

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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HOUSE BILL 869\*

Short Title: Standby Guardianship Act.

(Public)

Sponsors: Representatives Berry, Easterling (Co-sponsors); Russell and Buchanan.

Referred to: Welfare Reform and Human Resources.

April 12, 1995

A BILL TO BE ENTITLED  
AN ACT TO PROVIDE FOR THE APPOINTMENT OF STANDBY GUARDIANS.  
The General Assembly of North Carolina enacts:

Section 1. Chapter 35A of the General Statutes is amended by adding a new Article to read:

**"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 who shall assume the duties of guardian over the person and, when applicable, the property of a minor child, pursuant to G.S. 35A-1372 or to G.S. 35A-1373, 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.

- 1                    When no physician has this responsibility, a physician who is familiar  
2                    with the petitioner's medical condition may act as the attending  
3                    physician pursuant to this Article.
- 4                    (3) 'Consent' means written consent signed by the parent or legal guardian  
5                    in the presence of two witnesses, over the age of 18, neither of whom is  
6                    the standby guardian or alternate standby guardian who shall also sign  
7                    the document. The written consent shall constitute the terms for the  
8                    commencement of the duties of the standby guardian.
- 9                    (4) 'Debilitation' means a chronic and substantial inability, as a result of a  
10                    physically debilitating illness, disease, or injury, to care for one's minor  
11                    child.
- 12                    (5) 'Designation' means a written document voluntarily executed by the  
13                    designator pursuant to this Article.
- 14                    (6) 'Designator' means a competent parent who has legal custody of a child  
15                    or a minor child's legal guardian, who suffers from a progressively fatal  
16                    illness, or the guardian ad litem of a parent or legal guardian of a minor  
17                    child who makes a designation pursuant to this Article.
- 18                    (7) 'Determination of debilitation' means a written determination made by  
19                    the attending physician which contains the physician's opinion to a  
20                    reasonable degree of medical certainty regarding the nature, cause,  
21                    extent, and probable duration of the parent's or legal guardian's  
22                    debilitation.
- 23                    (8) 'Determination of incapacity' means a written determination made by  
24                    the attending physician which contains the physician's opinion to a  
25                    reasonable degree of medical certainty regarding the nature, cause,  
26                    extent, and probable duration of the incapacity of the parent or legal  
27                    guardian.
- 28                    (9) 'Incapacity' means a chronic and substantial inability, as a result of  
29                    mental or organic impairment, to understand the nature and  
30                    consequences of decisions concerning the care of one's minor child, and  
31                    a consequent inability to make these decisions.
- 32                    (10) 'Minor child' means a child or children under the age of 18 years, but  
33                    excludes a child or children residing in a placement funded or approved  
34                    by the department of social services pursuant to either a voluntary  
35                    agreement or court order.
- 36                    (11) 'Petitioner' means a minor child's biological or adoptive parent or legal  
37                    guardian who suffers from a progressively chronic illness or an  
38                    irreversibly fatal illness, or the guardian ad litem of that parent or legal  
39                    guardian appointed pursuant to G.S. 1A-1, Rule 17, or pursuant to  
40                    Article 1 of this Chapter, who is eligible under this Article to file a  
41                    petition for the appointment of a standby guardian.
- 42                    (12) 'Standby guardian' means a person appointed pursuant to G.S. 35A-1372  
43                    or designated pursuant to G.S. 35A-1373 to assume the duties of

1 guardian over the person and, when applicable, the property of a minor  
2 child upon the death of the parent or legal guardian, upon a  
3 determination of debilitation or incapacity of the parent or legal  
4 guardian, or with the consent of the parent or legal guardian.

- 5 (13) 'Triggering event' means an event stated in the designation, petition, or  
6 decree which empowers the standby guardian, or the alternate standby  
7 guardian, if one is identified and the standby guardian is unwilling or  
8 unable to serve, to assume the duties of the office, which event may be  
9 the death of the parent or legal guardian, incapacity of the parent or  
10 legal guardian, debilitation of the parent or legal guardian with the  
11 petitioner's consent, or the consent of the parent or legal guardian,  
12 whichever occurs first.

