procedure, including the right of a parent, child or interested person to demand a jury trial, are applicable in actions brought under this act.

II. States with general rules allowing for the appointment of a guardian ad litem to incompetent persons in civil proceedings.

Arkansas:

AR Code § 28-1-111(a): "[c]ircuit courts shall have the power and duty to appoint a guardian ad litem to a proceeding to represent an incompetent party who is not represented by a guardian or next friend."

Determination of Incompetence:

- AR Code § 5-25-101(3)(A): "whether a person is unable to care for himself or herself because of physical or mental disease or defect."

Due Process Rights:

- AR Code § 28-1-112(d): "[i]ncompetent person should receive notice of an action."

- Ark. R. Civ. P. 17(b): "[n]o judgment shall be rendered against an incompetent [person] until after a defense by a guardian or guardian ad litem."

- Ark R. Civ. P. 55(b): "[n]o judgment of default may be entered against an incompetent person."

Process of Appointing Guardian ad Litem:

- AR Code § 28-1-111(b): "[t]he appointment of a guardian ad litem may be made by the clerk of the court at any time after the initiation of a proceeding by the filing of a petition, subject to the approval of the court."

- Ark. R. Civ. P. 17(b): "any interested party may make an application for the appointment of a guardian ad litem."

Delaware

- A guardian ad litem will be appointed upon verified petition of the proposed guardian, the child, or some other party, setting forth such infancy or incompetency; that there is no general guardian or trustee within the State, or that such guardian or trustee has an interest in the cause. For special cause shown, the Court may upon application permit an infant to file or defend an action in the

infant's own name. Further proof of the infancy or incompetency, including the production of the infant or incompetent person, may be ordered by the Court. *D.G. v. W.D.P.*, Nos. CN99-11611, 00-6007, 2002 Del. Fam. Ct. LEXIS 75, at *1 n.2 (Fam. Ct. Apr. 4, 2002)

Determination of Incompetence:

- In order to declare a party incompetent, the court must find that the party is impaired to the extent that the party lacks the ability to make or communicate reasonable judgment as to personal decisions and does not understand the nature of the pending matters.

- No Delaware statute or case law sets the standard for the court to determine whether a party's mental competency is restored. However, it may reasonably be inferred from the line of cases establishing the standard for determining a party incompetent, that a party may restore his or her competency by inverting the standard for adjudicating a party incompetent. In order to restore one's legal competency, the party must establish that he or she has the ability to make or communicate reasonable judgment as to personal decisions and does understand the nature of the pending matters. *S.M. v. M.M.*, Nos. CS06-02731, 11-39276, 12-10283, 2012 Del. Fam. Ct. LEXIS 89, at *1 (Fam. Ct. Sep. 12, 2012)

Due Process Rights:

- With regard to an indigent parent's right to have counsel appointed at State expense, the Delaware Supreme Court's construction of the Delaware Constitution's mandate for due process "according to the very right of the cause" Del. Const. art. I, § 9, is consistent with the flexible standards of due process guaranteed by the United States Constitution. In a termination of parental rights proceeding, the Due Process Clause of U.S. Const. amend. XIV requires that trial courts determine whether or not to appoint counsel on a case-by-case basis. In a termination proceeding, a parent's due process right to the appointment of counsel guaranteed by the Delaware Constitution is also decided on a case-by-case basis.

- This "case-by-case" analysis, under both the United States and Delaware Constitutions, requires an examination of the following factors: (1) the private interest that will be affected by the official action; (2) the risk that there will be an erroneous deprivation of the interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government interest involved, including the added fiscal and administrative burdens that addition or substitute procedure would require. *Moore v. Hall*, 62 A.3d 1203, 1206 (Del. 2013).

Process of Appointing Guardian ad Litem:

- Pursuant to Fam. Ct. R. Civ. P. 17(b): a party may petition for a guardian ad litem. The proposed guardian or some other party shall petition the court to be appointed as a guardian ad litem. A guardian ad litem need not be an attorney. A hearing is required before a party may be adjudged incompetent.

Florida:

Fla. R. Civ. P. 1.210(b): "[a] minor or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad

litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the proper for the protection of the minor or incompetent person."

Determination of Incompetence:

- Fla. Stat. § 744.102(5) (1987): "any person who, because of minority, mental illness, mental retardation, senility, excessive use of drugs or alcohol, or other physical or mental incapacity, is incapable of either managing his property or care for himself, or both."

Due Process Rights:

- Under Florida law, appointment of a guardian ad litem, does not require an adjudication of incompetence or determination of incapacity pursuant to the Florida Guardianship Law. Rather, the court faced with protecting the rights of the alleged incompetent is authorized to made the determination of incompetence. Mem. of Law in Support of Am. Mot. for Confirmation of Status of ___ as Next Friend of Debtor, p. 262, *In re Debtor* (Bankr. M.D. Fla.); *see also Paul v. Gonzalez*, 960 So. 2d 858, 862 (Dist. Ct. App. 2007).

- The appointment of a guardian ad litem under such circumstances does not act as an adjudication of incompetence. *Peppard v. Peppard*, 198 S0. 2d 68, 69 (Fla. Dist. Ct. App. 1967).

