

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE DRS85112-LU-79 (03/04)

Short Title: Guardianship/Incompetency.

(Public)

Sponsors: Senator Clary.

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE PROCEDURES FOR DETERMINING INCOMPETENCY
3 UNDER THE LAWS RELATING TO GUARDIANSHIP, AS RECOMMENDED BY
4 THE HOUSE STUDY COMMITTEE ON STATE GUARDIANSHIP LAWS.

5 The General Assembly of North Carolina enacts:

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

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

12 **"§ 35A-1101. Definitions.**

13 When used in this Subchapter:

- 14 (1) ~~"Autism" means a physical disorder of the brain which causes disturbances~~
15 ~~in the developmental rate of physical, social, and language skills; abnormal~~
16 ~~responses to sensations; absence of or delay in speech or language; or~~
17 ~~abnormal ways of relating to people, objects, and events. Autism occurs~~
18 ~~sometimes by itself and sometimes in conjunction with other~~
19 ~~brain functioning disorders.~~
20 (2) ~~"Cerebral palsy" means a muscle dysfunction, characterized by impairment~~
21 ~~of movement, often combined with speech impairment, and caused by~~
22 ~~abnormality of or damage to the brain.~~
23 (3) "Clerk" means the clerk of superior court.
24 (4) "Designated agency" means the State or local human services agency
25 designated by the clerk in the clerk's order to prepare, cause to be prepared,
26 or assemble a multidisciplinary evaluation and to perform other functions as
27 the clerk may order. A designated agency includes, without limitation, State,
28 local, regional, or area mental health, mental retardation, vocational
29 rehabilitation, public health, social service, and developmental disabilities
30 agencies, and diagnostic evaluation centers.
31 (5) ~~"Epilepsy" means a group of neurological conditions characterized by~~
32 ~~abnormal electrical chemical discharge in the brain. This discharge is~~
33 ~~manifested in various forms of physical activity called seizures, which range~~
34 ~~from momentary lapses of consciousness to convulsive movements.~~



- 1 (6) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1,
2 Rule 17, Rules of Civil Procedure.
- 3 (7) ~~"Incompetent adult"~~ "Incapacitated adult" means an adult or emancipated
4 minor who ~~lacks sufficient capacity to manage the adult's own affairs or to~~
5 ~~make or communicate important decisions concerning the adult's person,~~
6 ~~family, or property whether the lack of capacity is due to mental illness,~~
7 ~~mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility,~~
8 ~~disease, injury, or similar cause or condition.~~ is unable to receive and
9 evaluate information or make or communicate decisions to such an extent
10 that the individual lacks the ability, even with the use of appropriate
11 technological assistance, to meet essential requirements for physical health,
12 safety, or self-care or manage the individual's property or business affairs.
- 13 (8) ~~"Incompetent child"~~ "Incapacitated minor" means a minor who is at least 17
14 1/2 years of age and who, ~~other than by reason of minority,~~ lacks sufficient
15 capacity to ~~make or communicate important decisions concerning the child's~~
16 ~~person, family, or property whether the lack of capacity is due to mental~~
17 ~~illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety,~~
18 ~~disease, injury, or similar cause or condition.~~ who is unable to receive and
19 evaluate information or make or communicate decisions to such an extent
20 that the individual lacks the ability, even with the use of appropriate
21 technological assistance, to meet essential requirements for physical health,
22 safety, or self-care or manage the individual's property or business affairs.
- 23 (9) "Indigent" means unable to pay for legal representation and other necessary
24 expenses of a proceeding brought under this Subchapter.
- 25 (10) ~~"Inebriety" means the habitual use of alcohol or drugs rendering a person~~
26 ~~incompetent to transact ordinary business concerning the person's estate,~~
27 ~~dangerous to person or property, cruel and intolerable to family, or unable to~~
28 ~~provide for family.~~
- 29 (11) "Interim guardian" means a guardian, appointed prior to adjudication of
30 incompetence and for a temporary period, for a person who requires
31 immediate intervention to address conditions that constitute imminent or
32 foreseeable risk of harm to the person's physical well-being or to the person's
33 estate.
- 34 (12) ~~"Mental illness" means an illness that so lessens the capacity of a person to~~
35 ~~use self-control, judgment, and discretion in the conduct of the person's~~
36 ~~affairs and social relations as to make it necessary or advisable for the~~
37 ~~person to be under treatment, care, supervision, guidance, or control. The~~
38 ~~term "mental illness" encompasses "mental disease", "mental disorder",~~
39 ~~"lunacy", "unsoundness of mind", and "insanity".~~
- 40 (13) ~~"Mental retardation" means significantly subaverage general intellectual~~
41 ~~functioning existing concurrently with deficits in adaptive behavior and~~
42 ~~manifested before age 22.~~
- 43 (14) ~~"Multidisciplinary evaluation" means an evaluation that contains current~~
44 ~~medical, psychological, and social work evaluations as directed by the clerk~~
45 ~~and that may include current evaluations by professionals in other~~
46 ~~disciplines, including without limitation education, vocational rehabilitation,~~
47 ~~occupational therapy, vocational therapy, psychiatry, speech and hearing,~~
48 ~~and communications disorders. The evaluation is current if made not more~~
49 ~~than one year from the date on which it is presented to or considered by the~~
50 ~~court. The evaluation shall set forth the nature and extent of the disability~~
51 ~~and recommend a guardianship plan and program.~~

- 1 (15) "Respondent" means a person who is alleged to be incompetent in a
2 proceeding under this Subchapter.
- 3 (16) "Treatment facility" has the same meaning as "facility" in G.S. 122C-3(14),
4 and includes group homes, halfway houses, and other community-based
5 residential facilities.
- 6 (17) "Ward" means a person who has been adjudicated incompetent or an adult or
7 minor for whom a guardian has been appointed by a court of competent
8 jurisdiction."

