

## Chapter 35A.

### Incompetency and Guardianship.

#### SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

##### Article 1.

##### Determination of Incompetence.

#### § 35A-1101. Definitions.

The following definitions apply in this Subchapter:

- (1) Autism – 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. – 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. – The clerk of superior court.
- (4) Designated agency. – 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 other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional, or area mental health, intellectual disability, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.
- (5) Epilepsy. – A group of neurological conditions characterized by abnormal electrical-chemical discharge in the brain. This discharge is manifested in various forms of physical activity called seizures, which range from momentary lapses of consciousness to convulsive movements.
- (6) Guardian ad litem. – A guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure.
- (7) Incompetent adult. – An adult or emancipated minor 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.
- (8) Incompetent child. – A minor who is at least 17 1/2 years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition.
- (9) Indigent. – Unable to pay for legal representation and other necessary expenses of a proceeding brought under this Subchapter.
- (10) Inebriety. – The habitual use of alcohol or drugs rendering a person incompetent to transact ordinary business concerning the person's estate, dangerous to

- person or property, cruel and intolerable to family, or unable to provide for family.
- (10a) Intellectual disability. – Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22.
  - (11) Interim guardian. – A guardian, appointed prior to adjudication of incompetence and for a temporary period, for a person who requires immediate intervention to address conditions that constitute imminent or foreseeable risk of harm to the person's physical well-being or to the person's estate.
  - (12) Mental illness. – An illness that so lessens the capacity of a person to use self-control, judgment, and discretion in the conduct of the person's affairs and social relations as to make it necessary or advisable for the person to be under treatment, care, supervision, guidance, or control. The term "mental illness" encompasses "mental disease", "mental disorder", "unsoundness of mind", and "insanity".
  - (13) Repealed by Session Laws 2018-47, s. 1(b), effective October 1, 2018.
  - (14) Multidisciplinary evaluation. – An evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may include current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.
  - (15) Respondent. – A person who is alleged to be incompetent in a proceeding under this Subchapter.
  - (16) Treatment facility. – Has the same meaning as "facility" in G.S. 122C-3(14), and includes group homes, halfway houses, and other community-based residential facilities.
  - (17) Ward. – A person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction. (1987, c. 550, s. 1; 1989, c. 473, s. 11; 1997-443, s. 11A.11; 2018-47, s. 1(b).)

**§ 35A-1102. Scope of law; exclusive procedure.**

This Article establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child. However, nothing in this Article shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North Carolina Rules of Civil Procedure. (1987, c. 550, s. 1; 2003-236, s. 4.)

**§ 35A-1103. Jurisdiction; venue.**

(a) The clerk in each county shall have original jurisdiction over proceedings under this Subchapter, subject to the rules set forth in Article 2 of Chapter 35B of the General Statutes.

(b) Venue for proceedings under this Subchapter shall be in the county in which the respondent resides or is domiciled or is an inpatient in a treatment facility. If the county of

residence or domicile cannot be determined, venue shall be in the county where the respondent is present.

(c) If proceedings involving the same respondent are brought under this Subchapter in more than one county in which venue is proper, venue shall be in the county in which proceedings were commenced first.

(d) If the clerk in the county in which a proceeding under this Subchapter is brought has an interest, direct or indirect, in the proceeding, jurisdiction with respect thereto shall be vested in any superior court judge residing or presiding in the district, and the jurisdiction of the superior court judge shall extend to all things which the clerk might have done. (1987, c. 550, s. 1; 2019-113, s. 2.)

#### **§ 35A-1104. Change of venue.**

The clerk, on motion of a party or the clerk's own motion, may order a change of venue upon finding that no hardship or prejudice to the respondent will result from a change of venue. (1987, c. 550, s. 1.)

#### **§ 35A-1105. Petition before clerk.**

A verified petition for the adjudication of incompetence of an adult, or of a minor who is within six months of reaching majority, may be filed with the clerk by any person, including any State or local human services agency or healthcare provider through its authorized representative without the need for legal counsel. (1987, c. 550, s. 1; 1989, c. 473, s. 22; 1997-443, s. 11A.12; 2018-33, s. 45(a).)

#### **§ 35A-1106. Contents of petition.**

The petition shall set forth, to the extent known:

- (1) The name, age, address, and county of residence of the respondent;
- (2) The name, address, and county of residence of the petitioner, and his interest in the proceeding;
- (3) A general statement of the respondent's assets and liabilities with an estimate of the value of any property, including any compensation, insurance, pension, or allowance to which he is entitled;
- (4) A statement of the facts tending to show that the respondent is incompetent and the reason or reasons why the adjudication of incompetence is sought;
- (5) The name, address, and county of residence of the respondent's next of kin and other persons known to have an interest in the proceeding;
- (6) Facts regarding the adjudication of respondent's incompetence by a court of another state, if an adjudication is sought on that basis pursuant to G.S. 35A-1113(1). (1987, c. 550, s. 1.)