- It is a denial of due process to dismiss the claim of a person who is incompetent without the presence of someone in the case able to prosecute or, at a minimum, prevent dismissal for lack of prosecution. *Paul v. Gonzalez*, 960 So. 2d at 862.

- The incompetent person must be read or served a copy of the summons and petition, and the person's guardian or other person in whose care or custody the person may be must also receive service. *Drake v. Wimbourne*, 112 So. 2d 27, 28 (Fla. Dist. Ct. App. 1959).

- The primary purpose of a guardian ad litem is to advocate for the best interests of the incompetent person in a legal proceeding. Even with the best interests in mind, however, a guardian ad litem cannot stand in the exact shoes of an incompetent defendant...the respondent has a due process right to be competent to challenge the facts underlying hearsay evidence...claims raising purely legal issues that are of record and factual claims that do not require the defendant's input may proceed. *In re Branch*, 890 So. 2d 322, 328 (Dist. Ct. App. 2004).

Process of Appointing Guardian ad Litem:

- Fla. R. Prob. & Guardianship P. R. 5.120(a): "[a]t any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of an incompetent person. . .no process need be served upon him, but he shall appear and defend as directed by the court."

- FRPGP R. 5.120(b): "[t]he petition for appointment of a guardian ad litem shall be verified. . ."

- FRPGP R. 5.120(c): "[w]ithin ten days after appointment, the petitioner shall deliver or mail conformed copies of the petition for appointment of a guardian ad litem and order to any guardian or person having legal custody of the minor or incompetent."

Georgia:

O.C.G.A. § 9-11-17(c) provides: Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may bring or defend an action on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may bring an action by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Determination of Incompetence:

- In a competency proceeding, a defendant has the burden of proving incompetency by a preponderance of the evidence.

- The constitutional test for competency seeks to determine whether the defendant is capable of understanding the nature and object of the proceedings, whether he comprehends his own condition in reference to such proceedings and whether he is capable of rendering his counsel assistance in providing a proper defense. *Tiegreen v. State*, 314 Ga. App. 860, 860, 726 S.E.2d 468, 470 (2012).

Due Process Rights:

- A competency hearing should be held, and the defendant has the burden of proving incompetence by a preponderance of the evidence. *See Tiegreen v. State*, 314 Ga. App. 860.

- The court shall appoint a guardian ad litem if incompetence is proven by a preponderance of the evidence. *Id.*

Process of Appointing Guardian ad Litem:

- Pursuant to O.C.G.A. § 9-11-17(c), a court shall appoint a guardian ad litem for incompetent person as it deems proper for the protection of such person. *In the Interest of N. S. E.*, 293 Ga. App. 171, 171, 666 S.E.2d 587, 587 (2008)

Illinois:

- Rule 19.01: A Guardian ad Litem may be appointed as authorized by statute when necessary to protect the interest of a person who is, or is alleged to be a person under legal disability. . .

Determination of Incompetence:

- 5 ILCS 70 § 1.06: a person under legal disability means "a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his or her person or estate, or (b) is a person with mental illness or is a person with developmental disabilities and who because of his or her mental illness or developmental disability is not fully

able to manage his or her person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his or her estate as to expose himself or herself or his or her family to want or suffering."

Due Process Rights:

- Rule 215: In any action in which the physical or mental condition of a party or of a person in the party's custody or legal control is in controversy, the court upon notice and on motion made within a reasonable time before the trial, may order such party to submit to a physical or mental examination by a licensed professional in a discipline related to the physical or mental condition which is involved. The motion shall suggest the identity of the examiner and set forth the examiner's specialty or discipline.

- Hearing and an opportunity to be heard must be held on the motion.

Process of Appointing Guardian ad Litem:

- Rule 19.01: A Guardian ad Litem may be appointed as authorized by statute when necessary to protect the interest of a person who is, or is alleged to be a person under legal disability. The Guardian ad Litem shall have such qualifications as the Court shall determine or as required by statute.

Indiana:

Ind. R. Trial P. 17(c): "[i]f an infant or incompetent person is not represented, or is not adequately represented, the court shall appoint a guardian ad litem for him. . .[t]he court shall make such other orders as it deems proper for the protection of such parties or persons."

Determination of Incompetence:

- Whether the trial court is reasonably convinced that a party litigant cannot understand and comprehend the significance of the legal proceedings and the effect and relationship of such proceedings in terms of the best interest of such party litigant. *Ramos v. Robertson's Apartments*, No. 71A03-1203-SC-107, 2012 Ind. App. Unpub. LEXIS 1436, at *5 (quoting 53 Am. Jur. 2d *Mentally Impaired Persons* § 162 (2012)).

Due Process Rights:

- The general rule is that an incompetent person is not required to have or appear by a guardian [ad litem] until such time as the trial court is aware of the person's [incompetence]. *Brewer v. Brewer*, 403 N.E.2d 352, 355 (Ind. Ct. App. 1980). The decision whether to appoint a guardian ad litem is left to the trial court's discretion. *See id.*

- The trial judge does not abuse his or her discretion in not appointing a guardian ad litem, if the person is adequately represented by counsel and suffered no prejudice. *Id.*

- Ind. R. Trial P. 4.2(B): "[s]ervice shall be made upon an incompetent person's next friend or guardian ad litem. If there is no next friend or guardian ad litem, service shall be made upon a court-appointed representative."

