***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**MEMORANDUM**

To: CAFL Appellate Panel Support Unit

From: [Law student intern – KH]

Date: Spring 2020

RE: Due process; right to counsel – competency to assist

**Memorandum**

1. **Questions Presented**
2. Is it mandatory for counsel to ask for a competency hearing for a client that is not competent to assist counsel?
3. Are counsel required to ask for a GAL/next friend when a client is not competent to assist counsel?
4. **Competency Hearings**
5. *Massachusetts Case Law*
6. Criminal Proceedings

Under Mass. Gen. Laws Ann. ch. 123, § 15, “whenever a court of competent jurisdiction doubts whether a defendant in a criminal case is competent to stand trial . . . it may at any stage of the proceedings . . . order an examination of such defendant to be conducted . . . .” Mass. Gen. Laws Ann. ch. 123, § 15 (West 2001). The language utilized within the statute places no limit on the time in which a competency examination must be done. *Commonwealth v. Conaghan*, 433 Mass. 105, 110 (2000). Additionally, the statute uses the language “may” and therefore does not make such examination required for counsel to request. *Id.* at § 15. However, although § 15 does not require the order of a competency examination, when there are doubts as to the competency of a defendant, case law has expanded on the issue of whether a competency hearing is required in a criminal proceeding.

In 1960, the United States Supreme Court, in *Dusky,* addressed when a competency hearing must be held in criminal proceedings. *Commonwealth v. Dusky*, 363 U.S. 402 (1960). The Court established that a competency hearing must be held where there exists doubt as to whether the defendant is competent to stand trial. *Commonwealth v Crowley,* 393 Mass. 393, 399 (1984) (citing *Commonwealth v. Dusky*, 363 U.S. 402 (1960). Doubt exists when there is a question as to whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him.” *Id.* at 398. If there is sufficient reason to doubt the defendant’s competency, a judge must raise the question *sua sponte*. *Pate v. Robinson,* 383 U.S. 375, 385 (1966). Massachusetts has utilized these rulings when faced with due process challenges involving competency hearings. In cases such as *Conaghan* and *Robbins,* the SJC has determined that a judge must order a competency hearing in criminal proceedings when evidence supports a substantial question of possible doubt. *Commonwealth v. Robbins,* 431 Mass. 442, 448 (2000).

Additionally, Massachusetts has also addressed whether it is the responsibility of the attorney to request a competency hearing and not solely the requirement of a judge. *Commonwealth v. A.B.,* 72 Mass. App. Ct. 10 (2008). Here, the court ruled that the failure of an attorney to request a competency determination by the judge was ineffective representation because the attorney failed to present evidence of incompetency to the judge. If the attorney had presented such evidence, it would have presented a substantial question of possible doubt as to the competency of the defendant to stand trial, which would have required the judge to raise the question *sua sponte*. *Id.* at 17. Thus, *A.B.* holds that an attorney may be required to request a competency hearing if there is sufficient evidence that has not been presented to a judge where such evidence would require a judge to raise the question themselves. *See id.*

1. Civil Proceedings

In civil proceedings, competency hearings are required only where they rise to the level of protecting such fundamental rights that competency hearings in criminal proceedings protect. *Schwab v. Boston Mun. Ct.,* CIV.A. 06-0964, 2007 WL 2204838, at \*3 (Mass. Super. Apr. 26, 2007) (citing *Commonwealth v. Knowlton,* 378 Mass. 479, 480 (1979)). When determining whether a competency hearing is necessary, one must look at the nature of the right the State seeks to circumscribe and whether that right is precious enough to warrant greater protection in a civil proceeding. *Knowlton,* 378 Mass. at 487. In *Knowlton*, the defendant was determined to be a sexually dangerous person (SDP). *Id.* at 480. The defendant appealed and argued that on the day of the SDP proceeding he should have been allowed a competency hearing prior to any further proceedings. *Id.* at 482. The court held that in both the conduct and the disposition of an SDP hearing, if there is a substantial question as to a defendant’s mental competence, the judge must hold a hearing to assess the competence of the defendant before proceeding with the SDP hearing.

