

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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HOUSE BILL 704*

Short Title: Guardianship/Court-Appointed Counsel. (Public)

Sponsors: Representatives Goodwin, Farmer-Butterfield, Bordsen, Burris-Floyd (Primary Sponsors); Bell, Cotham, Earle, Glazier, Harrison, Lucas, and Luebke.

Referred to: Judiciary III, if favorable, Appropriations.

March 23, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO REDEFINE THE ROLE OF COURT-APPOINTED ATTORNEYS IN
3 INCOMPETENCY AND GUARDIANSHIP PROCEEDINGS UNDER THE LAWS
4 PERTAINING TO GUARDIANSHIP.

5 The General Assembly of North Carolina enacts:

6 **SECTION 1.** G.S. 35A-1101(4) reads as rewritten:

7 "When used in this Subchapter:

8 ...

9 (4) "Designated agency" means the State or local human services agency
10 designated by the clerk in the clerk's order to prepare, cause to be prepared,
11 or assemble a multidisciplinary ~~evaluation and~~ evaluation, to serve as a
12 guardian ad litem, or to perform other functions as the clerk may order. A
13 designated agency includes, without limitation, State, local, regional, or area
14 mental health, mental retardation, vocational rehabilitation, public health,
15 social service, and developmental disabilities agencies, and diagnostic
16 evaluation centers. An agency may not be designated as a designated agency
17 in connection with any proceeding in which the agency or an official or
18 employee of the agency is a party or has been appointed as an interim
19 guardian, general guardian, or guardian of the person.

20"

21 **SECTION 2.** G.S. 35A-1107 is repealed.

22 **SECTION 3.** Article 1 of Chapter 35A of the General Statutes is amended by
23 adding a new section to read:

24 **"§ 35A-1107.1. Right to counsel.**

25 (a) Upon filing a petition for adjudication of incompetence, an attorney shall be
26 appointed to represent the respondent in accordance with rules adopted by the Office of
27 Indigent Defense Services. However, the respondent is entitled to be represented by counsel
28 retained by the respondent. If the respondent retains counsel, the attorney appointed to
29 represent the respondent shall be discharged from further responsibility in the proceeding. A
30 respondent who has not retained counsel may not discharge the attorney appointed to represent
31 him or her or waive his or her right to counsel unless the clerk, after examining the respondent
32 or hearing evidence, makes a finding that the respondent has sufficient capacity to make an
33 informed decision regarding waiver of legal representation.

34 (b) Unless discharged pursuant to subsection (a) of this section, an attorney appointed
35 under this section shall represent the respondent until the petition is dismissed or until a
36 guardian is appointed under Subchapter II of this Chapter.



1 (c) An appointed or retained attorney who represents a respondent in a proceeding
2 under this Subchapter or under Article 5 of this Chapter shall comply with the Revised Rules of
3 Professional Conduct adopted by the North Carolina State Bar, including the rules that address
4 representing clients with diminished capacity.

5 (d) An attorney appointed to represent a respondent under this section shall personally
6 visit the respondent as soon as possible following the attorney's appointment, and, to the extent
7 that the respondent is able to understand, shall:

8 (1) Explain to the respondent the substance of the petition, the nature, purpose,
9 and effect of the proceeding, the respondent's rights at the hearing, and the
10 general powers and duties of a guardian;

11 (2) Determine the respondent's views about the proposed guardian, the proposed
12 guardian's powers and duties, and the scope and duration of the proposed
13 guardianship; and

14 (3) Inform the respondent of the right to employ and consult with a lawyer at the
15 respondent's own expense.

16 An attorney appointed to represent a respondent under this section shall make a reasonable
17 investigation of the respondent's physical and mental condition, the respondent's mental and
18 physical capacity, the respondent's needs, the appropriateness of guardianship, and the
19 appropriateness of any proposed guardian.

20 (e) Notwithstanding the provisions of G.S. 1A-1, Rule 17, a guardian ad litem shall not
21 be appointed for a respondent in a proceeding under this Subchapter or Article 5 of this Chapter
22 unless requested by the respondent's counsel."

23 **SECTION 4.** G.S. 35A-1109 reads as rewritten:

24 "**§ 35A-1109. Service of notice and petition.**

25 Copies of the petition and initial notice of hearing shall be personally served on the
26 respondent. ~~Respondent's counsel or guardian ad litem shall be served pursuant to G.S. 1A-1,~~
27 ~~Rule 4, Rules of Civil Procedure.~~ A sheriff who serves the notice and petition shall do so
28 without demanding his fees in advance. The petitioner, within five days after filing the petition,
29 shall mail or cause to be mailed, by first-class mail, copies of the notice and petition to the
30 respondent's next of kin alleged in the petition and any other persons the clerk may designate,
31 unless such person has accepted notice. Proof of such mailing or acceptance shall be by
32 affidavit or certificate of acceptance of notice filed with the clerk. The clerk shall mail, by
33 first-class mail, copies of subsequent notices to the next of kin alleged in the petition and to
34 such other persons as the clerk deems appropriate."