- Ind. R. Trial P. 55: "[n]o judgment by default shall be entered against a person known to be incompetent unless represented in the action. . ."

Process of Appointing Guardian ad Litem:

- The decision whether to appoint a guardian ad litem is left to the trial court's discretion. The court can appoint a guardian ad litem any time it becomes aware of a person's incompetence. *Brewer v. Brewer*, 403 N.E.2d 352, 355 (Ind. Ct. App. 1980).

- Ind. R. Trial P. 17(c): "[g]uardian ad litems shall be subject to the rules applicable to guardians of the estates with respect to duties, terms of the bond required, accounting, compensation and termination. Ind. R. Trial P. 17(c)."

Iowa:

Iowa Code § 633.552: "[o]n petition and after notice and hearing, the court may appoint a guardian for an adult if the court finds by clear and convincing evidence that all of the following are true: [t]he decision-making capacity of the respondent is so impaired that the respondent is unable to care for the respondent's safety, or to provide for necessities such as food, shelter, clothing, or medical care without which physical injury or illness may occur.The appointment of a guardian is in the best interest of the respondent."

Determination of Incompetence:

- Competency is determined by whether a person possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged and not solely on whether the person is receiving mental-health treatment. Iowa Code § 229.27(2); *In the Interest of S.H.*, 922 N.W.2d 106 (Iowa Ct. App. 2018).

Due Process Rights:

- *In re Hruska's Guardianship*, 230 Iowa 668, 669, 298 N.W. 664, 664 (1941): Upon original appointment of either a temporary or permanent guardian for a person of unsound mind, notice to the alleged incompetent is necessary.

- Notice would be necessary even though the statute did not specifically provide therefor. Statutes authorizing such appointment without notice have been held invalid as in violation of due process. Iowa Code § § 12619, 12620 (1939).

Process of Appointing Guardian ad Litem:

- Iowa Code § 633.559: "[u]pon the filing of a petition, the court shall appoint counsel and a guardian ad litem . . . a guardian ad litem has previously been appointed. . .the court shall appoint the same guardian ad litem . . ."

Kentucky:

Ky. R. Civ. P. R. 17.03(2): "[a]ctions involving. . .persons of unsound mind shall be defended by the party's guardian or committee. If there is no guardian or committee or he is unable or unwilling to act or is a plaintiff, the court, or the clerk thereof. . . shall appoint a guardian ad litem to defend unless one has been previously appointed. . ."

Determination of Incompetence:

- A person of unsound mind a person whose mind has become so impaired or infirm by age, disease or other cause, as to be unable to take care of their own interests. *Howard v. Howards*, 87 Ky. 616, 621, 9 S.W. 411 (1888).

Due Process Rights:

- A person must be adjudicated incompetent to be appointed a guardian ad litem. In the absence of a legal adjudication of incompetence, the trial judge in a civil case has no duty to take steps on his own to protect the interest of any defendant. *Smith v. Flynn*, 390 S.W.3d 157, 159 (Ky. Ct. App. 2012) (citing *Goff v. Walker*, 809 S.W.2d 698, 699 (Ky. 1991)).

- Ky. R. Civ. P. R. 17.03(3): "[n]o judgments shall be rendered against a person of unsound mind until the party's guardian or committee or the guardian ad litem have made defense or filed a report stating that after careful examination of the case he is unable to make defense."

- Ky. R. Civ. P. R. 17.03(4): "[p]apers required to be served on a party shall be served on the person bringing or defending an action."

Process of Appointing Guardian ad Litem:

- Upon receipt of an affidavit stating that the defendant has no guardian, curator, or conservator residing in the state known to the affiant and request for an appointment of a guardian ad litem, the clerk can appoint a guardian ad litem from the roster of attorneys. *Kentucky Circuit Court Clerks' Manual*, ADMIN. OFF. OF CTS., https://kycourts.gov/resources/publicationsresources/Publications/ClerksManual.pdf (last visited Sep. 16, 2020).

- If a guardian ad litem was not appointed when the complaint was filed, then the court, not the clerk, appoints a guardian ad litem to defend the action. *Kentucky Circuit Court Clerks' Manual*, ADMIN. OFF. OF CTS., https://kycourts.gov/resources/publicationsresources/Publications/ClerksManual.pdf (last visited Sep. 16, 2020).

Louisiana:

The term used in Louisiana is not a guardian ad litem—it is a curator or guardian.

Art. 733(b): Mental incompetent: "[e]xcept as otherwise provided in Articles 732, 4431, and 4566, the curator appointed by a court of this state is the proper defendant in an action to enforce an obligation against a mental incompetent or an interdict. If an incompetent has no curator, but is interdicted, or committed to or confined in a mental institution, the action shall be brought against him, but the court shall appoint an attorney at law to represent him."

Determination of Incompetence:

- Art. 832. Mental incapacity to proceed, as defined by this Title, may be raised at any time. When the question of mental incapacity to proceed is raised, there shall be no further steps in the proceeding, except the filing of a, until counsel is appointed. . .

