

## SUBCHAPTER IV. STANDBY GUARDIANS.

### Article 21.

#### Standby Guardianship.

#### § 35A-1370. Definitions.

For purposes of this Article:

- (1) "Alternate standby guardian" means a person identified in either a petition or designation to become the guardian of the person or, when appropriate, the general guardian of a minor child or incompetent adult, pursuant to G.S. 35A-1373 or to G.S. 35A-1374, when the person identified as the standby guardian and the designator or petitioner has identified an alternate standby guardian.
- (2) "Attending physician" means the physician who has primary responsibility for the treatment and care of the parent or legal guardian. When more than one physician shares this responsibility, or when a physician is acting on the primary physician's behalf, any such physician may act as the attending physician pursuant to this section. When no physician has this responsibility, a physician who is familiar with the petitioner's medical condition may act as the attending physician pursuant to this Article.
- (3) "Debilitation" means a chronic and substantial inability, as a result of a physically debilitating illness, disease, or injury, to care for one's minor child or to satisfy his or her duties as guardian of the person or as general guardian of an incompetent adult.
- (4) "Designation" means a written document voluntarily executed by the designator pursuant to this Article.
- (5) "Designator" means a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is (i) the biological or adoptive parent, the guardian of the person, or the general guardian of a minor child or (ii) the guardian of the person or the general guardian of an incompetent adult. A designation under this Article may be made on behalf of a designator by the guardian of the person or the general guardian of the designator.
- (6) "Determination of debilitation" means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the debilitation of the petitioner or designator.
- (7) "Determination of incapacity" means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the incapacity of the petitioner or designator.
- (8) "Incapacity" means a chronic and substantial inability, as a result of mental or organic impairment, to understand the nature and consequences of decisions concerning the care of one's minor child or of an incompetent adult, and a consequent inability to make these decisions.
- (8a) "Incompetent adult" means an adult or emancipated minor who is subject to a guardianship of the person or a general guardianship.

- (9) "Minor child" means an unemancipated child or children under the age of 18 years.
- (10) "Petitioner" means a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is (i) the biological parent, the adoptive parent, the guardian of the person, or the general guardian of a minor child or (ii) the guardian of the person or the general guardian of an incompetent adult. A proceeding under this Article may be initiated and pursued on behalf of a petitioner by the guardian of the person, the general guardian of the petitioner, or by a person appointed by the clerk of superior court pursuant to Rule 17 of the Rules of Civil Procedure as guardian ad litem for the purpose of initiating and pursuing a proceeding under this Article on behalf of a petitioner.
- (11) "Standby guardian" means a person appointed pursuant to G.S. 35A-1373 or designated pursuant to G.S. 35A-1374 to become the guardian of the person or, when appropriate, the general guardian of a minor child or incompetent adult upon the death of a petitioner or designator, upon a determination of debilitation or incapacity of a petitioner or designator, or with the consent of a petitioner or designator.
- (12) "Triggering event" means an event stated in the designation executed or order entered under this Article which empowers the standby guardian, or the alternate standby guardian, if one is identified and the standby guardian is unwilling or unable to serve, to assume the duties of the office, which event may be the death of a petitioner or designator, incapacity of a petitioner or designator, debilitation of a petitioner or designator with the petitioner's or designator's consent, or the consent of the petitioner or designator, whichever occurs first. (1995, c. 313, s. 1; 2015-205, s. 1.)

**§ 35A-1371. Jurisdiction; limits.**

Notwithstanding the provisions of Subchapter II of this Chapter, the clerk of superior court shall have original jurisdiction for the appointment of a standby guardian for a minor child under this Article. Provided that the clerk shall have no jurisdiction, no standby guardian may be appointed under this Article, and no designation may become effective under this Article when a district court has assumed jurisdiction over the minor child in an action under Chapter 50 of the General Statutes or in an abuse, neglect, or dependency proceeding under Subchapter I of Chapter 7B of the General Statutes, or when a court in another state has assumed such jurisdiction under a comparable statute. (1995, c. 313, s. 1; 1998-202, s. 13(g).)

**§ 35A-1372. Standby guardianship; applicability.**

This Article provides two methods for appointing a standby guardian: by petition pursuant to G.S. 35A-1373 or by designation pursuant to G.S. 35A-1374. If a standby guardian is unwilling or unable to serve as a standby guardian and the designator or petitioner has identified an alternate standby guardian, then the alternate standby guardian shall become the standby guardian, upon the same conditions as set forth in this Article. (1995, c. 313, s. 1.)

