

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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HOUSE DRH60153-LUz-31 (02/12)

Short Title: Guardianship/Incompetency.

(Public)

Sponsors: Representative Bordsen.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO AMEND THE PROCEDURES FOR DETERMINING
INCOMPETENCY UNDER THE LAWS RELATING TO GUARDIANSHIP AS
RECOMMENDED BY THE HOUSE STUDY COMMITTEE ON STATE
GUARDIANSHIP LAWS.

The General Assembly of North Carolina enacts:

SECTION 1. The Revisor of Statutes shall substitute in Chapter 35A of the General Statutes, wherever they occur, the terms "incompetent", "incompetency", "competency", and "competent", respectively, with the terms "incapacitated", "incapacity", "legal capacity", and "not capacitated", respectively, unless the terms are otherwise amended by this act.

SECTION 2. G.S. 35A-1101 reads as rewritten:

"§ 35A-1101. Definitions.

When used in this Subchapter:

- (1) ~~"Autism" means a physical disorder of the brain which causes disturbances in the developmental rate of physical, social, and language skills; abnormal responses to sensations; absence of or delay in speech or language; or abnormal ways of relating to people, objects, and events. Autism occurs sometimes by itself and sometimes in conjunction with other brain functioning disorders.~~
- (2) ~~"Cerebral palsy" means a muscle dysfunction, characterized by impairment of movement, often combined with speech impairment, and caused by abnormality of or damage to the brain.~~
- (3) "Clerk" means the clerk of superior court.
- (4) "Designated agency" means the State or local human services agency designated by the clerk in the clerk's order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform

- 1 other functions as the clerk may order. A designated agency includes,
2 without limitation, State, local, regional, or area mental health, mental
3 retardation, vocational rehabilitation, public health, social service, and
4 developmental disabilities agencies, and diagnostic evaluation centers.
- 5 (5) ~~"Epilepsy" means a group of neurological conditions characterized by~~
6 ~~abnormal electrical-chemical discharge in the brain. This discharge is~~
7 ~~manifested in various forms of physical activity called seizures, which~~
8 ~~range from momentary lapses of consciousness to convulsive~~
9 ~~movements.~~
- 10 (6) "Guardian ad litem" means a guardian appointed pursuant to
11 G.S. 1A-1, Rule 17, Rules of Civil Procedure.
- 12 (7) ~~"Incompetent adult"~~"Incapacitated adult" means an adult or
13 emancipated minor who ~~lacks sufficient capacity to manage the adult's~~
14 ~~own affairs or to make or communicate important decisions~~
15 ~~concerning the adult's person, family, or property whether the lack of~~
16 ~~capacity is due to mental illness, mental retardation, epilepsy, cerebral~~
17 ~~palsy, autism, inebriety, senility, disease, injury, or similar cause or~~
18 ~~condition.~~is unable to receive and evaluate information or make or
19 communicate decisions to such an extent that the individual lacks the
20 ability, even with the use of appropriate technological assistance, to
21 meet essential requirements for physical health, safety, or self-care or
22 manage the individual's property or business affairs.
- 23 (8) ~~"Incompetent child"~~"Incapacitated minor" means a minor who is at least
24 17 1/2 years of age and ~~who, other than by reason of minority, lacks~~
25 ~~sufficient capacity to make or communicate important decisions~~
26 ~~concerning the child's person, family, or property whether the lack of~~
27 ~~capacity is due to mental illness, mental retardation, epilepsy, cerebral~~
28 ~~palsy, autism, inebriety, disease, injury, or similar cause or~~
29 ~~condition.~~who is unable to receive and evaluate information or make
30 or communicate decisions to such an extent that the individual lacks
31 the ability, even with the use of appropriate technological assistance,
32 to meet essential requirements for physical health, safety, or self-care
33 or manage the individual's property or business affairs.
- 34 (9) "Indigent" means unable to pay for legal representation and other
35 necessary expenses of a proceeding brought under this Subchapter.
- 36 (10) ~~"Inebriety" means the habitual use of alcohol or drugs rendering a~~
37 ~~person incompetent to transact ordinary business concerning the~~
38 ~~person's estate, dangerous to person or property, cruel and intolerable~~
39 ~~to family, or unable to provide for family.~~
- 40 (11) "Interim guardian" means a guardian, appointed prior to adjudication
41 of incompetence and for a temporary period, for a person who requires
42 immediate intervention to address conditions that constitute imminent
43 or foreseeable risk of harm to the person's physical well-being or to the
44 person's estate.