The rule in *Knowlton* that requires looking at the nature of the right the State seeks to circumscribe in order to determine if that right warrants greater protection in a civil proceeding, has continued to be cited to and utilized in various SDP proceedings but has not currently been cited by other civil proceedings. *See Commonwealth v. Travis,* 372 Mass. 238 (1977); *In re Floyd J. Andrews, Jr.,* 368 Mass. 468 (1975). Ultimately, an SDP proceeding results in the civil commitment of a defendant and thus the defendant’s liberty rights in such a proceeding are seen as a right that warrants great protection in this civil proceeding as those in criminal proceedings.

Although most civil proceedings involve an SDP proceeding, under *Troxel,* it was determined that parents have a fundamental right to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville,* 530 U.S. 57 (2000); S*ee also Stanley v. Illinois,* 405 U.S. 645, 651 (1972). One could make the argument using the *Knowlton* rule that a termination of parental rights or adoption proceeding could provoke an important fundamental right in which the State seeks to circumscribe, thus warranting greater protection as given in criminal proceedings. Ultimately, however, there is no specific case law asserting this kind of argument. Therefore, one should look to other states and how they have handled child welfare cases and their requirements for competency hearings in such cases.

1. *Out of State Case Law*
2. Indiana

Sabrina Daniel’s son was born in February of 2007. *In re E.D.,* 902 N.E.2d 316, 317 (Ind. Ct. App. 2009). Several days following the birth, DCS filed a petition alleging the child was in need of services due to the mother’s bizarre behavior and her untreated mental health issues.[[1]](#footnote-1) *Id.* In June 2007, the trial court found the child to be a CHINS and the following month filed a petition to terminate the mother’s parental rights.[[2]](#footnote-2) *Id.* In March of 2008, the mother’s counsel was granted a motion to continue because she did not believe the mother could provide informed consent to adoption. *Id.* The termination hearing was held in July 2008 and at this time mother’s counsel asked to continue the hearing based on the assertion that mother was unable to assist in her defense. *Id.* The trial court denied this motion and proceeded with the hearing in which DCS and the GAL called witnesses and the mother’s counsel was able to cross examine—but the mother did not present any evidence. *Id.* at 319. This resulted in the termination of the mother’s parental rights. *Id.*

On appeal, the mother argued that she was denied due process and that her inability to assist in her defense should be treated the same as a criminal defendant that is found incompetent. *Id.* at 320. However, the due process safeguard afforded to a defendant in a criminal trial are not applicable to a parent in a civil termination proceeding. *Id.* at 322. However, the court noted that the process due to a parent in a termination proceeding is explained by *In re C.C.* The nature of the process due in a termination of parental rights proceeding turns on the balancing of three factors: (1) the private interests affected by the proceeding, (2) the risk of error created by the State’s chosen procedure, and (3) the countervailing governmental interest supporting use of the challenged procedure. *In re C.C.,* 788 N.E.2d 847, 852 (2003). This test is parallel to that used in *Matthews* when determining the process due prior to the termination of disability benefits*. Matthews v. Eldridge,* 424 U.S 319 (1976).

In utilizing this three factor test from *In re C.C.*, the court stated that in termination proceedings both the private interests of the mother in the accuracy and justice of the proceeding and the State’s parens patriae interest in protecting the welfare of the child are both substantial and significant. *Id.* However, when looking at the risk of error, it was stated that delays in the termination case imposed significant costs on the governmental—as well as costs to the lives of the children. *Id.* at 322.Delaying the termination proceedings is also contrary to the proceeding’s purpose of protecting the child and attempting to achieve stability and permanency for the child. *Id.* Moreover, the mother’s rights were not significantly compromised because she was allowed to appear via telephone, was represented by counsel, was provided an opportunity to cross examine witnesses, and had the opportunity to introduce evidence, which she declined to do. *Id.* Thus, the risk of error caused by the trial court’s denial of the continuance request was minimal and therefore did not deny the mother due process when it denied said request. *Id.*