#### **§ 35A-1107. Right to counsel or guardian ad litem.**

(a) The respondent is entitled to be represented by counsel of the respondent's own choice or by an appointed guardian ad litem. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to represent the respondent unless the respondent retains counsel, in which event the guardian ad litem may be discharged. Appointment and discharge of an appointed guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services.

(b) An attorney appointed as a guardian ad litem under this section shall represent the respondent until any of the following occurs:

- (1) The petition is dismissed.
- (2) A guardian is appointed under Subchapter II of this Chapter.
- (3) Other relief is granted under Article 2 of this Subchapter.

(c) After being appointed, the guardian ad litem shall personally visit the respondent as soon as possible and shall make every reasonable effort to determine the respondent's wishes regarding the incompetency proceeding and any proposed guardianship. The guardian ad litem shall present to the clerk the respondent's express wishes at all relevant stages of the proceedings. The guardian ad litem also may make recommendations to the clerk concerning the respondent's best interests if those interests differ from the respondent's express wishes. In appropriate cases, the guardian ad litem shall consider the possibility of a limited guardianship and shall make recommendations to the clerk concerning the rights, powers, and privileges that the respondent should retain under a limited guardianship. (1987, c. 550, s. 1; 2000-144, s. 33; 2003-236, s. 3; 2022-64, s. 6.)

**§ 35A-1108. Issuance of notice.**

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

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

(c) Subsequent notices to the parties shall be served as provided by G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk orders otherwise. (1987, c. 550, s. 1; 2005-67, s. 2.)

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

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

(b) Expired August 1, 2020, pursuant to Session Laws 2020-3, s. 4.11(b). (1987, c. 550, s. 1; 1989, c. 473, s. 18; 2020-3, s. 4.11(a).)

**§ 35A-1110. Right to jury.**

The respondent has a right, upon request by him, his counsel, or his guardian ad litem, to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on his own motion. The jury shall be composed of 12 persons chosen from the county's jury list in accordance with the provisions of Chapter 9 of the General Statutes. (1987, c. 550, s. 1.)

**§ 35A-1111. Multidisciplinary evaluation.**

(a) To assist in determining the nature and extent of a respondent's disability, or to assist in developing an appropriate guardianship plan and program, the clerk, on his own motion or the motion of any party, may order that a multidisciplinary evaluation of the respondent be performed. A request for a multidisciplinary evaluation shall be made in writing and filed with the clerk within 10 days after service of the petition on the respondent.

(b) If a multidisciplinary evaluation is ordered, the clerk shall name a designated agency and order it to prepare, cause to be prepared, or assemble a current multidisciplinary evaluation of the respondent. The agency shall file the evaluation with the clerk not later than 30 days after the agency receives the clerk's order. The multidisciplinary evaluation shall be filed in the proceeding for adjudication of incompetence, in the proceeding for appointment of a guardian under Subchapter II of this Chapter, or both. Unless otherwise ordered by the clerk, the agency shall send copies of the evaluation to the petitioner and the counsel or guardian ad litem for the respondent not later than 30 days after the agency receives the clerk's order. The evaluation shall be kept under such conditions as directed by the clerk and its contents revealed only as directed by the clerk. The evaluation shall not be a public record and shall not be released except by order of the clerk.

(c) If a multidisciplinary evaluation does not contain medical, psychological, or social work evaluations ordered by the clerk, the designated agency nevertheless shall file the evaluation with the clerk and send copies as required by subsection (b). In a transmittal letter, the agency shall explain why the evaluation does not contain such medical, psychological, or social work evaluations.

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

(e) The multidisciplinary evaluation may be considered at the hearing for adjudication of incompetence, the hearing for appointment of a guardian under Subchapter II of this Chapter, or both. (1987, c. 550, s. 1.)

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

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

(b) The petitioner and the respondent are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses. If the petitioner is a State or local human service agency or a health care provider, evidence may be presented without the need for legal counsel.

(b1) At the hearing on the petition, on the clerk's own motion, the clerk may appoint an interim guardian pursuant to G.S. 35A-1114(d) and (e) if the clerk determines such an appointment to be in the best interests of the respondent.

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

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

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

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

(g) Except as provided in G.S. 35A-1114(f), a proceeding filed under this Article may be voluntarily dismissed as provided in G.S. 1A-1, Rule 41, Rules of Civil Procedure. (1987, c. 550, s. 1; 2017-158, s. 7; 2018-33, s. 45(b).)

**§ 35A-1113:** Repealed by Session Laws 2016-72, s. 2, effective December 1, 2016.

**§ 35A-1114. Appointment of interim guardian.**

(a) At the time of or subsequent to the filing of a petition under this Article, the petitioner or guardian ad litem may also file a verified motion with the clerk seeking the appointment of an interim guardian.

(b) The motion filed by the petitioner or guardian ad litem shall set forth facts tending to show:

- (1) That there is reasonable cause to believe that the respondent is incompetent, and
- (2) One or both of the following:
  - a. That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being and that requires immediate intervention;
  - b. That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate that requires immediate intervention in order to protect the respondent's interest, and
- (3) That the respondent needs an interim guardian to be appointed immediately to intervene on his behalf prior to the adjudication hearing.