- 1 (12) ~~"Mental illness" means an illness that so lessens the capacity of a~~
2 ~~person to use self control, judgment, and discretion in the conduct of~~
3 ~~the person's affairs and social relations as to make it necessary or~~
4 ~~advisable for the person to be under treatment, care, supervision,~~
5 ~~guidance, or control. The term "mental illness" encompasses "mental~~
6 ~~disease", "mental disorder", "lunacy", "unsoundness of mind", and~~
7 ~~"insanity".~~
- 8 (13) ~~"Mental retardation" means significantly subaverage general~~
9 ~~intellectual functioning existing concurrently with deficits in adaptive~~
10 ~~behavior and manifested before age 22.~~
- 11 (14) ~~"Multidisciplinary evaluation" means an evaluation that contains~~
12 ~~current medical, psychological, and social work evaluations as directed~~
13 ~~by the clerk and that may include current evaluations by professionals~~
14 ~~in other disciplines, including without limitation education, vocational~~
15 ~~rehabilitation, occupational therapy, vocational therapy, psychiatry,~~
16 ~~speech and hearing, and communications disorders. The evaluation is~~
17 ~~current if made not more than one year from the date on which it is~~
18 ~~presented to or considered by the court. The evaluation shall set forth~~
19 ~~the nature and extent of the disability and recommend a guardianship~~
20 ~~plan and program.~~
- 21 (15) "Respondent" means a person who is alleged to be incompetent in a
22 proceeding under this Subchapter.
- 23 (16) "Treatment facility" has the same meaning as "facility" in
24 G.S. 122C-3(14), and includes group homes, halfway houses, and
25 other community-based residential facilities.
- 26 (17) "Ward" means a person who has been adjudicated incompetent or an
27 adult or minor for whom a guardian has been appointed by a court of
28 competent jurisdiction."

29 **SECTION 3.** G.S. 35A-1108 reads as rewritten:

30 **"§ 35A-1108. Issuance of notice.**

31 (a) Within five days after filing of the petition, the clerk shall issue a written
32 notice of the date, time, and place for a hearing on the petition, which shall be held not
33 less than 10 days nor more than 30 days after service of the notice and petition on the
34 respondent, unless the clerk extends the time for good cause, for preparation of a
35 ~~multidisciplinary professional evaluation as provided in G.S. 35A-1111, evaluation,~~ or
36 for the completion of a mediation.

37 (b) If a ~~multidisciplinary professional~~ evaluation or mediation is ordered after a
38 notice of hearing has been issued, the clerk may extend the time for hearing and issue a
39 notice to the parties that the hearing has been continued, the reason therefor, and the
40 date, time, and place of the new hearing, which shall not be less than 10 days nor more
41 than 30 days after service of such notice on the respondent.

42 (c) Subsequent notices to the parties shall be served as provided by G.S. 1A-1,
43 Rule 5, Rules of Civil Procedure, unless the clerk orders otherwise."

44 **SECTION 4.** G.S. 35A-1111 reads as rewritten:

1 **"§ 35A-1111. Multidisciplinary Professional evaluation.**

2 (a) To assist in determining the nature and extent of a respondent's
3 ~~disability, incapacity,~~ or to assist in developing an appropriate guardianship plan and
4 program, the clerk, ~~on his own motion or the motion of any party,~~ clerk may order that a
5 multidisciplinary professional evaluation of the respondent be performed. ~~A request for~~
6 ~~a multidisciplinary evaluation shall be made in writing and filed with the clerk within 10~~
7 ~~days after service of the petition on the respondent.~~ The clerk shall order a professional
8 evaluation upon the request of the respondent or the respondent's counsel or guardian ad
9 litem. The clerk may order that the respondent attend a professional evaluation for the
10 purpose of being evaluated.