Due Process Rights:

- *State in Interest of S.A.D.*, 481 So. 2d 191, 191 (La. Ct. App. 1985): When counsel has been appointed, due process does not always require an opportunity to be present in court or the ability to communicate with counsel. As an example, judicial commitments of the mentally ill, La. Rev. Stat. Ann. § 28:50 et seq., § 28:54(C) and interdiction of incompetents, La. Code Civ. Proc. Ann. art. 4544, have been found to meet due process standards, even when physical presence is impractical or when the ability to communicate with counsel is lacking.

- As to the government's interest, the state has a significant "parens patriae" interest in the welfare of children residing in Louisiana. The court believes that the state's interest as "parens patriae," when such interest parallels the strong overriding interest of the children in having parental rights terminated (and only when the interests so parallel), is paramount to the parental right to be present at the termination hearing.

Process of Appointing Guardian ad Litem:

- La. C.C.P. Art. 5091(a),(b): "[t]he court shall appoint an attorney at law to represent the defendant, on the petition or ex parte written motion of the plaintiff, when: [a]n unemancipated minor or mental incompetent who has no legal representative, and who may be sued through an attorney at law appointed by the court to represent him."

Maine:

Me. R. Civ. P. 17: "[t]he court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person. In any action in which there are or may be defendants who have been served only by publication and who have not appeared, the court may appoint an agent, guardian ad litem, or next friend to represent them."

Determination of Incompetence:

- M.R.S. § 3318-A: "A [party] is competent to proceed if they have: a rational as well as a factual understanding of the proceedings; and [a] sufficient present ability to consult with legal counsel with a reasonable degree of rational understanding."

Due Process Rights:

- Due process is a flexible concept that typically requires consideration of a number of factors, including the importance of the individual's interest, the potential for governmental error, and the magnitude of the state's interest. The constitutional requirement of due process is satisfied by the

application of a preponderance of the evidence standard in guardianship proceedings. *Guardianship of Hughes,* 1998 ME 186, ¶ 1, 715 A.2d 919, 920.

- Parties must be given notice and be given an opportunity to be heard upon application of a guardian ad litem. *See* Me. R. Guardians Ad Litem Rule 4.

Process of Appointing Guardian ad Litem:

- Me. R. Guardians Ad Litem Rule 4: "[a] party may file a motion for the court to appoint a guardian ad litem in proceedings to determine parental rights and responsibilities and guardianship of a minor pursuant to Title 18-C and in contested proceedings pursuant to Title 19-A, section 904, 1653, or 1803 in which a minor child is involved. The court may also appoint a guardian ad litem on its own motion after notice to the parties and an opportunity to be heard. The court's adjudication of a motion for appointment of a guardian ad litem shall be governed by 18-C M.R.S. § 1-111 or 19-A M.R.S. § 1507."

- "In a Title 19-A proceeding, any motion or request to the court for appointment of a guardian ad litem shall be filed no later than the conference with the court following the first scheduled mediation session or, if mediation is waived, 60 days after the first conference with the court. . ." *Id.*

Maryland:

Mass. R. Civ. P. R. 17(b): "[i]f an infant or incompetent person, or an incapacitated person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person, or an incapacitated person not otherwise represented in an action or shall make such other order as it deems proper. . ."

Determination of Incompetence:

- One who is unable to understand the nature of the legal proceeding and is unable to assist in the presentation of his or her case. *Adoption of Kirk,* 35 Mass. App. Ct. 533, 537, 623 N.E.2d 492 (1993).

Due Process Rights:

- The judge is under no mandate to appoint a guardian ad litem if there is no prior adjudication of incompetence. *Adoption of Kirk,* 35 Mass. App. Ct. 533, 536, 623 N.E.2d 492 (1993).

- At common law, an infant or an incompetent must be served like any other defendant, and service must precede the appointment of a guardian ad litem. Mass. R. Civ. P. R. 4 [Reporter's Notes].

- Mass. R. Civ. P. R. 55(b)(2): "[n]o judgment by default shall be entered against an infant or incompetent person or an incapacitated person unless represented in the action by a guardian, conservator, or other such representative who has appeared therein."

Process of Appointing Guardian ad Litem:

- A guardian ad litem should only be appointed if requested by motion or on the court's own motion. In either case, a guardian ad litem should only be appointed after a determination by a judge that one is needed. *Guardianship of Mentally Ill Person*, 397, Mass 93, 98 n.8 (1986).

Montana:

Mont. R. Civ. P. 17(c)(2): "a court must appoint a guardian ad litem, or issue another appropriate order, to protect a minor or incompetent person who is unrepresented in a civil action."

Determination of Incompetence:

- Mont. Code Ann. § 72-5-101(1): "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the person or which cause has so impaired the person's judgment that the person is incapable of realizing and making rational decision with respect to the person's need for treatment."

Due Process Rights:

- A competency hearing should be held to determine whether a guardian ad litem needs to be appointed under Rule 17(c). *In re Marriage of Tesch*, 199 Mont. 240, 246, 648 P.2d 293 (1982).