1. Connecticut

Connecticut has faced the question of whether competency hearings are required in child welfare cases, specifically termination of parental rights. *In re Alexander V*., 223 Conn. 557 (1992). Here, the Court utilized the three *Matthews* factors and concluded that due process requires a hearing to be held to determine competency of a parent in a termination case. *Id.* at 560. However, the Court restricted their holding by also asserting that due process requires a competency hearing in all termination cases but only when: (1) the parent's attorney requests such a hearing, or (2) in the absence of such a request, the conduct of the parent reasonably suggests to the court, in the exercise of its discretion, the desirability of ordering such a hearing *sua sponte*. *Id.* at 566. In either situation, the standard for the court to employ is whether the record before the court contains “specific factual allegations that, if true, would constitute substantial evidence of mental impairment. *Id.* Moreover, in *In re Kaleb H.*, the Connecticut Supreme Court utilized this due process requirement of a competency hearing and held that a judge may decline a competency evaluation if there are not specific factual allegations that would constitute substantial evidence of mental impairment. *In re Kaleb H.,* 306 Conn. 22 (2012).

1. Texas

Currently, there is no Texas authority which would permit a trial court to halt termination proceedings due to the incompetency of the parent. *In re R.M.T.,* 352 S.W.3d 12, 18 (2011). In *In re E.L.T,* the court was confronted with the issue of whether an allegedly incompetent mother was entitled to a competency hearing prior to a termination of parental rights proceeding. *In re E.L.T.,* 93 S.W.3d 372. The mother had not been appointed a GAL or attorney ad litem, and there was no finding by any court that the mother was incompetent. *Id.* at 375. At the time of trial, the mother’s counsel requested a competency evaluation and a continuance; however, the court denied the motion and affirmed that decision because the motion was not in writing, and unverified, and due to the lack of authority in which a family court proceeding can be halted due to incompetency. *Id*. The court noted that the relevant sections of the Texas Family Code do not prescribe a competency standard that a parent must meet before participating in hearing or trial. *Id.*

In contrast, in *In re R.M.T*., the father was represented by a GAL and attorney ad litem, another court had previously and fairly recently found him incompetent to stand trial in his criminal case, and his incompetency persisted at the time of the parental rights termination proceeding. 52 S.W.3d 12, 18 (2011). The father moved for a continuance alleging his incompetence as the reason. *Id.* at 16. However, in utilizing the *Matthews* factors, the court found that it was not required to provide a competency hearing prior to the parental rights termination hearing as he was accorded all process due to him in this type of proceeding. *Id.* at 23.

1. **GAL Appointment**
2. *Massachusetts Case Law*

Mass. Gen. Laws ch. 190B § 1-404 states that “if, in a formal proceeding involving trusts or estates of decedents, minors, protected persons or incapacitated persons . . . , a minor, a protected person, an incapacitated person or a person not ascertained or not in being may be or may become interested in any property, real or personal or, in the enforcement or defense of any legal rights, the court in which any action, petition or proceeding of any kind relative to or affecting any such estate or legal rights is pending may . . . a suitable person to appear and act therein as guardian ad litem or next friend of such . . . incapacitated person.” Mass. Gen. Laws ch. 190B §1-404 (West 2012). If a court determines that an interest is not represented or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem to receive notice, give consent and otherwise represent, bind and act on behalf of an incapacitated individual. Mass. Gen. Laws ch. 203E §305 (West 2012).

In *Adoption of Kirk,* parents’ counsel moved the court for appointment of a GAL on the basis that the parents both suffered from mental illnesses. *Adoption of Kirk,* 35 Mass. App. Ct. 533, 535 (1993). However, the judge denied this request and entered a decree granting permanent custody of the child to the department and dispensing with the consent of either parent to the adoption of the child on any petition sponsored by the department. *Id.* In this instance, the Probate Court judge was not required to appoint a GAL for the parents, even though evidence presented at trial revealed each parent suffered from a diagnosed mental illness. *Id.* at 536.

In making this ruling, the court applied a previous statute no longer in place, which permitted appointment of a GAL for a person under disability whenever a determination of mental incompetence has been made. *Id.* In addition, the court utilized the generally accepted view that where no adjudication of incompetency has been made, failure to appoint a GAL is not error if no special reason is shown to the contrary. *Id.* Moreover, the court held that absent a request for a competency hearing, the court must determine whether anything at trial reasonably raised substantial question of possible doubt about the parents’ competence. *Id.* at 37. In doing so, the court found that there was nothing in the parents’ testimony which raises such a question. Thus, there was no evidence to find that either parent required the additional assistance of a GAL. *Id.* at 538.

