

Caselaw and RPC Primer Regarding Alleged Incompetent Parents in Dependency and Termination of Parental Rights¹

What happens if there is a concern that a parent is incompetent? Opposing parties concerned about competency have a duty to bring it to the court's attention. *Flaherty v. Flaherty*, 50 Wash.2d 393 (1957). A court may appoint a guardian ad litem for a parent if he/she is found to be incompetent. *Graham v. Graham*, 40 Wash.2d 64 (1952). A party may request a competency hearing or the court may consider appointment of a guardian ad litem on its own motion. *Graham* at 67. However, an attorney who alleges a client is incompetent without first confirming the fact can be subject to attorney discipline. *Matter of Welfare F.M.O.*, No. 33339-6-III at 12 (Unpublished portion) (May 24, 2016) citing *In re Disciplinary Proceedings Against Eugster*, 166 Wn.2d 293, 322 (2009).

What duties do parents' attorneys have when they believe their client may be incompetent? The attorney, to the extent reasonably possible, should maintain a normal attorney client relationship with a diminished capacity client. Washington State Rules of Professional Conduct (RPC) 1.14. An attorney should take protective action on behalf of a client with diminished capacity; however, the attorney should take the most limited action that is possible given the circumstances. RPC 1.14, Comment [7]. An attorney is required to discuss competency with the client and seek the client's input about how to proceed. RPC 1.2(a). A client has the ultimate authority to determine representation and the lawyer's duty to abide by the diminished capacity client's decisions should be guided by referencing to RPC 1.14. RPC 1.2, Comment [1] and [4]. "[A] client with diminished capacity often has the ability to reach conclusions about matters affecting the client's own well-being." RPC 1.14, Comment [1]. "Loyalty and independent judgment are essential elements in the lawyer's relationship with the client." RPC 1.7, Comment [1]. Information relating to representation of a parent with diminished capacity is protected just as other parents' confidential information is protected. RPC 1.6. Given the duties of an attorney under the RPCs, an attorney representing the alleged incompetent parent will likely be reluctant to raise an issue of incompetency, especially given the impact such a finding could have on the outcome of the case and the client's stated goals.

Does a parent have to prove they are competent? No. An adult litigant is presumed to be competent. *Vo v. Pham*, 81 Wash.App. 781 (1996) citing *Binder v. Binder*, 50 Wash.2d 142 (1957). The burden to establish incompetency is on the party raising the issue. *State v. Coley*, 180 Wn.2d 543(2014), *cert. denied*, 135 S. Ct. 1444 (2015). The court should exercise great caution in making such a determination. "There is something fundamental in the matter of a litigant being able to use his personal judgment and intelligence in connections with a lawsuit affecting him." *Graham* at 67. But the court has a duty to act to protect the rights of a litigant who appears to be incompetent. *Vo, supra*. A parent who objects (either on his/her own or through his/her attorney) to being found incompetent is entitled to a full and fair hearing with an opportunity to be heard. *Graham* at 68. An indigent parent is entitled to be represented by an attorney at the competency hearing to represent the parent's stated interests. RCW 13.34.090 (1) and RPC 1.2(a).

How is a finding of civil incompetency different than criminal incompetency? In a criminal context, an individual is incompetent when "a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15). An incompetent person cannot be tried, convicted nor sentenced for a crime so long as he/she is incompetent. RCW 10.77.050. A civil party litigant is incompetent when he/she cannot comprehend the

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significance of legal proceedings and the effect and relationship of such proceedings on his/her best interests. *Graham* at 66-67. A dependency or termination case continues even when a parent is found incompetent and such a finding can be used as evidence to help establish the parent is unfit. "It is entirely possible to for a person to be competent in a civil case and not competent in a criminal case – or vice versa." *F.M.O.* at 12.

What should the court consider at a competency hearing? The trial court has the inherent duty and power to make a determination as to the mental competency of an alleged incompetent by conducting a hearing, on the record, in which the parent has the opportunity to present evidence on the question of mental competency. *Vo v. Pham*, 81 Wash.App. 781 (1996). The standard of proof to establish incompetency is preponderance of the evidence. *State v. Coley* at 555 (2014). The court is given wide discretion to determine competency. *State v. Dodd*, 70 Wash. 2d 513, 514 (1967), The court may consider many things, including the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of others. *Id.*

What is the role of a guardian ad litem (GAL) if one is appointed? An incompetent individual can only appear through his/her GAL; the GAL has complete statutory authority to represent the incompetent person's interests. *In re Dill*, 60 Wash. 2d 148 (1962) (overturning termination finding where GAL was not present for hearing.); *In re Dependency of P.H.V.S.*, 186 Wash.App. 167 (2014) (court erred in allowing dependency fact finding to continue when GAL was not available to be present for the third day of trial). However, a GAL, just like an attorney for the client, cannot waive an incompetent client's substantial right. *In re Welfare of H.Q.*, 182 Wash. App. 541 (2014) (parent attorney could not waive right to relinquish; the parent must specifically authorize the waiver of a substantial right); *In re Houts*, 7 Wash.App. 476 (1972) (overturning termination where attorney consented to GAL being appointed for the parents and to parents being excluded from the hearing and noting "good motives do not excuse the violation of the parents' constitutional right to a hearing when parents are sought to be permanently deprived of their children."). A GAL must assume an adversarial posture protecting the incompetent's fundamental rights. *Matter of Guardianship of K.M.*, 62 Wash. App. 811 (1991). If a GAL does not actively investigate charges, consult meaningfully with the client, explain legal consequences of the proceeding, submit all relevant defenses or legal claims and perform other necessary functions, then the appointment of a GAL becomes a "'mere formality' and a meaningless gesture." *In re Quesnell*, 83 Wn. 2d 224 (1973), in part citing *Kroot v. Liberty Bank of Chicago*, 307 Ill.App.209 (1940).

Can a parent relinquish if he/she are incompetent? Maybe. Because parents' fundamental constitutional rights are at stake during a termination proceeding, parents have a substantive due process right to pursue relinquishment when it is a viable alternative. *In re Welfare of H.Q.* at 553 (incompetent parent entitled to hearing to determine whether he was competent to relinquish). A GAL for an incompetent parent should investigate and report to the court whether the relinquishment (including those involving RCW 13.34 dependents) was signed voluntarily and with an understanding of the consequences of the action. RCW 26.33.070(1).

What is the role of the parent's attorney if a GAL is appointed? The finding of incompetence terminates the attorney client relationship that previously existed between the parent's attorney and the incompetent parent. *Franks v. Douglas*, 57 Wash. 2d 583 (1961); *In re Houts* at 484. The GAL has the authority to retain the parent's attorney or request new counsel to represent the GAL, subject to direction by the court. *Graham* at 68.