- Equity and public policy demand that an alleged incompetent person be present and represented at a competency hearing. *Id.*

- The District Court has an affirmative duty to assure that the rights of a party, who is alleged to be incompetent, are protected. *State ex rel. Perman v. Dist. Court*, 213 Mont. 130, 135, 690 P.2d 419 (1984).

- The fact that an individual is represented at a hearing by appointed counsel does not meet the requirements of Rule 17(c) if, in fact, the individual is incompetent. *In re R.A.D.*, 231 Mont. 143, 156-57, 753 P.2d 862 (1988).

Process of Appointing Guardian ad Litem:

- Mont. Code Ann. § 25-5-301(3): "[a] guardian ad litem for an insane or incompetent person can be made upon the application of a relative or friend of the insane or incompetent person or of any other party to the action or proceeding."

- A competency hearing should then be held to determine whether a guardian ad litem should be appointed. *In re Marriage of Tesch*, 199 Mont. at 246.

- Also, a judge can likely appoint a guardian ad litem sua sponte, since they have an affirmative duty to assure the rights of an alleged incompetent individual are protected. *State ex rel. Perman v. Dist. Court*, 213 Mont. at 135.

Michigan:

MCR. 2.201 (E) (c): "[i]f the minor or incompetent person does not have a conservator to represent the person as defendant, the action may not proceed until the court appoints a guardian ad litem, who is not responsible for the costs of the action unless, by reason of personal misconduct, he or she is specifically charged costs by the court. It is unnecessary to appoint a representative for a minor accused of a civil infraction."

Determination of Incompetence:

- MCR Rule 6.125: In determining competency the court relies on criminal procedures and having a mental competency hearing for incompetent in any situation. The issue must be raised by a motion.

Due Process Rights:

- MCR 2.201(c): . . . the action may not proceed until the court appoints a guardian ad litem.

- No additional due process rights are specified.

Process of Appointing Guardian ad Litem:

- MCR. 2.201(E)(2): Appointment of a next friend or guardian ad litem shall be made by the court as follows:

> (i) if the party is a minor 14 years of age or older, on the minor's nomination, accompanied by a written consent of the person to be appointed;
>
> (ii) if the party is a minor under 14 years of age or an incompetent person, on the nomination of the party's next of kin or of another relative or friend the court deems suitable, accompanied by a written consent of the person to be appointed; or
>
> (iii) if a nomination is not made or approved within 21 days after service of process, on motion of the court or of a party.

Mississippi:

Miss. Code Ann. § 65-1-315: "[t]he judge shall appoint guardians ad litem for these parties who are minors, incompetents, or other parties who may be under a disability and without general guardian."

Determination of Incompetence:

- The standard for assessing a defendant's competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him. *Magee v. State*, 914 So. 2d 729, 731 (Miss. App. 2000).

Due Process Rights:

- Mo. Rev. Stat. § 211.462.2 requires the appointment of a guardian ad litem for an incompetent or minor parent. *Rutledge v. C.S.* (In the Interest of C.D.), 27 S.W.3d 826, 827 (Mo. Ct. App. 2000).

- No additional due process rights are specified.

Process of Appointing Guardian ad Litem:

- Miss. Code Ann. § 65-1-315: "[t]he judge may make additional parties as he deems necessary to the complete determination of the proceeding and may enter such other orders, either in law or equity, as may be necessary to carry out the provisions of this article."

Missouri:

Rule 22: Guardians ad litem will be appointed in civil cases for unknown or incompetent parties, members of the Armed Forces in default, minors, and those confined to prison, as required by law. Fees for the guardian ad litem will be allowed and taxed as costs as deemed appropriate by the Court.

Determination of Incompetence:

- A mental examination is not required unless there is evidence or there are circumstances raising a reasonable doubt about the defendant's mental competence. The test is whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. *Barber v. State*, 564 S.W.2d 914, 915

Due Process Rights:

- The parent or guardian of the person of the child shall be notified of the right to have counsel, and if they request counsel and are financially unable to employ counsel, counsel shall be appointed by the court. Notice of this provision shall be contained in the summons. When the parent is a minor or incompetent the court shall appoint a guardian ad litem to represent such parent. *K.N.P. v. Greene Cty. Juvenile Office* (In the Interest of J.G.W.), 545 S.W.3d 928, 929 (Mo. Ct. App. 2018).

Process of Appointing Guardian ad Litem

- § 211.462: When the parent is a minor or incompetent the court shall appoint a guardian ad litem to represent such parent.

New Jersey:[3]

When a mentally incapacitated person is not represented by a guardian in a civil action, the court may appoint a guardian ad litem for the individual. *S.T. v. 1515 Broad St., LLC*, 242 N.J. 257*, 227 A.3d 1190, 1202 (2020) (not published in New Jersey Publisher) (citing Rule 4:26-2(a)).

[3] In New Jersey, a guardian ad litem is only appointed to determine if an adult guardianship is necessary before civil action can proceed.

The guardian ad litem's responsibility is to advise the court as to whether a formal competency hearing may be necessary and if so, to represent the alleged mentally incapacitated person at that hearing. *Id.* at 1202-03 (citing comment to Rule 4:26-2(b)).