(c) Upon filing of the motion for appointment of an interim guardian by the petitioner or the guardian ad litem, the clerk shall immediately set a date, time, and place for a hearing on the motion.

(c1) The motion and notice setting the date, time, and place for the hearing shall be served promptly on the petitioner, the respondent and on his counsel or guardian ad litem, and other

persons the clerk may designate. The hearing shall be held as soon as possible but not later than 15 days after the motion has been served on the respondent.

(d) If at the hearing the clerk finds that there is reasonable cause to believe that the respondent is incompetent, and:

(1) That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being, and that there is immediate need for a guardian to provide consent or take other steps to protect the respondent, or

(2) That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate, and that immediate intervention is required in order to protect the respondent's interest, the clerk shall immediately enter an order appointing an interim guardian.

(e) The clerk's order appointing an interim guardian shall include specific findings of fact to support the clerk's conclusions, and shall set forth the interim guardian's powers and duties. Such powers and duties shall be limited and shall extend only so far and so long as necessary to meet the conditions necessitating the appointment of an interim guardian. In any event, the interim guardianship shall terminate on the earliest of the following: the date specified in the clerk's order; 45 days after entry of the clerk's order unless the clerk, for good cause shown, extends that period for up to 45 additional days; when any guardians are appointed following an adjudication of incompetence; or when the petition is dismissed by the court. An interim guardian whose authority relates only to the person of the respondent shall not be required to post a bond. If the interim guardian has authority related to the respondent's estate, the interim guardian shall post a bond in an amount determined by the clerk, with any conditions the clerk may impose, and shall render an account as directed by the clerk.

(f) When a motion for appointment of an interim guardian has been made, the petitioner may voluntarily dismiss the petition for adjudication of incompetence only prior to the hearing on the motion for appointment of an interim guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 12; 2017-158, s. 6; 2018-40, s. 10.)

#### **§ 35A-1115. Appeal from clerk's order.**

Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals. An appeal does not stay the appointment of a guardian unless so ordered by the superior court or the Court of Appeals. The Court of Appeals may request the Attorney General to represent the petitioner on any appeal by the respondent to the Appellate Division of the General Court of Justice, but the Department of Justice shall not be required to pay any of the costs of the appeal. (1987, c. 550, s. 1.)

#### **§ 35A-1116. Costs and fees.**

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

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

- (2) The respondent is indigent, in which case the costs shall be waived by the clerk if not taxed against the petitioner as provided above or otherwise paid as provided in subsection (b) or (c).
- (b) Multidisciplinary Evaluation. – The cost of a multidisciplinary evaluation order pursuant to G.S. 35A-1111 shall be assessed as follows:
- (1) If the respondent is adjudicated incompetent and is not indigent, the cost shall be assessed against the respondent;
  - (2) If the respondent is adjudicated incompetent and is indigent, the cost shall be borne by the Department of Health and Human Services;
  - (3) If the respondent is not adjudicated incompetent, the cost may be taxed against either party, apportioned among the parties, or borne by the Department of Health and Human Services, in the discretion of the court.
- (c) Witness. – Witness fees shall be paid by:
- (1) The respondent, if the respondent is adjudicated incompetent and is not indigent;
  - (2) The petitioner, if the respondent is not adjudicated incompetent and the clerk finds that there were not reasonable grounds to bring the proceeding;
  - (2a) The petitioner for any of the petitioner's witnesses, and the respondent for any of the respondent's witnesses, when the clerk finds all of the following:
    - a. There were reasonable grounds to bring the proceeding.
    - b. The respondent was not adjudicated incompetent.
    - c. The respondent is not indigent.
  - (3) The Administrative Office of the Courts for witness fees for the respondent, if the respondent is indigent.
- (c1) Mediator. – Mediator fees and other costs associated with mediation shall be assessed in accordance with G.S. 7A-38.3B.
- (c2) Guardian Ad Litem. – The fees of an appointed guardian ad litem shall be paid by:
- (1) The respondent, if:
    - a. The respondent is adjudicated incompetent; and
    - b. The respondent is not indigent.
  - (2) The respondent, if:
    - a. The respondent is not adjudicated incompetent;
    - b. The clerk finds that there were reasonable grounds to bring the proceeding; and
    - c. The respondent is not indigent.
  - (3) The petitioner, if:
    - a. The respondent is not adjudicated incompetent; and
    - b. The clerk finds that there were not reasonable grounds to bring the proceedings.
  - (4) The Office of Indigent Defense Services in all other cases.
- (d) The provisions of this section shall also apply to all parties to any proceedings under this Chapter, including a guardian who has been removed from office and the sureties on the guardian's bond. (1987, c. 550, s. 1; 1989, c. 473, s. 15; 1995, c. 235, s. 9; 1997-443, s. 11A.118(a); 2005-67, s. 3; 2009-387, s. 1.)

**§§ 35A-1117 through 35A-1119: Reserved for future codification purposes.**

