

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009**

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**HOUSE DRH30120-LL-111 (2/25)**

Short Title: Clarify Entitlement to Counsel/Appointment. (Public)

Sponsors: Representatives Goodwin and Ross (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED  
2 AN ACT TO MAKE CLARIFICATIONS TO THE ENTITLEMENT TO COUNSEL AND  
3 THE PROCEDURES FOR APPOINTMENT.

4 The General Assembly of North Carolina enacts:

5 **SECTION 1.** G.S. 35A-1116 reads as rewritten:

6 "**§ 35A-1116. Costs and fees.**

7 (a) Except as otherwise provided herein, costs shall be assessed as in special  
8 proceedings. Costs, including any reasonable fees and expenses of counsel for the petitioner  
9 which the clerk, in his discretion, may allow, may be taxed against either party in the discretion  
10 of the court unless:

11 (1) The clerk finds that the petitioner did not have reasonable grounds to bring  
12 the proceeding, in which case costs shall be taxed to the petitioner; or

13 (2) The respondent is indigent, in which case the costs shall be waived by the  
14 clerk if not taxed against the petitioner as provided above or otherwise paid  
15 as provided in subsection (b) or (c).

16 (b) The cost of a multidisciplinary evaluation order pursuant to G.S. 35A-1111 shall be  
17 assessed as follows:

18 (1) If the respondent is adjudicated incompetent and is not indigent, the cost  
19 shall be assessed against the respondent;

20 (2) If the respondent is adjudicated incompetent and is indigent, the cost shall be  
21 borne by the Department of Health and Human Services;

22 (3) If the respondent is not adjudicated incompetent, the cost may be taxed  
23 against either party, apportioned among the parties, or borne by the  
24 Department of Health and Human Services, in the discretion of the court.

25 (c) Witness fees ~~and the fees of court appointed counsel or guardian ad litem~~ shall be  
26 paid by:

27 (1) The respondent, if the respondent is adjudicated incompetent and is not  
28 indigent;

29 (2) The petitioner, if the respondent is not adjudicated incompetent and the clerk  
30 finds that there were not reasonable grounds to bring the proceeding;

31 (2a) The petitioner for any of the petitioner's witnesses and the respondent for  
32 any of the respondent's witnesses when the clerk finds there were reasonable  
33 grounds to bring the proceeding, the respondent was not adjudicated  
34 incompetent, and the respondent is not indigent;



1           (3)    The Administrative Office of the Courts ~~in all other cases.~~ for witness fees  
2                   for the respondent, if the respondent is indigent.  
3       (c1)    Mediator fees and other costs associated with mediation shall be assessed in  
4 accordance with G.S. 7A-38.3B.

5       (c2)    The fees of an appointed guardian ad litem shall be paid by:

6           (1)    The respondent, if the respondent is adjudicated incompetent and is not  
7                   indigent;

8           (2)    The petitioner, if the respondent is not adjudicated incompetent and the clerk  
9                   finds that there were not reasonable grounds to bring the proceedings.

10          (3)    The Office of Indigent Defense Services in all other cases.

11       (d)    The provisions of this section shall also apply to all parties to any proceedings under  
12 this Chapter, including a guardian who has been removed from office and the sureties on the  
13 guardian's bond."

14           **SECTION 2.** G.S. 35A-1207(a) reads as rewritten:

15       "(a)    Any interested person may file a motion in the cause with the clerk in the county  
16 where a guardianship is docketed to request modification of the order appointing a guardian or  
17 guardians or consideration of any matter pertaining to the guardianship. If the clerk determines  
18 that the ward's interests are not adequately represented, the ward is entitled to be represented at  
19 the hearing on the motion by counsel of the ward's own choice or by an appointed guardian ad  
20 litem. Appointment and discharge of an appointed guardian ad litem shall be in accordance  
21 with rules adopted by the Office of Indigent Defense Services."

22           **SECTION 3.** G.S. 35A-1290(a) reads as rewritten:

23       "(a)    The clerk has the power and authority on information or complaint made to remove  
24 any guardian appointed under the provisions of this Subchapter, to appoint successor guardians,  
25 and to make rules or enter orders for the better management of estates and the better care and  
26 maintenance of wards and their dependents. At any hearing to remove an appointed guardian or  
27 to appoint a successor guardian, if the clerk determines that the ward's interests are not  
28 adequately represented, the ward is entitled to be represented by counsel of the ward's own  
29 choice or by an appointed guardian ad litem. Appointment and discharge of an appointed  
30 guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense  
31 Services."