Because Massachusetts statute underwent a change fairly recently, there is not recent case law interpreting said statute in regard to requesting or the court ordering a hearing to determine the appointment of a GAL. Based on this, it could be beneficial to utilize other states and some of their rulings in order to better support an argument that the court may have been required to appoint a GAL. However, some states seem to have specific statutes themselves; thus, one should look into what that specific state’s statute allows and how similar it is to that of Massachusetts.

1. *Out of State Case Law*
2. California

In a dependency case, also known as a termination of rights case, a parent who is mentally incompetent must appear by a GAL. *In re James F.,* 42 Cal. 4th 901, 910 (2008). The GAL so appearing for any person who lacks legal capacity to make decisions shall have power, with the approval of the court in which the action or proceeding is pending, to compromise the same, to agree to the order or judgment to be entered therein for or against the ward or conservatee, and to satisfy any judgment or order in favor of the ward or conservatee or release or discharge any claim of the ward or conservatee pursuant to that compromise. Cal. Civ. Proc. Code Ann. § 372 (West). The effect of the GAL is to transfer direction and control of the litigation from the parent to the GAL. *In re James F.,* 42 Cal. at 910.

To determine whether a parent is mentally incompetent, the test is whether the parent has the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case. *Id*. at 910*.* Before appointing a GAL to represent a parent in such a proceeding, the court must hold an informal hearing at which the parent has an opportunity to be heard. *Id.* At this time, either the court or counsel should explain to the parent the purpose of the GAL and the grounds for believing that the parent is mentally incompetent. *Id.* If the court appoints a GAL, the record must contain substantial evidence of the parent’s incompetence. *Id.* Ultimately, this evidence can either come from the parent’s counsel or the court themselves as either can explain the grounds for believing the parent is incompetent. *Id.*

1. Arizona

Arizona defines a GAL as a person appointed by the court to protect the interest of a minor or an incompetent in a particular case before the court. Ariz. Rev. Stat. Ann. § 8–531 (West 2014). Arizona amended statute [A.R.S. § 8–535](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000251&cite=AZSTS8-535&originatingDoc=I6f1a65290c1c11dba2529ff4f933adbe&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(D) in 1989, so that the juvenile court, pursuant to [A.R.S. § 8–535](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000251&cite=AZSTS8-535&originatingDoc=I6f1a65290c1c11dba2529ff4f933adbe&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(F), is no longer automatically required to appoint a GAL for the parent in a termination of rights proceeding. Ariz. Rev. Stat. Ann. [§ 8–535](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000251&cite=AZSTS8-535&originatingDoc=I6f1a65290c1c11dba2529ff4f933adbe&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(F) (West 2006). However, under § 8–535(F), the court is required to make the appointment when reasonable grounds exist, regardless of whether the motion is made by any party or the court’s own motion. *Id* § 8–535(F). When determining whether reasonable grounds exist for the appointment of a GAL, the court must distinguish between mentally ill and incompetent, the latter requiring appointment. *See Kelly R. v. Arizona Dept. of Economic Sec.,* 213 Ariz. 17, 21 (2006).

1. North Carolina

Under North Carolina statute, a guardian ad litem is defined as a guardian appointed pursuant to G.S. 1A-1, Rule 17. N.C. Gen. Stat. Ann. 1A-1, 17 (West). Section 7B-1101.1(c) of North Carolina General Statutes permits the district court, either on the motion of a party or on its own motion, to appoint a GAL for an incompetent person.  [N.C. Gen. Stat. Ann. § 35A-1101(7)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000037&cite=NCSTS35A-1101&originatingDoc=I7ea780b0186d11ea99759a7d72d9b23a&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_794b00004e3d1) (West). In *Matter of Z.V.A.* the court concluded that it was in the child’s best interests to terminate the mother’s parental rights. *Matter of Z.V.A.,* 835 S.E.2d 425, 428 (N.C. 2019). However, the mother argued on appeal that the court failed to address whether she required a GAL under state statute. *Id.* at 428. 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, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. *Id.*; *see also In re T.L.H.* 772 S.E.2d 451, 454 (N.C. 2015). Here, the court found that the mother demonstrated that she had developed adaptive skills to lessen the impact of her disability. *Matter of Z.V.A.,* 835 S.E.2d*.* at 429.Thus, evidence that supported the findings of fact did not suggest that the mother’s disability rose to the level of incompetence as to require the appointment of GAL to safeguard her interests. *Id.* at 429.

