

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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SENATE BILL 682*
House Committee Substitute Favorable 5/18/95

Short Title: Standby Guardianship Act.

(Public)

Sponsors:

Referred to:

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 Subchapter to read:

6 **"SUBCHAPTER IV. STANDBY GUARDIANS FOR MINOR CHILDREN.**

7 **"ARTICLE 21.**

8 **"STANDBY GUARDIANSHIP.**

9 **"§ 35A-1370. Definitions.**

10 For purposes of this Article:

11 (1) 'Alternate standby guardian' means a person identified in either a
12 petition or designation to become the guardian of the person or, when
13 appropriate, the general guardian of a minor child, pursuant to G.S.
14 35A-1372 or to G.S. 35A-1373, when the person identified as the
15 standby guardian and the designator or petitioner has identified an
16 alternate standby guardian.

17 (2) 'Attending physician' means the physician who has primary
18 responsibility for the treatment and care of the parent or legal guardian.
19 When more than one physician shares this responsibility, or when a

1 physician is acting on the primary physician's behalf, any such
2 physician may act as the attending physician pursuant to this section.
3 When no physician has this responsibility, a physician who is familiar
4 with the petitioner's medical condition may act as the attending
5 physician pursuant to this Article.

6 (3) 'Debilitation' means a chronic and substantial inability, as a result of a
7 physically debilitating illness, disease, or injury, to care for one's minor
8 child.

9 (4) 'Designation' means a written document voluntarily executed by the
10 designator pursuant to this Article.

11 (5) 'Designator' means a person who suffers from a progressive chronic
12 illness or an irreversible fatal illness and who is the biological or
13 adoptive parent, the guardian of the person, or the general guardian of a
14 minor child. A designation under this Article may be made on behalf of
15 a designator by the guardian of the person or the general guardian of the
16 designator.

17 (6) 'Determination of debilitation' means a written determination made by
18 the attending physician which contains the physician's opinion to a
19 reasonable degree of medical certainty regarding the nature, cause,
20 extent, and probable duration of the debilitation of the petitioner or
21 designator.

22 (7) 'Determination of incapacity' means a written determination made by
23 the attending physician which contains the physician's opinion to a
24 reasonable degree of medical certainty regarding the nature, cause,
25 extent, and probable duration of the incapacity of the petitioner or
26 designator.

27 (8) 'Incapacity' means a chronic and substantial inability, as a result of
28 mental or organic impairment, to understand the nature and
29 consequences of decisions concerning the care of one's minor child, and
30 a consequent inability to make these decisions.

31 (9) 'Minor child' means an unemancipated child or children under the age of
32 18 years.

33 (10) 'Petitioner' means a person who suffers from a progressive chronic
34 illness or an irreversible fatal illness and who is the biological parent,
35 the adoptive parent, the guardian of the person, or the general guardian
36 of a minor child. A proceeding under this Article may be initiated and
37 pursued on behalf of a petitioner by the guardian of the person, the
38 general guardian of the petitioner, or by a person appointed by the clerk
39 of superior court pursuant to Rule 17 of the Rules of Civil Procedure as
40 guardian ad litem for the purpose of initiating and pursuing a proceeding
41 under this Article on behalf of a petitioner.

42 (11) 'Standby guardian' means a person appointed pursuant to G.S. 35A-1372
43 or designated pursuant to G.S. 35A-1373 to become the guardian of the

1 person or, when appropriate, the general guardian of a minor child upon
2 the death of a petitioner or designator, upon a determination of
3 debilitation or incapacity of a petitioner or designator, or with the
4 consent of a petitioner or designator.

5 (12) 'Triggering event' means an event stated in the designation executed or
6 order entered under this Article which empowers the standby guardian,
7 or the alternate standby guardian, if one is identified and the standby
8 guardian is unwilling or unable to serve, to assume the duties of the
9 office, which event may be the death of a petitioner or designator,
10 incapacity of a petitioner or designator, debilitation of a petitioner or
11 designator with the petitioner's or designator's consent, or the consent of
12 the petitioner or designator, whichever occurs first.

13 **"§ 35A-1370.1. Jurisdiction; limits.**

14 Notwithstanding the provisions of Subchapter II of this Chapter, the clerk of superior
15 court shall have original jurisdiction for the appointment of a standby guardian for a
16 minor child under this Article. Provided that the clerk shall have no jurisdiction, no
17 standby guardian may be appointed under this Article, and no designation may become
18 effective under this Article when a district court has assumed jurisdiction over the minor
19 child in an action under Chapter 50 of the General Statutes or in an abuse, neglect, or
20 dependency proceeding under Subchapter XI of Chapter 7A of the General Statutes, or
21 when a court in another state has assumed such jurisdiction under a comparable statute.