11 (b) If a multidisciplinary professional evaluation is ordered, ~~the clerk shall name~~
12 ~~a designated agency and order it to prepare, cause to be prepared, or assemble a current~~
13 ~~multidisciplinary evaluation of the respondent.~~ a designated agency, physician,
14 psychologist, or other professional who is qualified to evaluate the respondent's alleged
15 incapacity shall examine the respondent. The agency shall file the evaluation shall be
16 filed with the clerk not later than 30 days after the agency receives the clerk's order. The
17 multidisciplinary evaluation shall be filed in the proceeding for adjudication of
18 incompetence, in the proceeding for appointment of a guardian under Subchapter II of
19 this Chapter, or both. Unless otherwise ordered by the clerk, the agency shall send
20 ~~copies~~ The agency shall provide copies of the evaluation to the petitioner and the
21 ~~counsel or guardian ad litem for the respondent not later than 30 days after the agency~~
22 ~~receives the clerk's order. The evaluation shall be kept under such conditions as directed~~
23 ~~by the clerk and its contents revealed only as directed by the clerk.~~ to the respondent or
24 the respondent's counsel or guardian ad litem. The evaluation shall not be a public
25 record and shall not be released except by order of the clerk.

26 (c) If a ~~multidisciplinary evaluation does not contain medical, psychological, or~~
27 ~~social work evaluations ordered by the clerk, the designated agency nevertheless shall~~
28 ~~file the evaluation with the clerk and send copies as required by subsection (b). In a~~
29 ~~transmittal letter, the agency shall explain why the evaluation does not contain such~~
30 ~~medical, psychological, or social work evaluations.~~ Unless otherwise directed by the
31 clerk, the evaluation shall contain: (i) a description of the nature, type, and extent of the
32 respondent's specific cognitive and functional limitations; (ii) an evaluation of the
33 respondent's mental and physical condition and, if appropriate, educational potential,
34 adaptive behavior, and social skills; (iii) a prognosis for improvement and a
35 recommendation as to the appropriate treatment or habilitation plan; and (iv) the date of
36 any assessment or examination upon which the report is based.

37 (d) ~~The clerk may order that the respondent attend a multidisciplinary evaluation~~
38 ~~for the purpose of being evaluated.~~

39 (e) ~~The multidisciplinary~~ If otherwise admissible, the professional evaluation
40 may be considered at the hearing for adjudication of ~~incompetence, incapacity,~~ the
41 hearing for appointment of a guardian under Subchapter II of this Chapter, or both."

42 **SECTION 5.** G.S. 35A-1112 reads as rewritten:

43 **"§ 35A-1112. Hearing on petition; adjudication order.**

1 (a) The hearing on the petition shall be at the date, time, and place set forth in the
2 final notice of hearing and shall be open to the public unless the respondent or his
3 counsel or guardian ad litem requests otherwise, in which event the clerk shall exclude
4 all persons other than those directly involved in or testifying at the hearing.

5 (b) The petitioner and the respondent are entitled to present testimony and
6 documentary evidence, to subpoena witnesses and the production of documents, and to
7 examine and cross-examine witnesses.

8 (c) The clerk shall dismiss the proceeding if the finder of fact, whether the clerk
9 or a jury, does not find the respondent to be incompetent.

10 (d) If the finder of fact, whether the clerk or the jury, finds by clear, cogent, and
11 convincing evidence that the respondent is ~~incompetent, incapacitated~~, the clerk shall
12 enter an order adjudicating the respondent ~~incompetent, incapacitated~~. ~~The~~ If the clerk is
13 the finder of fact, the clerk may shall include in the order findings on the nature and
14 extent of the ward's ~~incompetence, incapacity~~.

15 (e) Following an adjudication of ~~incompetence, incapacity~~, the clerk shall ~~either~~
16 ~~appoint~~ consider appointing a guardian pursuant to Subchapter II of this Chapter or, for
17 good cause shown, transfer the proceeding for the appointment of a guardian to any
18 county identified in G.S. 35A-1103. The transferring clerk shall enter a written order
19 authorizing the transfer. The clerk in the transferring county shall transfer all original
20 papers and documents, including the ~~multidisciplinary professional~~ evaluation, if any, to
21 the transferee county and close his file with a copy of the adjudication order and transfer
22 order.