35 **SECTION 5.** G.S. 35A-1110 reads as rewritten:

36 "**§ 35A-1110. Right to jury.**

37 The respondent has a right, upon request by ~~him, his~~ the respondent, the respondent's
38 counsel, or his ~~the respondent's~~ guardian ad litem, to trial by jury. Failure to request a trial by
39 jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in
40 accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial
41 by jury on his own motion. The jury shall be composed of 12 persons chosen from the county's
42 jury list in accordance with the provisions of Chapter 9 of the General Statutes."

43 **SECTION 6.** G.S. 35A-1111(b) reads as rewritten:

44 "(b) If a multidisciplinary evaluation is ordered, the clerk shall name a designated
45 agency and order it to prepare, cause to be prepared, or assemble a current multidisciplinary
46 evaluation of the respondent. The agency shall file the evaluation with the clerk not later than
47 30 days after the agency receives the clerk's order. The multidisciplinary evaluation shall be
48 filed in the proceeding for adjudication of incompetence, in the proceeding for appointment of
49 a guardian under Subchapter II of this Chapter, or both. Unless otherwise ordered by the clerk,
50 the agency shall send copies of the evaluation to the petitioner and the respondent's counsel or
51 and guardian ad litem for the respondent not later than 30 days after the agency receives the

1 clerk's order. The evaluation shall be kept under such conditions as directed by the clerk and its
2 contents revealed only as directed by the clerk. The evaluation shall not be a public record and
3 shall not be released except by order of the clerk."

4 **SECTION 7.** G.S. 35A-1112(a) reads as rewritten:

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

9 **SECTION 8.** G.S. 35A-1113 reads as rewritten:

10 "**§ 35A-1113. Hearing when incompetence determined in another state.**

11 When the petition alleges that the respondent is incompetent on the basis of an adjudication
12 that occurred in another state, the clerk ~~in his discretion~~ may:

- 13 (1) Adjudicate incompetence on the basis of the prior adjudication, if the clerk
14 first finds by clear, cogent, and convincing evidence that:
- 15 a. The respondent is represented by an ~~attorney or guardian ad litem;~~
16 ~~and~~attorney;
 - 17 b. A certified copy of an order adjudicating the respondent incompetent
18 has been filed in the proceeding; ~~and~~
 - 19 c. The prior adjudication was made by a court of competent jurisdiction
20 on grounds comparable to a ground for adjudication of incompetence
21 under this Article; and
 - 22 d. The respondent, subsequent to the adjudication of incompetence in
23 another state, assumed residence in North Carolina and needs a
24 guardian in this State; or
- 25 (2) Decline to adjudicate incompetence on the basis of the other state's
26 adjudication, and proceed with an adjudicatory hearing as in any other case
27 pursuant to this Article."

28 **SECTION 9.** G.S. 35A-1114(c) reads as rewritten:

29 "(c) Upon filing of the motion for appointment of an interim guardian, the clerk shall
30 immediately set a date, time, and place for a hearing on the motion. The motion and a notice
31 setting the date, time, and place for the hearing shall be served promptly on the respondent and
32 on ~~his counsel or guardian ad litem~~the respondent's counsel, the respondent's guardian ad litem,
33 and other persons the clerk may designate. The hearing shall be held as soon as possible but no
34 later than 15 days after the motion has been served on the respondent."

35 **SECTION 10.** G.S. 35A-1116 reads as rewritten:

36 "**§ 35A-1116. Costs and fees.**

37 (a) Except as otherwise provided herein, costs shall be assessed as in special
38 proceedings. Costs, including witness fees and, in the clerk's discretion, any reasonable fees
39 and expenses of counsel for the petitioner ~~which the clerk, in his discretion, may allow,~~ may be
40 taxed against either party in the discretion of the court unless:

- 41 (1) The clerk finds that the petitioner did not have reasonable grounds to bring
42 the proceeding, in which case costs shall be taxed to the petitioner; or
43 (2) The respondent is indigent, in which case the costs shall be waived by the
44 clerk if not taxed against the petitioner as provided above or otherwise paid
45 as provided in subsection (b) or (c).