22 **"§ 35A-1371. Standby guardianship; applicability.**

23 This Article provides two methods for appointing a standby guardian: by petition
24 pursuant to G.S. 35A-1372 or by designation pursuant to G.S. 35A-1373. If a standby
25 guardian is unwilling or unable to serve as a standby guardian and the designator or
26 petitioner has identified an alternate standby guardian, then the alternate standby guardian
27 shall become the standby guardian, upon the same conditions as set forth in this Article.

28 **"§ 35A-1372. Appointment by petition of standby guardian; petition, notice,**
29 **hearing, order.**

30 (a) A petitioner shall commence a proceeding under this Article for the
31 appointment of a standby guardian of a minor child by filing a petition with the clerk of
32 superior court of the county in which the minor child resides or is domiciled at the time
33 of filing. A petition filed by a guardian of the person or a general guardian of the minor
34 child who was appointed under this Chapter shall be treated as a motion in the cause in
35 the original guardianship, but the provisions of this section shall otherwise apply.

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

38 (1) Identify the petitioner, the minor child, the person designated to be the
39 standby guardian, and the person designated to be the alternate standby
40 guardian, if any;

41 (2) State that the authority of the standby guardian is to become effective
42 upon the death of the petitioner, upon the incapacity of the petitioner,
43 upon the debilitation of the petitioner with the consent of the petitioner,

1 or upon the petitioner's signing of a written consent stating that the
2 standby guardian's authority is in effect, whichever occurs first;

3 (3) State that the petitioner suffers from a progressively chronic illness or
4 an irreversible fatal illness, and the basis for such a statement, such as
5 the date and source of a medical diagnosis, without requiring the
6 identification of the illness in question;

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

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

12 (c) A copy of the petition and written notice of the time, date, and place set for a
13 hearing shall be served upon any biological or adoptive parent of the minor child who is
14 not a petitioner, and on any other person the clerk may direct, including the minor child.
15 Service shall be made pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk
16 directs otherwise. When service is made by the sheriff, the sheriff shall make such service
17 without demanding his fees in advance. Parties may waive their right to notice of the
18 hearing and the clerk may proceed to consider the petition upon determining that all
19 necessary parties are before the court and agree to have the petition considered.

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

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

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

1 of that unwillingness or inability, letters of appointment will be issued to the alternate
2 standby guardian.

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

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

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

22 (j) Where the order provides that the authority of the standby guardian is effective
23 upon receipt of a determination of the incapacity of the petitioner, the standby guardian's
24 authority shall commence upon the standby guardian's receipt of a copy of the
25 determination of incapacity made pursuant to G.S. 35A-1374. The standby guardian
26 shall file a copy of the determination of incapacity in the office of the clerk who entered
27 the order within 90 days of the date of the receipt of such determination, or the standby
28 guardian's authority may be rescinded by the clerk.

29 (k) Where the order provides that the authority of the standby guardian is effective
30 upon receipt of a determination of the debilitation of the petitioner, the standby guardian's
31 authority shall commence upon the standby guardian's receipt of a copy of the
32 determination of debilitation made pursuant to G.S. 35A-1374, as well as a written
33 consent signed by the petitioner. The standby guardian shall file a copy of the
34 determination of debilitation and the written consent in the office of the clerk who
35 entered the order within 90 days of the date of the receipt of such determination, or the
36 standby guardian's authority may be rescinded by the clerk.

37 (l) Notwithstanding subsections (i), (j), and (k) of this section, a standby
38 guardian's authority shall commence upon the standby guardian's receipt of the
39 petitioner's written consent to such commencement, signed by the petitioner in the
40 presence of two witnesses who are at least 18 years of age, other than the standby
41 guardian or the alternate standby guardian, who shall also sign the writing. Another
42 person may sign the written consent on the petitioner's behalf and at the petitioner's
43 direction if the petitioner is physically unable to do so, provided such consent is signed in

1 the presence of the petitioner and the two witnesses. The standby guardian shall file the
2 written consent in the office of the clerk who entered the order within 90 days of the date
3 of such written consent, or the standby guardian's authority may be rescinded by the
4 clerk.

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

8 (n) A person appointed standby guardian pursuant to this section may at any time
9 before the commencement of the person's authority renounce the appointment by
10 executing a written renunciation and filing it with the clerk who entered the order and
11 promptly providing the petitioner with a copy of the renunciation. Upon the filing of a
12 renunciation, the clerk shall issue letters of appointment to the alternate standby guardian,
13 if any.

14 **"§ 35A-1373. Appointment by written designation; form.**

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

21 (b) A designation of a standby guardian shall identify the designator, the minor
22 child, the person designated to be the standby guardian, and the person designated to be
23 the alternate standby guardian, if any, and shall indicate that the designator intends for the
24 standby guardian or the alternate standby guardian to become the minor child's guardian
25 in the event that the designator either:

26 (1) Becomes incapacitated;

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

29 (3) Dies prior to the commencement of a judicial proceeding to appoint a
30 guardian of the person or general guardian of a minor child; or

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

32 (c) The authority of the standby guardian under a designation shall commence
33 upon the same conditions as set forth in G.S. 35A-1372(i) through (l).