23 (f) If the adjudication occurs in any county other than the county of the
24 respondent's residence, a certified copy of the adjudication order shall be sent to the
25 clerk in the county of the ward's legal residence, to be filed and indexed as in a special
26 proceeding of that county.

27 (g) Except as provided in G.S. 35A-1114(f), a proceeding filed under this Article
28 may be voluntarily dismissed as provided in G.S. 1A-1, Rule 41, Rules of Civil
29 Procedure."

30 **SECTION 6.** G.S. 35A-1116(b) reads as rewritten:

31 "(b) The cost of a ~~multidisciplinary professional~~ evaluation order ~~pursuant to~~
32 ~~G.S. 35A-1114~~ shall be assessed as follows:

- 33 (1) If the respondent is ~~adjudicated incompetent~~ adjudged incapacitated
34 and is not indigent, the cost shall be assessed against the respondent;
- 35 (2) If the respondent is ~~adjudicated incompetent~~ adjudged incapacitated
36 and is indigent, the cost shall be borne by the Department of Health
37 and Human Services;
- 38 (3) If the respondent is not ~~adjudicated~~ incompetent, adjudged
39 incapacitated, the cost may be taxed against either party, apportioned
40 among the parties, or borne by the Department of Health and Human
41 Services, in the discretion of the court."

42 **SECTION 7.** G.S. 35A-1120 reads as rewritten:

43 "**§ 35A-1120. Appointment of guardian.**

1 If the respondent is ~~adjudicated incompetent, adjudged incapacitated,~~ a guardian or
2 guardians ~~shall~~ may be appointed in the manner provided for in Subchapter II of this
3 Chapter."

4 **SECTION 8.** G.S. 35A-1130(c) reads as rewritten:

5 "(c) At the hearing on the motion, the ward shall be entitled to be represented by
6 counsel or guardian ad litem, and a guardian ad litem shall be appointed in accordance
7 with rules adopted by the Office of Indigent Defense Services if the ward is indigent
8 and not represented by counsel. ~~Upon motion of any party or the clerk's own motion,~~
9 ~~the~~ The clerk may order a multidisciplinary evaluation, professional evaluation of the
10 respondent pursuant to G.S. 35A-1111 upon motion of the respondent or the
11 respondent's counsel or guardian ad litem. The ward has a right, upon request by ~~him,~~
12 ~~his counsel, or his~~ the ward or the ward's counsel or guardian ad litem to trial by jury.
13 Failure to request a trial by jury shall constitute a waiver of the right. The clerk may
14 nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of
15 Civil Procedure, by entering an order for trial by jury on ~~his~~ the clerk's own motion.
16 ~~Provided, if~~ If there is a jury in a proceeding for restoration to ~~competency, capacity,~~ it
17 shall be a jury of six persons selected in accordance with the provisions of Chapter 9 of
18 the General Statutes."

19 **SECTION 9.** G.S. 35A-1202(13) is repealed.

20 **SECTION 10.** G.S. 35A-1210 reads as rewritten:

21 "**§ 35A-1210. Application before clerk.**

22 Any individual, corporation, or disinterested public agent may file an application for
23 the appointment of a guardian for an ~~incompetent-incapacitated~~ person by filing the
24 same with the clerk. The application may be joined with or filed subsequent to a petition
25 for the adjudication of ~~incompetence-incapacity~~ under Subchapter I of this Chapter. The
26 application shall set forth, to the extent known and to the extent such information is not
27 already a matter of record in the case:

- 28 (1) The name, age, address, and county of residence of the ward or
29 respondent;
- 30 (2) The name, address, and county of residence of the applicant, ~~his~~ the
31 applicant's relationship if any to the respondent or ward, and ~~his~~ the
32 applicant's interest in the proceeding;
- 33 (3) The name, address, and county of residence of the respondent's next of
34 kin and other persons known to have an interest in the proceeding;
- 35 (4) A general statement of the ward's or respondent's assets and liabilities
36 with an estimate of the value of any property, including any income
37 and receivables to which ~~he~~ the ward or respondent is entitled; ~~and~~
- 38 (4a) If a plenary guardianship is requested, the reasons why a limited
39 guardianship is inappropriate;
- 40 (4b) If a limited guardianship is requested, the powers that should be
41 granted to the guardian and the rights that should be retained by the
42 ward; and
- 43 (5) Whether the applicant seeks the appointment of a guardian of the
44 person, a guardian of the estate, or a general guardian, and whom the

1 applicant recommends or seeks to have appointed as such guardian or
2 guardians."