Determination of Incompetence:

- A person who is impaired by reason of mental illness or intellectual disability to the extent that the individual lacks sufficient capacity to govern himself and manage his affairs. *S.T. v. 1515 Broad St., LLC*, 242 N.J. 257, 227 A.3d 1190, 1204 (2020) (quoting N.J.S.A. 3B:1-2).

Due Process Rights:

- When a guardian ad litem is appointed pursuant to Rule 4:26-2(b) to represent an individual who is "alleged" to be mentally incapacitated, the guardian ad litem's function is to inquire into the individual's alleged mental incapacity. The role of the guardian ad litem is to act as an independent investigator and inform the court on the subject of the client's mental capacity. *S.T. v. 1515 Broad St., LLC*, 242 N.J. 257, 227 A.3d 1190, 1203 (2020) (citing *In re M.R.*, 135 N.J. 155, 173-74, 638 A.2d 1274 (1994)).

- After completing its inquiry, the guardian ad litem submits a report to the court containing the results of the investigation and recommends whether a formal hearing should proceed under Rule 4:86—an action for guardianship of an alleged incapacitated individual. *Id.*

- A guardianship complaint, among other things, must include two affidavits from properly qualified medical professional, stating their opinions about "the extent to which the alleged incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs." *Id.* at 1204 (citing N.J.S.A. 3B:1-2).

- If the court is satisfied with the sufficiency of the complaint and supporting affidavits the court must (1) set a date for the hearing, give the alleged incapacitated person at least 20 days' notice of the hearing, and (3) advise the person that if he or she opposed the action, "they may appear either in person or by attorney and may demand a trial by jury. If the alleged incapacitated person is not represented by counsel, the court must appoint counsel. *Id.* at 1205 (quoting N.J.S.A. 3B:12-24; R.4:86-4(a)(7)).

Process of Appointing Guardian ad Litem:

- The court may appoint a guardian ad litem for an alleged mentally incapacitated person on its own motion or the motion of others. *S.T. v. 1515 Broad St., LLC*, 242 N.J. 257, 227 A.3d 1190, 1202 (2020) (quoting Rule 4:26-2(b)(2)-(4)).

New York:

A person judicially declared incompetent must appear [in civil actions] by their committees, conservators, or court-appointed guardians, or in default thereof or for good cause shown, then by guardian ad litem appointed by the court in which the action is pending. *Trotta by Tierney* v. Phelan, 162 Misc. 2d 853, 856, 615 N.Y.S. 2d 596 (Sup. Ct. 1994) (citing N.Y. CPLR 1201).

Determination of Incompetence:

- N.Y. Est Pow & Trust L § 1-2.9: "a person judicially declared to be incapable of managing his affairs."

Due Process Rights:

- N.Y. CPLR 1202(b): "[n]otice of a motion for appointment of a guardian ad litem for a person shall be served upon the guardian of his property, upon his committee or upon his conservator, or if he has no such guardian, committee, or conservator, upon the person with whom he resides. . ."

- N.Y. CPLR 1202(c): "[n]o order appointing a guardian ad litem shall be effective until a written consent of the proposed guardian has been submitted to the court together with an affidavit stating facts showing his ability to answer for any damage sustained by his negligence or misconduct."

- N.Y. CPLR 1203: "[n]o judgment by default may be entered against an infant or a person judicially declared to be incompetent unless his representative appeared in the action or twenty days have expired since appointment of a guardian ad litem."

Process of Appointing Guardian ad Litem:

- N.Y. CPLR 1202(a)(1)-(3): "[t]he court in which an action is triable may appoint a guardian ad litem at any stage in the action upon its own initiative or upon the motion of:
    1. An infant party if he is more than fourteen years of age; or
    2. A relative, friend or a guardian, committee of the property, or conservator; or
    3. Any other party to the action if a motion has not been made under paragraph one or two within ten days after completion of service."

North Dakota:

N.D.C.C. § 28-03-04: "[w]hen the defendant, at the time the action is commenced is a person of unsound mind, and no guardian or conservator has been appointed, the court shall appoint a guardian ad litem for the defendant for the purposes of the action."

Determination of Incompetence:

- N.D.C.C. § 30.1-26-01(2): A "person of unsound mind" is not defined in the North Dakota Century Code, but an "incapacitated person" is defined. An incapacitated person is: any adult person who is impaired by reason r of mental illness, mental deficiency, physical illness of disability, or chemical dependency to the extent that the person lacks capacity to make or communicate responsible decisions concerning that person's matters of residence, education, medical treatment, legal affairs, vocation, finance, or other matters, or which incapacity endangers the person's health or safety.

Due Process Rights:

- N.D.C.C. § 28-03-04: "[p]erson of unsound mind must be given personal notice of an application for the appointment of a guardian ad litem, and the notice must be given at least five days before a hearing on the application."

- N.D.C.C. § 28-03-04: "[t]he court should hold a hearing on the application."

- N.D.C.C. § 28-03-04: "[i]f deemed desirable and practicable, the court should order the person of unsound mind to appear personally for the hearing or to be brought in by the sheriff."

