

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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SENATE BILL 682*

Short Title: Standby Guardianship Act.

(Public)

Sponsors: Senators Gulley, Allran, and Lucas.

Referred to: Judiciary II/Election Laws

April 13, 1995

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

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

6 **"ARTICLE 21.**
7 **"STANDBY GUARDIANSHIP.**
8 **"§ 35A-1370. Definitions.**

9 For purposes of this Article:

- 10 (1) 'Alternate standby guardian' means a person identified in either a
11 petition or designation who shall assume the duties of guardian over the
12 person and, when applicable, the property of a minor child, pursuant to
13 G.S. 35A-1372 or to G.S. 35A-1373, when the person identified as the
14 standby guardian and the designator or petitioner has identified an
15 alternate standby guardian.
- 16 (2) 'Attending physician' means the physician who has primary
17 responsibility for the treatment and care of the parent or legal guardian.
18 When more than one physician shares this responsibility, or when a
19 physician is acting on the primary physician's behalf, any such
20 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.