**§ 35A-1373. Appointment by petition of standby guardian; petition, notice, hearing, order.**

(a) A petitioner shall commence a proceeding under this Article for the appointment of a standby guardian (i) in the case of a minor child, by filing a petition with the clerk of superior court

of the county in which the minor child resides or is domiciled at the time of filing or (ii) in the case of an incompetent adult, by filing a petition with the clerk of superior court in the county where the guardianship is docketed. A petition filed by a guardian of the person or a general guardian of the minor child who was appointed under this Chapter shall be treated as a motion in the cause in the original guardianship, but the provisions of this section shall otherwise apply.

(b) A petition for the judicial appointment of a standby guardian shall:

- (1) Identify the petitioner, the minor child or incompetent adult, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian, if any;
- (2) State that the authority of the standby guardian is to become effective upon the death of the petitioner, upon the incapacity of the petitioner, upon the debilitation of the petitioner with the consent of the petitioner, or upon the petitioner's signing of a written consent stating that the standby guardian's authority is in effect, whichever occurs first;
- (3) State that the petitioner suffers from a progressively chronic illness or an irreversible fatal illness, and the basis for such a statement, such as the date and source of a medical diagnosis, without requiring the identification of the illness in question;
- (4) State whether there are any lawsuits, in this or any other jurisdiction, involving the minor child or incompetent adult and, if so, identify the parties, the case numbers, and the states and counties where filed; and
- (5) Be verified by the petitioner in front of a notary public or another person authorized to administer oaths.

(c) A copy of the petition and written notice of the time, date, and place set for a hearing shall be served upon any biological or adoptive parent of the minor child who is not a petitioner (if the petition concerns a minor child) or on such as would be required if the petition was filed as a motion in the cause under G.S. 35A-1207 (if the petition concerns an incompetent adult), and on any other person the clerk may direct, including the minor child or incompetent adult. If the petition concerns a minor child, service shall be made pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk directs otherwise. If the petition concerns an incompetent adult, service shall be made pursuant to Rule 5 of the Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the petition upon determining that all necessary parties are before the court and agree to have the petition considered.

(d) If at or before the hearing any parent entitled to notice under subsection (c) of this section presents to the clerk a written claim for custody of the minor child, the clerk shall stay further proceedings under this Article pending the filing of a complaint for custody of the minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint, shall dismiss the petition. If no such complaint is filed within 30 days after the claim is presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

(e) The petitioner's appearance at the hearing shall not be required if the petitioner is medically unable to appear, unless the clerk determines that the petitioner is able with reasonable accommodation to appear and that the interests of justice require that the petitioner be present at the hearing.

(f) At the hearing, the clerk shall receive evidence necessary to determine whether the requirements of this Article for the appointment of a standby guardian have been satisfied. If the clerk finds that the petitioner suffers from a progressive chronic illness or an irreversible fatal illness, that the best interests of the minor child or incompetent adult will be promoted by the appointment of a standby guardian of the person or general guardian, and that the standby guardian and the alternate standby guardian, if any, are fit to serve as guardian of the person or general guardian of the minor child or incompetent adult, the clerk shall enter an order appointing the standby guardian named in the petition as standby guardian of the person or standby general guardian of the minor child or incompetent adult and shall issue letters of appointment to the standby guardian. The order may also appoint the alternate standby guardian named in the petition as the alternate standby guardian of the person or alternate general guardian of the minor child or incompetent adult in the event that the person named as standby guardian is unwilling or unable to serve as standby guardian and shall provide that, upon a showing of that unwillingness or inability, letters of appointment will be issued to the alternate standby guardian.

(g) Letters of appointment issued pursuant to this section shall state that the authority of the standby guardian or alternate standby guardian of the person or the standby guardian or alternate standby general guardian is effective upon the receipt by the guardian of a determination of the death of the petitioner, upon receipt of a determination of the incapacity of the petitioner, upon receipt of a determination of the debilitation of the petitioner and the petitioner's consent, whichever occurs first, and shall also provide that the authority of the standby guardian may earlier become effective upon written consent of the petitioner pursuant to subsection (l) of this section.