13 **"§ 35A-1371. Standby guardianship; applicability.**

14 This Article provides two methods for appointing a standby guardian: by petition  
15 pursuant to G.S. 35A-1372 or by designation pursuant to G.S. 35A-1373. If a standby  
16 guardian is unwilling or unable to serve as a standby guardian and the designator or  
17 petitioner has identified an alternate standby guardian, then the alternate standby guardian  
18 shall become the standby guardian, upon the same conditions as set forth in this Article.  
19 The provisions of this Chapter relating to guardians shall apply to standby guardians,  
20 except insofar as this Article provides otherwise.

21 **"§ 35A-1372. Appointment by petition.**

22 (a) A petition for the judicial appointment of a standby guardian of the person or  
23 property of a minor child pursuant to this section may be made by the biological or  
24 adoptive parent or the legal guardian of the minor child. If a parent or legal guardian of a  
25 minor child has a guardian ad litem, appointed pursuant to the provisions of G.S. 1A-1,  
26 Rule 17 or pursuant to Article 1 of this Chapter, that guardian ad litem shall also have the  
27 authority to petition for the judicial appointment of a standby guardian for the minor child  
28 of the guardian ad litem's ward.

29 (b) A petition for the judicial appointment of a standby guardian of a minor child  
30 shall:

- 31 (1) Identify the parent or legal guardian, the minor child, the person  
32 designated to be the standby guardian, and the person designated to be  
33 the alternate standby guardian, if any;  
34 (2) State that the authority of the standby guardian is to become effective  
35 upon the death of the parent or legal guardian, upon the incapacity of  
36 the parent or legal guardian, upon the debilitation of the parent or legal  
37 guardian with the consent of the petitioner, or upon the petitioner's  
38 signing of a written consent stating that the standby guardian's authority  
39 is in effect, whichever occurs first;  
40 (3) State that the parent or legal guardian suffers from a progressively  
41 chronic illness or an irreversibly fatal illness, and the basis for such a  
42 statement, such as the date and source of a medical diagnosis, without  
43 requiring the identification of the illness in question;

1           (4) State whether there are any lawsuits, in this or any other jurisdiction,  
2           involving the minor child and, if so, identify the parties, the case  
3           numbers, and the states and counties where filed; and

4           (5) Be verified by the petitioner in front of a notary public or another person  
5           authorized to administer oaths.

6           (c) The petitioner shall provide any other parent or legal guardian of the minor  
7           child with reasonable notice and an opportunity to be heard.

8           (d) The petitioner's appearance in court shall not be required if the petitioner is  
9           medically unable to appear, except upon motion and for good cause shown.

10          (e) If the court finds that the parent or legal guardian suffers from a progressively  
11          chronic illness or an irreversibly fatal illness and that the best interests of the minor child  
12          will be promoted by the appointment of a standby guardian of the person or the property,  
13          it shall issue a decree appointing the standby guardian, or if the person identified as the  
14          standby guardian is unwilling or unable to serve as standby guardian, then appointing the  
15          person identified as the alternate standby guardian as standby guardian.

16          (f) A decree issued pursuant to this section shall state that the authority of the  
17          standby guardian is effective upon the receipt of a determination of the death of the  
18          parent or legal guardian, upon receipt of a determination of the incapacity of the parent or  
19          legal guardian, upon receipt of a determination of the debilitation of the parent or legal  
20          guardian with the petitioner's consent, whichever occurs first, and shall also provide that  
21          the authority of the standby guardian may earlier become effective upon written consent  
22          of the petitioner pursuant to subsection (l) of this section.

23          (g) The decree shall also include a finding that the standby guardian and the  
24          alternate standby guardian are fit to serve as standby guardian.

25          (h) If at any time prior to the commencement of the authority of the standby  
26          guardian the court finds that the requirements of subsection (e) of this section are no  
27          longer satisfied, it may rescind the decree.