46 (b) The cost of a multidisciplinary evaluation order pursuant to
47 ~~G.S. 35A-1111~~G.S. 35A-1111, witness fees, and fees of a guardian ad litem shall be assessed
48 as follows:

- 49 (1) If the respondent is adjudicated incompetent and is not indigent, the cost
50 shall be assessed against the respondent;

- 1 (2) If the respondent is adjudicated incompetent and is indigent, the cost shall be
 2 borne by the Department of Health and Human Services;
 3 (3) If the respondent is not adjudicated incompetent, the cost may be taxed
 4 against either party, apportioned among the parties, or borne by the
 5 Department of Health and Human Services, in the discretion of the court.

6 (c) ~~Witness fees and the~~ The fees of the respondent's court-appointed counsel or
 7 ~~guardian ad litem~~ shall be paid by:

- 8 (1) The respondent, if the respondent is adjudicated incompetent and is not
 9 indigent;
 10 (2) The petitioner, if the respondent is not adjudicated incompetent and the clerk
 11 finds that there were not reasonable grounds to bring the proceeding;
 12 (3) ~~The Administrative Office of the Courts~~ Office of Indigent Defense Services
 13 in all other cases.

14 (c1) Mediator fees and other costs associated with mediation shall be assessed in
 15 accordance with G.S. 7A-38.3B.

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

19 **SECTION 11.** G.S. 35A-1130(c) reads as rewritten:

20 "(c) At the hearing on the motion, the ward shall be entitled to be represented by counsel
 21 ~~or guardian ad litem, and a guardian ad litem shall be appointed in accordance with rules~~
 22 ~~adopted by the Office of Indigent Defense Services if the ward is indigent and not represented~~
 23 ~~by counsel retained by the ward or by an attorney appointed in accordance with~~
 24 G.S. 35A-1107.1. Upon motion of any party or the clerk's own motion, the clerk may order a
 25 multidisciplinary evaluation. The ward has a right, upon request by ~~him, his~~ the ward, the ward's
 26 ~~counsel, or his the ward's~~ guardian ad litem to trial by jury. Failure to request a trial by jury
 27 shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in
 28 accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial
 29 by jury on his own motion. ~~Provided, if~~ if there is a jury in a proceeding for restoration to
 30 competency, it shall be a jury of six persons selected in accordance with the provisions of
 31 Chapter 9 of the General Statutes."

32 **SECTION 12.** G.S. 35A-1202(3) reads as rewritten:

33 "When used in this Subchapter, unless a contrary intent is indicated or the context requires
 34 otherwise:

35 ...

- 36 (3) "Designated agency" means the State or local human services agency
 37 designated by the clerk in an order to prepare, cause to be prepared, or
 38 assemble a multidisciplinary ~~evaluation and~~ evaluation, to serve as a guardian
 39 ad litem, or to perform other functions as the clerk may order. A designated
 40 agency includes, without limitation, State, local, regional or area mental
 41 health, mental retardation, vocational rehabilitation, public health, social
 42 service, and developmental disabilities agencies, and diagnostic evaluation
 43 centers. An agency may not be designated as a designated agency in
 44 connection with any proceeding in which the agency or an official or
 45 employee of the agency is a party or has been appointed as a general
 46 guardian or guardian of the person.

47"

48 **SECTION 13.** G.S. 35A-1211(a) reads as rewritten:

49 "(a) Application for appointment of a guardian and related motions and notices shall be
 50 served on the ~~respondent,~~ respondent or guardian ad litem, respondent's ~~counsel or guardian ad~~
 51 ~~litem,~~ counsel, other parties of record, and such other persons as the clerk shall direct."

1 **SECTION 14.** On or before October 1, 2010, the Office of Indigent Defense
2 Services shall adopt and implement rules governing the appointment, discharge, and
3 compensation of attorneys appointed to represent respondents under Chapter 35A of the
4 General Statutes in accordance with G.S. 35A-1107.1, as enacted in Section 3 of this act.

5 **SECTION 15.** There is appropriated from the General Fund to the Judicial
6 Department, Office of Indigent Defense Services, the sum of thirty thousand dollars (\$30,000)
7 for the 2009-2010 fiscal year to develop educational and training resources for attorneys who
8 represent respondents in incompetency and guardianship proceedings.

9 **SECTION 16.** There is appropriated from the General Fund to the Judicial
10 Department, Office of Indigent Defense Services, the sum of thirty thousand dollars (\$30,000)
11 for the 2009-2010 fiscal year and the sum of thirty thousand dollars (\$30,000) for the
12 2010-2011 fiscal year to partially offset personnel costs related to the appointment, supervision,
13 and training of attorneys who are appointed to represent respondents in incompetency and
14 guardianship proceedings.

15 **SECTION 17.** Sections 15 and 16 of this act become effective July 1, 2009. The
16 remainder of this act becomes effective October 1, 2010, and applies to proceedings, motions,
17 orders, or applications filed on or after that date.