(h) If at any time prior to the commencement of the authority of the standby guardian the clerk, upon motion of the petitioner or any person entitled to notice under subsection (c) of this section and after hearing, finds that the requirements of subsection (f) of this section are no longer satisfied, the clerk shall rescind the order.

(i) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the death of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of proof of death of the petitioner such as a copy of a death certificate or a funeral home receipt. The standby guardian shall file the proof of death in the office of the clerk who entered the order within 90 days of the date of the petitioner's death or the standby guardian's authority may be rescinded by the clerk.

(j) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the incapacity of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of a copy of the determination of incapacity made pursuant to G.S. 35A-1375. The standby guardian shall file a copy of the determination of incapacity in the office of the clerk who entered the order within 90 days of the date of the receipt of such determination, or the standby guardian's authority may be rescinded by the clerk.

(k) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the debilitation of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of a copy of the determination of debilitation made pursuant to G.S. 35A-1375, as well as a written consent signed by the petitioner. The standby guardian shall file a copy of the determination of debilitation and the written consent in the office of the clerk who entered the order within 90 days of the date of the receipt of such determination, or the standby guardian's authority may be rescinded by the clerk.

(l) Notwithstanding subsections (i), (j), and (k) of this section, a standby guardian's authority shall commence upon the standby guardian's receipt of the petitioner's written consent to

such commencement, signed by the petitioner in the presence of two witnesses who are at least 18 years of age, other than the standby guardian or the alternate standby guardian, who shall also sign the writing. Another person may sign the written consent on the petitioner's behalf and at the petitioner's direction if the petitioner is physically unable to do so, provided such consent is signed in the presence of the petitioner and the two witnesses. The standby guardian shall file the written consent in the office of the clerk who entered the order within 90 days of the date of such written consent, or the standby guardian's authority may be rescinded by the clerk.

(m) The petitioner may revoke a standby guardianship created under this section by executing a written revocation, filing it in the office of the clerk who entered the order, and promptly providing the standby guardian with a copy of the revocation.

(n) A person appointed standby guardian pursuant to this section may at any time before the commencement of the person's authority renounce the appointment by executing a written renunciation and filing it with the clerk who entered the order and promptly providing the petitioner with a copy of the renunciation. Upon the filing of a renunciation, the clerk shall issue letters of appointment to the alternate standby guardian, if any. (1995, c. 313, s. 1; 2015-205, s. 1.)

#### **§ 35A-1374. Appointment by written designation; form.**

(a) A designator may designate a standby guardian by means of a written designation, signed by the designator in the presence of two witnesses at least 18 years of age, other than the standby guardian or alternate standby guardian, who shall also sign the writing. Another person may sign the written designation on the behalf of and at the direction of the designator if the designator is physically unable to do so, provided that the designation is signed in the presence of the designator and the two witnesses.

(b) A designation of a standby guardian shall identify the designator, the minor child or incompetent adult, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian, if any, and shall indicate that the designator intends for the standby guardian or the alternate standby guardian to become the guardian of the minor child or incompetent adult in the event that the designator either:

- (1) Becomes incapacitated;
- (2) Becomes debilitated and consents to the commencement of the standby guardian's authority;
- (3) Dies prior to the commencement of a judicial proceeding to appoint a guardian of the person or general guardian of a minor child; or
- (4) Consents to the commencement of the standby guardian's authority.

(c) The authority of the standby guardian under a designation shall commence upon the same conditions as set forth in G.S. 35A-1373(i) through (l), as if the order referred to therein was a written description under this section.

(d) The standby guardian or, if the standby guardian is unable or unwilling to serve, the alternate standby guardian shall commence a proceeding under this Article to be appointed guardian of the person or general guardian of the minor child or incompetent adult by, in the case of a minor child, filing a petition with the clerk of superior court of the county in which the minor child resides or is domiciled at the time of filing or, in the case of an incompetent adult, filing a petition with the clerk of superior court in the county where the guardianship is docketed. The petition shall be filed after receipt of either:

- (1) A copy of a determination of incapacity made pursuant to G.S. 35A-1375;

- (2) A copy of a determination of debilitation made pursuant to G.S. 35A-1375 and a copy of the designator's written consent to such commencement;
- (3) A copy of the designator's written consent to such commencement, made pursuant to G.S. 35A-1373(l); or
- (4) Proof of death of the designator, such as a copy of a death certificate or a funeral home receipt.