28          (i) Where the decree provides that the authority of the standby guardian is  
29          effective upon receipt of a determination of the death of the parent or legal guardian, the  
30          standby guardian's authority shall commence upon the standby guardian's receipt of proof  
31          of death of the parent or legal guardian such as a copy of a death certificate or a funeral  
32          home receipt. The standby guardian shall file the proof of death with the court that  
33          issued the decree within 90 days of the date of the petitioner's death or the standby  
34          guardian's authority may be rescinded by the court.

35          (j) Where the decree provides that the authority of the standby guardian is  
36          effective upon receipt of a determination of the incapacity of the parent or legal guardian,  
37          the standby guardian's authority shall commence upon the standby guardian's receipt of a  
38          copy of the determination of incapacity made pursuant to G.S. 35A-1374. The standby  
39          guardian shall file a copy of the determination of incapacity with the court that issued the  
40          decree within 90 days of the date of the receipt of such determination, or the standby  
41          guardian's authority may be rescinded by the court.

42          (k) Where the decree provides that the authority of the standby guardian is  
43          effective upon receipt of a determination of the debilitation of the parent or legal

1 guardian, the standby guardian's authority shall commence upon the standby guardian's  
2 receipt of a copy of the determination of debilitation made pursuant to G.S. 35A-1374, as  
3 well as a written consent signed by the petitioner. The standby guardian shall file a copy  
4 of the determination of debilitation and the written consent with the court that issued the  
5 decree within 90 days of the date of the receipt of such determination, or the standby  
6 guardian's authority may be rescinded by the court.

7 (l) Notwithstanding subsections (i), (j), and (k) of this section, a standby  
8 guardian's authority shall commence upon the standby guardian's receipt of the  
9 petitioner's written consent to such commencement, signed by the petitioner in the  
10 presence of two witnesses who are at least 18 years of age, other than the standby  
11 guardian or the alternate standby guardian, who shall also sign the writing. Another  
12 person may sign the written consent on the petitioner's behalf and at the petitioner's  
13 direction if the petitioner is physically unable to do so, provided such consent is signed in  
14 the presence of the petitioner and the two witnesses. The standby guardian shall file the  
15 written consent with the court that issued the decree within 90 days of the date of such  
16 written consent, or the standby guardian's authority may be rescinded by the court.

17 (m) The petitioner may revoke a standby guardianship created under this section by  
18 executing a written revocation, filing it with the court that issued the decree, and  
19 promptly providing the standby guardian with a copy of the revocation.

20 (n) A person appointed standby guardian pursuant to this section may at any time  
21 before the commencement of the person's authority renounce the appointment by  
22 executing a written renunciation and filing it with the court that issued the decree and  
23 promptly providing the petitioner with a copy of the renunciation, and then the alternate  
24 standby guardian shall become standby guardian upon the same conditions as set forth in  
25 this Article.

26 **"§ 35A-1373. Appointment by written designation; form.**

27 (a) A parent or legal guardian of a minor child or the guardian ad litem of a parent  
28 or legal guardian may designate a standby guardian by means of a written designation,  
29 signed by the parent or legal guardian of the minor child or the guardian ad litem of the  
30 parent or the legal guardian in the presence of two witnesses at least 18 years of age,  
31 other than the standby guardian or alternate standby guardian, who shall also sign the  
32 writing. Another person may sign the written designation on the behalf of the parent or  
33 legal guardian and at the direction of the parent or legal guardian if the parent or legal  
34 guardian is physically unable to do so, provided that the designation is signed in the  
35 presence of the parent or legal guardian and the two witnesses.

36 (b) A designation of a standby guardian shall identify the parent or legal guardian,  
37 the minor child, the person designated to be the standby guardian, and the person  
38 designated to be the alternate standby guardian, if any, and shall indicate that the  
39 designator intends for the standby guardian to become the minor child's guardian in the  
40 event that the parent or legal guardian either:

41 (1) Becomes incapacitated;

42 (2) Becomes debilitated and consents to the commencement of the standby  
43 guardian's authority;

1           (3) Dies prior to the commencement of a judicial proceeding to appoint a  
2           guardian of the person or property of a minor child; or

3           (4) Consents to the commencement of the standby guardian's authority.