Process of Appointing Guardian ad Litem:

- It is within the district court's discretion to determine when it is appropriate to appoint a guardian ad litem. "[A] trial court may appoint a guardian ad litem on its own initiative at its discretion." *Murphy v. Murphy* (*In re Estate of Murphy*), 554, N.W.2d 432, 440 (N.D. 1996) (quoting *Ludwig v. Burchill*, 514 N.W.2d 674, 677 (N.D. 1994) (internal citation omitted)).

- N.D.C.C. § 28-03-04: "[a]ny party to the action or any relative or friend of the person of unsound mind may make an application for the appointment of a guardian ad litem."

Oklahoma:

12 Okl. St. § 2017(C): ". . . [t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

Determination of Incompetence:

- *Allen v. State*, 1998 OK CR 25, ¶ 1, 956 P.2d 918, 918: "Incompetent" or "incompetency" means the present inability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him or her and to effectively and rationally assist in his or her defense.

Due Process Rights:

- Upon the filing of an application for determination of competency, the court holds a hearing to examine the application and determine if sufficient facts are alleged to create "a doubt" as to the competency of the defendant. Okla. Stat. tit. 22, § 1175.3 91991). *Allen v. State*, 1998 OK CR 25, ¶ 1, 956 P.2d 918, 918.

- A guardian ad litem's appointment does not amount to an adjudication of incompetency but is merely a determination of the fact that the state of the record indicates the need for court intervention for a party's protection. It is an assertion of the court's inherent common-law equitable powers. Bratcher v. State (In re T.E.B.), 2001 OK CIV APP 70, ¶ 1, 24 P.3d 900, 901

Process of Appointing Guardian ad Litem:

- 10A Okl. St. § 1-4-306: "[a]fter a petition is filed, the court may appoint a guardian ad litem sua sponte or upon the request of another party to the action."

Rhode Island:

The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as the court deems proper for the protection of the infant or incompetent person. *Willner v. S. Cty. Hosp.*, 222 A.3d 1251, 1255 n.4 (R.I. 2020).

Determination of Incompetence:

- "Incompetent" or "incompetency" means mentally incompetent to stand trial. A person is mentally incompetent to stand trial if he or she is unable to understand the character and consequences of the proceedings against him or her or is unable properly to assist in his or her defense. *Mcmaugh v. State*, P.M. 86-2956, 1991 R.I. Super. LEXIS 128, at *1 (Super. Ct. May 21, 1991).

Due Process Rights:

- R.I. Gen. Laws § 33-22-17: "[w]hen before or at the hearing on any proceeding . . .the court determines that the interest of a person unborn, unascertained, or legally incompetent to act in his or her own behalf, is not fully represented, the court may appoint some competent and disinterested person to act as guardian ad litem, or next friend, for the person unborn, unascertained, or legally incompetent, and to represent his or her interest in the case."

- No additional due process rights specified.

Process of Appointing Guardian ad Litem

- Appointment of a guardian ad litem is within the trial court's discretion.

Virginia:

The provisions of Va. Code Ann. § 8.01-9(A) states that a suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court shall appoint some discreet and competent attorney-at-law as guardian ad litem to such defendant, whether such defendant shall have been served with process or not.

Determination of Incompetence:

- Code § 37.1-134: whether incompetent capable of managing own estate is a question of fact.

Due Process Rights:

- Code § 37.1-134.1 (Restoration of Competency) does not require additional findings mandated in initial determination of incompetency under Code §§ 37.1-128.01-128.04; good cause found for exclusion of incompetent during testimony in civil proceeding for restoration of competency and no denial of due process or abuse of discretion by Court. *Schmidt v. Goddin*, 224 Va. 474, 476, 297 S.E.2d 701, 702 (1982)

Process of Appointing Guardian ad Litem:

- Va. Code Ann. § 64.2-2003 § 16.1-266: On the filing of every petition. . . the court shall appoint a guardian ad litem to represent the interests of the respondent.

TAB 4

Rule 19. Extraordinary writs.

(a) Petition for extraordinary writ to a judge or agency; petition; service and filing. An application for an extraordinary writ referred to in Rule 65B, Utah Rules of Civil Procedure, directed to a judge, agency, person or entity shall be made by filing a petition with the clerk of the appellate court. Service of the petition shall be made on the respondent judge, agency, person, or entity and on all parties to the action or case in the trial court or agency. In the event of an original petition in the appellate court where no action is pending in the trial court or agency, the petition shall be served personally on the respondent judge, agency, person or entity and service shall be made by the most direct means available on all persons or associations whose interests might be substantially affected.

(b) Contents of petition and filing fee. A petition for an extraordinary writ shall contain the following:

(b)(1) A statement of all persons or associations, by name or by class, whose interests might be substantially affected;

(b)(2) A statement of the issues presented and of the relief sought;

(b)(3) A statement of the facts necessary to an understanding of the issues presented by the petition;

(b)(4) A statement of the reasons why no other plain, speedy, or adequate remedy exists and why the writ should issue;

(b)(5) Except in cases where the writ is directed to a district court, a statement explaining why it is impractical or inappropriate to file the petition for a writ in the district court;

(b)(6) Copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition;

(b)(7) A memorandum of points and authorities in support of the petition; and

(b)(8) The prescribed filing fee, unless waived by the court.