(e) The standby guardian shall file a petition pursuant to subsection (d) of this section within 90 days of the date of the commencement of the standby guardian's authority under this section, or the standby guardian's authority shall lapse after the expiration of those 90 days, to recommence only upon filing of the petition.

(f) A petition filed pursuant to subsection (d) of this section shall:

- (1) Append the written designation of such person as standby guardian; and
- (2) Append a copy of either (i) the determination of incapacity of the designator; (ii) the determination of debilitation of the designator and the written consent of the designator; (iii) the designator's consent; or (iv) proof of death of the designator, such as a copy of a death certificate or a funeral home receipt; and
- (3) If the petition is by a person designated as an alternate standby guardian, state that the person designated as the standby guardian is unwilling or unable to act as standby guardian, and the basis for that statement; and
- (4) State whether there are any lawsuits, in this State or any other jurisdiction, involving the minor child or incompetent adult and, if so, identify the parties, the case numbers, and the states and counties where filed; and
- (5) Be verified by the standby guardian or alternate standby guardian in front of a notary public or another person authorized to administer oaths.

(g) A copy of the petition and written notice of the time, date, and place set for a hearing shall be served upon any biological or adoptive parent of the minor child who is not a designator (if the petition concerns a minor child), on such persons as would be required if the petition was filed as a motion in the cause under G.S. 35A-1207 (if the petition concerns an incompetent adult), and on any other person the clerk may direct, including the minor child or incompetent adult. If the petition concerns a minor child, service shall be made pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk directs otherwise. If the petition concerns an incompetent adult, service shall be made pursuant to Rule 5 of the Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the petition upon determining that all necessary parties are before the court and agree to have the petition considered.

(h) If at or before the hearing any parent entitled to notice under subsection (c) of this section presents to the clerk a written claim for custody of the minor child, the clerk shall stay further proceedings under this Article pending the filing of a complaint for custody of the minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint, shall dismiss the petition. If no such complaint is filed within 30 days after the claim is presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

(i) At the hearing, the clerk shall receive evidence necessary to determine whether the requirements of this section have been satisfied. The clerk shall enter an order appointing the standby guardian or alternate standby guardian as guardian of the person or general guardian of the minor child or incompetent adult if the clerk finds that:

- (1) The person was duly designated as a standby guardian or alternate standby guardian;
  - (2) That (i) there has been a determination of incapacity of the designator; (ii) there has been a determination of debilitation and the designator has consented to the commencement of the standby guardian's authority; (iii) the designator has consented to that commencement; or (iv) the designator has died, such information coming from a document, such as a copy of a death certificate or a funeral home receipt;
  - (3) That the best interests of the minor child or incompetent adult will be promoted by the appointment of the person designated as standby guardian or alternate standby guardian as guardian of the person or general guardian of the minor child or incompetent adult;
  - (4) That the standby guardian or alternate standby guardian is fit to serve as guardian of the person or general guardian of the minor child or incompetent adult; and
  - (5) That, if the petition is by a person designated as an alternate standby guardian, the person designated as standby guardian is unwilling or unable to serve as standby guardian.
- (j) The designator may revoke a standby guardianship created under this section by:
- (1) Notifying the standby guardian in writing of the intent to revoke the standby guardianship prior to the filing of the petition under this section; or
  - (2) Where the petition has already been filed, by executing a written revocation, filing it in the office of the clerk with whom the petition was filed, and promptly providing the standby guardian with a copy of the written revocation. (1995, c. 313, s. 1; 2015-205, s. 1.)

**§ 35A-1375. Determination of incapacity or debilitation.**

(a) If requested by the petitioner, designator, or standby guardian, an attending physician shall make a determination regarding the incapacity or debilitation of the petitioner or designator for purposes of this Article.

(b) A determination of incapacity or debilitation shall:

- (1) Be made by the attending physician to a reasonable degree of medical certainty;
- (2) Be in writing; and
- (3) Contain the attending physician's opinion regarding the cause and nature of the incapacity or debilitation, as well as its extent and probable duration.

(c) The attending physician shall provide a copy of the determination of incapacity or debilitation to the standby guardian, if the standby guardian's identity is known to the physician.

(d) The standby guardian shall ensure that the petitioner or designator is informed of the commencement of the standby guardian's authority as a result of a determination of incapacity or debilitation and of the possibility of a future suspension of the standby guardian's authority pursuant to G.S. 35A-1376. (1995, c. 313, s. 1.)