4       (c) The authority of the standby guardian under a designation shall commence  
5 upon the same conditions as set forth for the effectiveness of a judicial decree in G.S.  
6 35A-1372(i) through (l).

7       (d) The standby guardian shall file a petition for appointment as guardian after  
8 receipt of either:

9           (1) A copy of a determination of incapacity made pursuant to G.S. 35A-  
10 1374;

11          (2) A copy of a determination of debilitation made pursuant to G.S. 35A-  
12 1374 and a copy of the designator's written consent to such  
13 commencement;

14          (3) A copy of the designator's written consent to such commencement,  
15 made pursuant to G.S. 35A-1372(l); or

16          (4) Proof of death of the parent or legal guardian, such as a copy of a death  
17 certificate or a funeral home receipt.

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

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

23           (1) Append the written designation of such person as standby guardian; and

24           (2) Append a copy of either (i) the determination of incapacity of the parent  
25 or legal guardian; (ii) the determination of debilitation of the parent or  
26 legal guardian and the written consent of the designator; (iii) the  
27 designator's consent; or (iv) proof of death of the parent or legal  
28 guardian, such as a copy of a death certificate or a funeral home receipt;  
29 and

30           (3) If the petition is by a person designated as an alternate standby guardian,  
31 state that the person designated as the standby guardian is unwilling or  
32 unable to act as standby guardian, and the basis for that statement; and

33           (4) State whether there are any lawsuits, in this State or any other  
34 jurisdiction, involving the minor child and, if so, identify the parties, the  
35 case numbers, and the states and counties where filed; and

36           (5) Be verified by the petitioner in front of a notary public or another person  
37 authorized to administer oaths.

38       (g) The petitioner shall provide any other parent or legal guardian of the minor  
39 child with reasonable notice and an opportunity to be heard.

40       (h) The court shall issue a decree appointing the petitioner as standby guardian if  
41 the court finds that:

42           (1) The person was duly designated as a standby guardian or alternate  
43 standby guardian;

- 1           (2) That (i) there has been a determination of incapacity; (ii) there has been  
2 a determination of debilitation and the designator has consented to the  
3 commencement of the standby guardian's authority; (iii) the designator  
4 has consented to that commencement; or (iv) the parent or legal  
5 guardian of the minor child has died, such information coming from a  
6 document, such as a copy of a death certificate or a funeral home  
7 receipt;
- 8           (3) That the best interests of the minor child will be promoted by the  
9 appointment of a standby guardian of the person or property; and
- 10          (4) That, if the petition is by a person designated as an alternate standby  
11 guardian, the person designated as standby guardian is unwilling or  
12 unable to serve as standby guardian.
- 13          (i) The designator may revoke a standby guardianship created under this section  
14 by:
- 15               (1) Notifying the standby guardian in writing of the intent to revoke the  
16 standby guardianship prior to the filing of the petition; or
- 17               (2) Where the petition has already been filed, by executing a written  
18 revocation, filing it with the court where the petition was filed, and  
19 promptly providing the standby guardian with a copy of the written  
20 revocation.

21 **"§ 35A-1374. Determination of incapacity or debilitation.**

- 22          (a) A determination of incapacity or debilitation shall:
- 23               (1) Be made by the attending physician to a reasonable degree of medical  
24 certainty;
- 25               (2) Be in writing; and
- 26               (3) Contain the attending physician's opinion regarding the cause and nature  
27 of the incapacity or debilitation of the parent or legal guardian, as well  
28 as its extent and probable duration.
- 29          (b) The attending physician shall provide a copy of the determination of incapacity  
30 or debilitation to the standby guardian, if the standby guardian's identity is known to the  
31 physician.
- 32          (c) If requested by the petitioner, designator, or standby guardian, an attending  
33 physician shall make a determination regarding the incapacity or debilitation of the parent  
34 or legal guardian for purposes of this Article.
- 35          (d) The standby guardian shall ensure that the petitioner or designator is informed  
36 of the commencement of the standby guardian's authority as a result of a determination of  
37 incapacity or debilitation and of the possibility of a future suspension of the standby  
38 guardian's authority pursuant to G.S. 35A-1375.