(b)(9) Where emergency relief is sought, the petition must comply with Rule 23C(b), including any additional requirements set forth by that subpart.

(b)(10) Where the subject of the petition is an interlocutory order, the petition must state whether a petition for interlocutory appeal has been filed and, if so, summarize its status or, if not, state why interlocutory appeal is not a plain, speedy or adequate remedy.

(c) Response to petition . The judge, agency, person, or entity and all parties in the action other than the petitioner shall be deemed respondents for all purposes. Two or more respondents may respond jointly. If any respondent does not desire to appear in the proceedings, that respondent may advise the clerk of the appellate court and all parties by letter, but the allegations of the petition shall not thereby be deemed admitted. Where emergency relief is sought, Rule 23C(d) shall apply.

Rule 20. Habeas corpus proceedings.

(a) **Application for an original writ; when appropriate**. If a petition for a writ of habeas corpus is filed in the appellate court or submitted to a justice or judge thereof, it will be referred to the appropriate district court unless it is shown on the face of the petition to the satisfaction of the appellate court that the district court is unavailable or other exigent circumstances exist. If a petition is initially filed in a district court or is referred to a district court by the appellate court and the district court denies or dismisses the petition, a refiling of the petition with the appellate court is inappropriate; the proper procedure in such an instance is an appeal from the order of the district court.

(b) **Procedure on original petition**.

(1) A habeas corpus proceeding may be commenced by filing a petition with the clerk of the appellate court or, in emergency situations, with a justice or judge of the court. For matters pending in the Supreme court, an original petition and seven copies shall be filed in the Supreme Court. For matters pending in the Court of Appeals, an original petition and four copies shall be filed in the Court of Appeals. The petitioner shall serve a copy of the petition on the respondent pursuant to any of the methods provided for service of process in Rule 4 of the Utah Rules of Civil Procedure but, if imprisoned, the petitioner may mail by United States mail, postage prepaid, a copy of the petition to the Attorney General of Utah or the county attorney of the county if imprisoned in a county jail. Such service is in lieu of service upon the named respondent, and a certificate of mailing under oath that a copy was mailed to the Attorney General or county attorney must be filed with the clerk of the appellate court. In emergency situations, an order to show cause may be issued by the court, or a single justice or judge if the court is not available, and a stay or injunction may be issued to preserve the court's jurisdiction until such time as the court can hear argument on whether a writ should issue.

(2) If the petition is not referred to the district court, the attorney general or the county attorney, as the case

TAB 5

Rule 16. Transfer of delinquency case for preliminary inquiry.

(a) When a minor resides in a county within the state other than the county in which the alleged delinquency occurred, and it appears that the minor qualifies for a nonjudicial adjustment pursuant to statute, the intake probation officer of the county of occurrence shall, unless otherwise directed by court order, transfer the referral to the county of residence for a preliminary inquiry to be conducted in accordance with Rule 15. If any of the following circumstances are found to exist at the time of preliminary inquiry, the referral shall be transferred back to the county of occurrence for filing of a petition and further proceedings:

(a)(1) if a minor, the child or the child's parent, guardian or custodian cannot be located or failed to appear after notice for the preliminary inquiry;

(a)(2) if a minor, the child or the child's parent, guardian or custodian declines an offer for a nonjudicial adjustment;

(a)(3) if a minor or the minor's custodian cannot be located or fails to appear after notice for the preliminary inquiry or the minor declines an offer for a nonjudicial adjustment;

(a)(4) there are circumstances in the case that require adjudication in the county of occurrence in the interest of justice; or

(a)(5) there are multiple minors involved who live in different counties.

(b) If the referral is not returned to the county of occurrence, a petition may be filed in the county of residence, and the arraignment and all further proceedings may be conducted in that county if the petition is admitted.

West's Utah Code Annotated
Title 78a. Judiciary and Judicial Administration (Refs & Annos)
Chapter 6. Juvenile Court Act (Refs & Annos)
Part 1. General Provisions (Refs & Annos)

U.C.A. 1953 § 78A-6-110
Formerly cited as UT ST § 78-3a-111

§ 78A-6-110. Venue--Transfer or certification to other districts--Dismissal without adjudication on merits

Currentness

(1) Proceedings in minor's cases shall be commenced in the court of the district in which the minor is living or is found, or in which an alleged violation of law or ordinance occurred.

(2) After the filing of a petition, the court may transfer the case to the district where the minor resides or to the district where the violation of law or ordinance is alleged to have occurred. The court may, in its discretion, after adjudication certify the case for disposition to the court of the district in which the minor resides.

(3) The transferring or certifying court shall transmit all documents and legal and social records, or certified copies to the receiving court, and the receiving court shall proceed with the case as if the petition had been originally filed or the adjudication had been originally made in that court.

(4) The dismissal of a petition in one district where the dismissal is without prejudice and where there has been no adjudication upon the merits shall not preclude refiling within the same district or another district where there is venue of the case.

Credits
Laws 2008, c. 3, § 376, eff. Feb. 7, 2008.

U.C.A. 1953 § 78A-6-110, UT ST § 78A-6-110
Current with laws through the 2020 Sixth Special Session. Some statutes sections may be more current, see credits for details.

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