3 **SECTION 11.** G.S. 35A-1212 reads as rewritten:

4 **"§ 35A-1212. Hearing before clerk on appointment of guardian.**

5 (a) The clerk shall make such inquiry and receive such evidence as the clerk
6 deems necessary to determine:

7 (1) The nature and extent of the ~~needed guardianship;~~ward's need for a
8 guardian;

9 (1a) Whether the ward's needs can be met by means other than the
10 appointment of a guardian;

11 (2) The assets, liabilities, and needs of the ward; and

12 (3) Who, in the clerk's discretion, can most suitably serve as the guardian
13 or guardians.

14 If the clerk determines that the nature and extent of the ward's capacity justifies
15 ordering a limited guardianship, the clerk ~~may~~shall do so.

16 (b) ~~If a current multidisciplinary evaluation is not available and the clerk~~
17 ~~determines that one is necessary, the clerk, on his own motion or the motion of any~~
18 ~~party, may order that such an evaluation be performed pursuant to G.S. 35A-1111. The~~
19 ~~provisions of that section shall apply to such an order for a multidisciplinary evaluation~~
20 ~~following an adjudication of incompetence.~~If a professional evaluation has not been
21 performed, the clerk may order that a professional evaluation of the respondent be
22 performed pursuant to G.S. 35A-1111 upon the request of the respondent or the
23 respondent's counsel or guardian ad litem.

24 (c) The clerk may require a report prepared by a designated agency to evaluate
25 the suitability of a prospective guardian, to include a recommendation as to an
26 appropriate party or parties to serve as guardian, or both, based on the nature and extent
27 of the needed guardianship and the ward's assets, liabilities, and needs.

28 (d) If a designated agency has not been named pursuant to G.S. 35A-1111, the
29 clerk may, at any time he finds that the best interest of the ward would be served
30 thereby, name a designated agency."

31 **SECTION 12.** G.S. 35A-1215 reads as rewritten:

32 **"§ 35A-1215. Clerk's order; issuance of letters of appointment.**

33 (a) When appointing a guardian, the clerk shall enter an order setting forth:

34 (1) The nature of the guardianship or guardianships to be created and the
35 name of the person or entity appointed to fill each guardianship; and

36 (2) The powers and duties of the guardian or guardians, which shall
37 include, unless the clerk orders otherwise, (i) with respect to a
38 guardian of the person and general guardian, the powers and duties
39 provided under G.S. 35A, Article 8, and (ii) with respect to a guardian
40 of the estate and general guardian, the powers, and duties provided
41 under G.S. 35A, Article 9 and Subchapter III; and

42 (3) The identity of the designated agency if there is one.

1 (a1) The clerk may not enter an order appointing a guardian for an incapacitated
2 person unless the clerk finds that the ward's identified needs cannot be met adequately
3 by means other than appointment of a guardian.

4 (a2) The clerk shall grant to a guardian only those powers necessitated by the
5 ward's limitations and demonstrated needs and make appointive or other orders that
6 encourage the development of the ward's maximum self-reliance and independence.

7 (b) If the clerk orders a limited guardianship as authorized by G.S. 35A-1212(a),
8 the clerk may order that the ward retain certain legal rights and privileges to which the
9 ward was entitled before the ward was adjudged ~~incompetent~~incapacitated. Any order
10 of limited guardianship shall include findings as to the nature and extent of the ward's
11 ~~incompetence~~incapacity as it relates to the ward's need for a guardian or guardians.

12 (c) The clerk shall issue the guardian or guardians letters of appointment as
13 provided in G.S. 35A-1206."

14 **SECTION 13.** This act becomes effective October 1, 2008, and applies to
15 proceedings filed or pending on or after that date.