39 **"§ 35A-1375. Restoration of capacity or ability; suspension of guardianship.**

40          In the event that the authority of the standby guardian becomes effective upon the  
41 receipt of a determination of incapacity or debilitation of the parent or legal guardian of a  
42 minor child and the parent or legal guardian is subsequently restored to capacity or ability  
43 to care for the child, the authority of the standby guardian based on that incapacity or

1 debilitation shall be suspended. The attending physician shall provide a copy of the  
2 determination of restored capacity or ability to the standby guardian, if the identity of the  
3 standby guardian is known to the attending physician, and the standby guardian shall, and  
4 the parent or legal guardian may, file a copy of the determination of restored capacity or  
5 ability with the court that issued the decree. A determination of restored capacity or  
6 ability shall:

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

12 The decree issued by the court shall remain in full force and effect, and the authority  
13 of the standby guardian shall recommence upon the standby guardian's receipt of a  
14 subsequent determination of the parent's or legal guardian's incapacity, pursuant to G.S.  
15 35A-1372(j), or upon the standby guardian's receipt of a subsequent determination of  
16 debilitation pursuant to G.S. 35A-1372(k), or upon the receipt of proof of death of the  
17 parent or legal guardian, or upon the written consent of the parent or legal guardian,  
18 pursuant to G.S. 35A-1372(l).

19 **"§ 35A-1376. Authority concurrent to parental rights.**

20 The commencement of the standby guardian's authority pursuant to a determination of  
21 incapacity, determination of debilitation, or written consent shall not itself divest the  
22 parent or legal guardian of any parental or guardianship rights, but shall confer upon the  
23 standby guardian concurrent authority with respect to the minor child.

24 **"§ 35A-1377. Filing of appointment or designation of standby guardian.**

25 (a) The clerk of superior court of any county, upon being paid the fees provided  
26 for by law or an affidavit of indigency, shall receive for filing any instrument appointing  
27 or designating a standby guardian pursuant to the provisions of this Article made by a  
28 domiciliary of the county and shall give a written receipt therefor to the person delivering  
29 it. The filing of an appointment or designation of standby guardian shall be for the sole  
30 purpose of safekeeping and shall not affect the validity of the appointment or designation.

31 (b) The appointment or designation shall be delivered only to:

- 32 (1) The petitioner or designator;
- 33 (2) The person appointed or designated as standby guardian or alternate  
34 standby guardian; and
- 35 (3) Any other person directed by the court.

36 **"§ 35A-1378. Appointment of guardian ad litem.**

37 (a) The court may appoint a guardian ad litem to represent the best interests of the  
38 minor child and, where appropriate, express the wishes of the minor child.

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

1 (c) The court may order the guardian ad litem to conduct an investigation to  
2 determine the fitness of the intended standby guardian and alternate standby guardian, if  
3 any, to perform the duties of standby guardian.

4 **"§ 35A-1379. Bond.**

5 The court shall not require the standby guardian of a minor child to post a bond. The  
6 court in its discretion may require a bond pursuant to Article 7 of this Chapter if the  
7 standby guardian is appointed as guardian of the property of the minor child, but in no  
8 event shall such a bond be required prior to the occurrence of a triggering event.

9 **"§ 35A-1380. Accounting.**

10 If a standby guardian is appointed guardian of the property of a minor child, the  
11 standby guardian shall comply with the requirements of Article 10 of this Chapter.

12 **"§ 35A-1381. Termination.**

13 Any standby guardianship created under this Article shall continue until the child  
14 reaches 18 years of age unless sooner terminated by order of the court which issued the  
15 decree appointing the standby guardian, by revocation pursuant to this Article, or by  
16 renunciation pursuant to this Article."

17 Sec. 2. This act is effective upon ratification.