32           **SECTION 4.** G.S. 35A-1293 reads as rewritten:

33       "**§ 35A-1293. Appointment of successor guardian.**

34       Upon the removal, death, or resignation of a guardian, the clerk shall appoint a successor  
35 guardian following the same criteria that would apply to the initial appointment of a guardian.  
36 If the clerk determines that the ward's interests are not adequately represented, the ward is  
37 entitled to be represented by counsel of the ward's own choice or by an appointed guardian ad  
38 litem. Appointment and discharge of an appointed guardian ad litem shall be in accordance  
39 with rules adopted by the Office of Indigent Defense Services."

40           **SECTION 5.** G.S. 14-208.40B(b) reads as rewritten:

41       "(b)    If the Department determines that the offender falls into one of the categories  
42 described in G.S. 14-208.40(a), the Department shall schedule a hearing in the court of the  
43 county in which the offender resides. The Department shall notify the offender of the  
44 Department's determination and the date of the scheduled hearing by certified mail sent to the  
45 address provided by the offender pursuant to G.S. 14-208.7. The hearing shall be scheduled no  
46 sooner than 15 days from the date the notification is mailed. Receipt of notification shall be  
47 presumed to be the date indicated by the certified mail receipt. Upon the court's determination  
48 that the offender is indigent and entitled to counsel, the court shall assign counsel to represent  
49 the offender at the hearing pursuant to rules adopted by the Office of Indigent Defense  
50 Services."

51           **SECTION 6.** G.S. 7A-451(c) reads as rewritten:

1       "(c) In any capital case, an indigent defendant who is under a sentence of death and  
2 desires counsel may apply to the ~~superior court of the district where the defendant was indicted~~  
3 Office of Indigent Defense Services for the appointment of counsel to represent the defendant  
4 in preparing, filing, and litigating a motion for appropriate relief. The application for the  
5 appointment of such postconviction counsel may be made prior to completion of review on  
6 direct appeal and shall be made no later than 10 days from the latest of the following:

- 7           (1) The mandate has been issued by the Supreme Court of North Carolina on  
8           direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a  
9           petition for writ of certiorari to the United States Supreme Court has expired  
10          without a petition being filed;
- 11          (2) The United States Supreme Court denied a timely petition for writ of  
12          certiorari of the decision on direct appeal by the Supreme Court of North  
13          Carolina; or
- 14          (3) The United States Supreme Court granted the defendant's or the State's  
15          timely petition for writ of certiorari of the decision on direct appeal by the  
16          Supreme Court of North Carolina, but subsequently left the defendant's  
17          death sentence undisturbed.

18       ~~If there is not a criminal or mixed session of superior court scheduled for that district, the~~  
19 ~~application must be made no later than 10 days from the beginning of the next criminal or~~  
20 ~~mixed session of superior court in the district. Upon application, supported by the defendant's~~  
21 ~~affidavit, the superior court shall enter an order appointing the Office of Indigent Defense~~  
22 ~~Services if the court finds that the defendant is indigent and desires counsel, and the Office of~~  
23 ~~Indigent Defense Services shall determine whether the defendant was previously adjudicated~~  
24 ~~indigent for purposes of trial or direct appeal. If the defendant was previously adjudicated~~  
25 ~~indigent, the defendant shall be presumed indigent for purposes of this subsection and the~~  
26 ~~Office of Indigent Defense Services shall appoint two counsel to represent the defendant. If the~~  
27 ~~defendant was not previously adjudicated indigent, the Office of Indigent Defense Services~~  
28 ~~shall request that the superior court in the district where the defendant was indicted determine~~  
29 ~~whether the defendant is indigent. If the court finds that the defendant is indigent, the Office of~~  
30 ~~Indigent Defense Services shall then appoint two counsel to represent the defendant. The~~  
31 ~~defendant does not have a right to be present at the time of appointment of counsel, and the~~  
32 ~~appointment need not be made in open court. If the defendant was previously adjudicated an~~  
33 ~~indigent for purposes of trial or direct appeal, the defendant shall be presumed indigent for~~  
34 ~~purposes of this subsection."~~

35           **SECTION 7.** This act becomes effective July 1, 2009.