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

10 **"§ 35A-1108. Issuance of notice.**

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

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

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

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

24 **"§ 35A-1111. ~~Multidisciplinary~~ Professional evaluation.**

25 (a) To assist in determining the nature and extent of a respondent's ~~disability, incapacity,~~
26 or to assist in developing an appropriate guardianship plan and program, the ~~clerk, on his own~~
27 ~~motion or the motion of any party, clerk~~ may order that a ~~multidisciplinary-professional~~
28 evaluation of the respondent be performed. A request for a multidisciplinary evaluation shall be
29 made in writing and filed with the clerk within 10 days after service of the petition on the
30 respondent. The clerk shall order a professional evaluation upon the request of the respondent or
31 the respondent's counsel or guardian ad litem. The clerk may order that the respondent attend a
32 professional evaluation for the purpose of being evaluated.

33 (b) If a ~~multidisciplinary-professional~~ evaluation is ordered, ~~the clerk shall name a~~
34 ~~designated agency and order it to prepare, cause to be prepared, or assemble a current~~
35 ~~multidisciplinary evaluation of the respondent.~~ a designated agency, physician, psychologist, or
36 other professional who is qualified to evaluate the respondent's alleged incapacity shall
37 examine the respondent. The agency shall file the evaluation shall be filed with the clerk not
38 later than 30 days after the agency receives the clerk's order. The multidisciplinary evaluation
39 shall be filed in the proceeding for adjudication of incompetence, in the proceeding for
40 appointment of a guardian under Subchapter II of this Chapter, or both. Unless otherwise
41 ordered by the clerk, the agency shall send copies The agency shall provide copies of the
42 evaluation to the petitioner and the counsel or guardian ad litem for the respondent not later
43 than 30 days after the agency receives the clerk's order. The evaluation shall be kept under such
44 conditions as directed by the clerk and its contents revealed only as directed by the clerk to the
45 respondent or the respondent's counsel or guardian ad litem. The evaluation shall not be a
46 public record and shall not be released except by order of the clerk.

47 (c) ~~If a multidisciplinary evaluation does not contain medical, psychological, or social~~
48 ~~work evaluations ordered by the clerk, the designated agency nevertheless shall file the~~
49 ~~evaluation with the clerk and send copies as required by subsection (b). In a transmittal letter,~~
50 ~~the agency shall explain why the evaluation does not contain such medical, psychological, or~~
51 ~~social work evaluations.~~ Unless otherwise directed by the clerk, the evaluation shall contain: (i)

1 a description of the nature, type, and extent of the respondent's specific cognitive and functional
2 limitations; (ii) an evaluation of the respondent's mental and physical condition and, if
3 appropriate, educational potential, adaptive behavior, and social skills; (iii) a prognosis for
4 improvement and a recommendation as to the appropriate treatment or habilitation plan; and
5 (iv) the date of any assessment or examination upon which the report is based.

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

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

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

12 **"§ 35A-1112. Hearing on petition; adjudication order.**

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

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

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

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

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

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

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

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

40 "(b) The cost of a ~~multidisciplinary~~ professional evaluation order ~~pursuant to~~
41 ~~G.S. 35A-1111~~ shall be assessed as follows:

42 (1) If the respondent is ~~adjudicated incompetent~~ adjudged incapacitated and is
43 not indigent, the cost shall be assessed against the respondent;

44 (2) If the respondent is ~~adjudicated incompetent~~ adjudged incapacitated and is
45 indigent, the cost shall be borne by the Department of Health and Human
46 Services;

47 (3) If the respondent is not ~~adjudicated incompetent~~ adjudged incapacitated, the
48 cost may be taxed against either party, apportioned among the parties, or
49 borne by the Department of Health and Human Services, in the discretion of
50 the court."

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

1 **"§ 35A-1120. Appointment of guardian.**

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

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

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

20 **"§ 35A-1210. Application before clerk.**

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

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

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

44 **"§ 35A-1212. Hearing before clerk on appointment of guardian.**

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

- 47 (1) The nature and extent of the ~~needed guardianship;~~ ward's need for a guardian;
- 48 (1a) Whether the ward's needs can be met by means other than the appointment
49 of a guardian;
- 50 (2) The assets, liabilities, and needs of the ward; and

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

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

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

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

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

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

20 "**§ 35A-1215. Clerk's order; issuance of letters of appointment.**

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

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

24 (2) The powers and duties of the guardian or guardians, which shall include,
25 unless the clerk orders otherwise, (i) with respect to a guardian of the person
26 and general guardian, the powers and duties provided under G.S. 35A,
27 Article 8, and (ii) with respect to a guardian of the estate and general
28 guardian, the powers, and duties provided under G.S. 35A, Article 9 and
29 Subchapter III; and

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

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

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

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

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

44 **SECTION 13.** This act becomes effective October 1, 2009, and applies to
45 proceedings filed or pending on or after that date.