**§ 35A-1376. Restoration of capacity or ability; suspension of guardianship.**

In the event that the authority of the standby guardian becomes effective upon the receipt of a determination of incapacity or debilitation and the petitioner or designator is subsequently restored to capacity or ability to care for the child, the authority of the standby guardian based on that

incapacity or debilitation shall be suspended. The attending physician shall provide a copy of the determination of restored capacity or ability to the standby guardian, if the identity of the standby guardian is known to the attending physician. If an order appointing the standby guardian as guardian of the person or general guardian of the minor child or incompetent adult has been entered, the standby guardian shall, and the petitioner or designator may, file a copy of the determination of restored capacity or ability in the office of the clerk who entered the order. A determination of restored capacity or ability shall:

- (1) Be made by the attending physician to a reasonable degree of medical certainty;
- (2) Be in writing; and
- (3) Contain the attending physician's opinion regarding the cause and nature of the parent's or legal guardian's restoration to capacity or ability.

Any order appointing the standby guardian as guardian of the person or general guardian of the minor child or incompetent adult shall remain in full force and effect, and the authority of the standby guardian shall recommence upon the standby guardian's receipt of a subsequent determination of the petitioner's or designator's incapacity, pursuant to G.S. 35A-1373(j), or upon the standby guardian's receipt of a subsequent determination of debilitation pursuant to G.S. 35A-1373(k), or upon the receipt of proof of death of the petitioner or designator, or upon the written consent of the petitioner or designator, pursuant to G.S. 35A-1373(l). (1995, c. 313, s. 1; 2015-205, s. 1.)

#### **§ 35A-1377. Authority concurrent to parental rights.**

The commencement of the standby guardian's authority pursuant to a determination of incapacity, determination of debilitation, or written consent shall not itself divest the petitioner or designator of any parental or guardianship rights, but shall confer upon the standby guardian concurrent authority with respect to the minor child. (1995, c. 313, s. 1.)

#### **§ 35A-1378. Powers and duties.**

A standby guardian designated pursuant to G.S. 35A-1374 and a guardian of the person or general guardian appointed pursuant to this Article have all of the powers, authority, duties, and responsibilities of a guardian appointed pursuant to Subchapter II of this Chapter. (1995, c. 313, s. 1.)

#### **§ 35A-1379. Appointment of guardian ad litem.**

(a) The clerk may appoint a volunteer guardian ad litem, if available, to represent the best interests of the minor child or incompetent adult and, where appropriate, express the wishes of the minor child or incompetent adult.

(b) The duties of the guardian ad litem, when appointed, shall be to make an investigation to determine the facts, the needs of the minor child or incompetent adult and the available resources within the family to meet those needs, and to protect and promote the best interests of the minor child or incompetent adult until formally relieved of the responsibility by the clerk.

(c) The court may order the guardian ad litem to conduct an investigation to determine the fitness of the intended standby guardian and alternate standby guardian, if any, to perform the duties of standby guardian. (1995, c. 313, s. 1; 2015-205, s. 1.)

#### **§ 35A-1380. Bond.**



The bond requirements of Article 7 of this Chapter shall apply to a guardian of the person or general guardian appointed pursuant to G.S. 35A-1373 or G.S. 35A-1374, provided that: (i) the clerk need not require a bond if the bond requirement is waived in writing by the petitioner or designator; and (ii) a general guardian appointed pursuant to G.S. 35A-1373 shall not be required to furnish a bond until a triggering event has occurred. (1995, c. 313, s. 1.)

**§ 35A-1381. Accounting.**

The accounting requirements of Article 10 of this Chapter apply to a general guardian appointed pursuant to this Article. (1995, c. 313, s. 1.)

**§ 35A-1382. Termination.**

(a) Any standby guardianship created under this Article shall continue until:

- (1) If the ward is a minor child, the child reaches 18 years of age unless sooner terminated by order of the clerk who entered the order appointing the standby guardian.
- (2) Revocation pursuant to this Article.
- (3) Renunciation pursuant to this Article.

(b) A standby guardianship shall terminate, and the authority of the standby guardian designated pursuant to G.S. 35A-1374 or of a guardian of the person or general guardian appointed pursuant to this Article shall cease, upon the entry of an order of the district court granting custody of the minor child to any other person. (1995, c. 313, s. 1; 2015-205, s. 1.)