Additionally, in *In re T.L.H.,* the court was faced with the extent to which a trial court must inquire into a parent’s competence to determine whether it is necessary to appoint a GAL for that parent, despite the absence of any request that such a hearing by held or that a parental GAL be appointed. *In re T.L.H.,* 772 S.E.2d 451, 452 (N.C. 2015). The court ruled that there was sufficient evidence showing the mother was not incompetent to necessitate a competency inquiry to determine whether a GAL appointment was necessary. *Id.* at 455. In doing so, the court noted that previous courts have stated that a trial judge has a duty to properly inquire into the competency if a litigant in a civil trial or proceeding when circumstances are brought to the judge’s attention that raise a substantial question as to whether the litigant is incompetent. *Id.* However, the court’s decision and duty concerning whether to conduct an inquiry into a parent’s competency is also discretionary in nature. *Id.*

1. New York

A guardian ad litem, pursuant to New York statute, is defined as an attorney who will take steps with diligence and as deemed necessary to represent and protect the interests of the person under disability. N.Y. Surr. Ct. Proc. Act Law § 404 (McKinney). A GAL may be appointed by the court at any stage in the action upon its own initiative or upon the motion of a party, relative, friend or guardian, or any other party to the action. N.Y. C.P.L.R. 1202 (McKinney). Where there is a question of fact whether a GAL should be appointed, a hearing must be conducted; the failure to make such an inquiry once a meritorious question of a litigant’s competence has been raised requires remittal. *Matter of Jesten J.F.,* 167 A.D.3d 1527, 1528 (2018).

For instance, the mother in *Matter of Jesten* appealed from an order that terminated her parental rights with respect to her son on the ground of permanent neglect. *Id.* at 1527. Here, the court concluded that a meritorious question of the mother’s competence was raised and thus a competency hearing should have been required. *Id.* at 1528. Although the mother’s attorney did not specifically request the appointment of a GAL, the attorney informed the court that the mother was unable to assist in her own defense when she moved to strike the mother’s incoherent testimony. *Id.* This was sufficient to alert the court to the issue of the mother’s competence. *Id.* Thus, it was error for the court not to hold a hearing on whether a GAL should have been appointed for the mother. *Id.* at 1528.

However, when the record does not indicate that a party was incapable of understanding the proceedings, defending his or her rights, or assisting counsel, a court may not be required to hold a hearing to determine whether a GAL should be appointed. *In re Marie Z.Z.,* 140 A.D.3d 1216 (2016). This occurred in *In re Marie Z.Z.,* where a mother appealed a ruling that terminated her parental rights and transferred custody and guardianship of her child. *Id.* at 1217. The mother argued on appeal that the court erred in failing to appoint a GAL. *Id.* Neither the mother nor her attorney requested the appointment of a GAL at any point during the proceedings, given her mental illness. *Id.* Despite this, and the mother’s mental illness, the record does not indicate that the mother was incapable of understanding the proceedings, defending her rights, or assisting her counsel. *Id.* The mother gave coherent testimony in response to the allegations, she understood the severity of her mental illness and the importance of taking medication, and she defended her interactions with the child during supervised visits. *Id.* Because of these facts in the record, the court did not err in failing to *sua sponte* appoint a GAL for the mother during the proceedings. *Id.*

1. Indiana utilizes the terminology DCS, which is parallel to Massachusetts DCF. [↑](#footnote-ref-1)
2. Indiana uses CHINS terminology which refers to “child in need of services” as an equivalent to Massachusetts CRA, “child requiring assistance” [↑](#footnote-ref-2)