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

39 (1) A copy of a determination of incapacity made pursuant to G.S. 35A-
40 1374;

41 (2) A copy of a determination of debilitation made pursuant to G.S. 35A-
42 1374 and a copy of the designator's written consent to such
43 commencement;

- 1 (3) A copy of the designator's written consent to such commencement,
2 made pursuant to G.S. 35A-1372(l); or
- 3 (4) Proof of death of the designator, such as a copy of a death certificate or
4 a funeral home receipt.
- 5 (e) The standby guardian shall file a petition pursuant to subsection (d) of this
6 section within 90 days of the date of the commencement of the standby guardian's
7 authority under this section, or the standby guardian's authority shall lapse after the
8 expiration of those 90 days, to recommence only upon filing of the petition.
- 9 (f) A petition filed pursuant to subsection (d) of this section shall:
- 10 (1) Append the written designation of such person as standby guardian; and
11 (2) Append a copy of either (i) the determination of incapacity of the
12 designator; (ii) the determination of debilitation of the designator and
13 the written consent of the designator; (iii) the designator's consent; or
14 (iv) proof of death of the designator, such as a copy of a death certificate
15 or a funeral home receipt; and
- 16 (3) If the petition is by a person designated as an alternate standby guardian,
17 state that the person designated as the standby guardian is unwilling or
18 unable to act as standby guardian, and the basis for that statement; and
- 19 (4) State whether there are any lawsuits, in this State or any other
20 jurisdiction, involving the minor child and, if so, identify the parties, the
21 case numbers, and the states and counties where filed; and
- 22 (5) Be verified by the standby guardian or alternate standby guardian in
23 front of a notary public or another person authorized to administer
24 oaths.
- 25 (g) A copy of the petition and written notice of the time, date, and place set for a
26 hearing shall be served upon any biological or adoptive parent of the minor child who is
27 not a designator, and on any other person the clerk may direct, including the minor child.
28 Service shall be made pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk
29 directs otherwise. When service is made by the sheriff, the sheriff shall make such service
30 without demanding his fees in advance. Parties may waive their right to notice of the
31 hearing and the clerk may proceed to consider the petition upon determining that all
32 necessary parties are before the court and agree to have the petition considered.
- 33 (h) If at or before the hearing any parent entitled to notice under subsection (c) of
34 this section presents to the clerk a written claim for custody of the minor child, the clerk
35 shall stay further proceedings under this Article pending the filing of a complaint for
36 custody of the minor child under Chapter 50 of the General Statutes and, upon the filing
37 of such a complaint, shall dismiss the petition. If no such complaint is filed within 30
38 days after the claim is presented, the clerk shall conduct a hearing and enter an order as
39 provided for in this section.
- 40 (i) At the hearing, the clerk shall receive evidence necessary to determine whether
41 the requirements of this section have been satisfied. The clerk shall enter an order
42 appointing the standby guardian or alternate standby guardian as guardian of the person
43 or general guardian of the minor child if the clerk finds that:

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

27 **"§ 35A-1374. Determination of incapacity or debilitation.**

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

31 (b) A determination of incapacity or debilitation shall:

- 32 (1) Be made by the attending physician to a reasonable degree of medical
33 certainty;
- 34 (2) Be in writing; and
- 35 (3) Contain the attending physician's opinion regarding the cause and nature
36 of the incapacity or debilitation, as well as its extent and probable
37 duration.
- 38 (c) The attending physician shall provide a copy of the determination of incapacity
39 or debilitation to the standby guardian, if the standby guardian's identity is known to the
40 physician.

41 (d) The standby guardian shall ensure that the petitioner or designator is informed
42 of the commencement of the standby guardian's authority as a result of a determination of

1 incapacity or debilitation and of the possibility of a future suspension of the standby
2 guardian's authority pursuant to G.S. 35A-1375.

3 **"§ 35A-1375. Restoration of capacity or ability; suspension of guardianship.**

4 In the event that the authority of the standby guardian becomes effective upon the
5 receipt of a determination of incapacity or debilitation and the petitioner or designator is
6 subsequently restored to capacity or ability to care for the child, the authority of the
7 standby guardian based on that incapacity or debilitation shall be suspended. The
8 attending physician shall provide a copy of the determination of restored capacity or
9 ability to the standby guardian, if the identity of the standby guardian is known to the
10 attending physician. If an order appointing the standby guardian as guardian of the person
11 or general guardian of the minor child has been entered, the standby guardian shall, and
12 the petitioner or designator may, file a copy of the determination of restored capacity or
13 ability in the office of the clerk who entered the order. A determination of restored
14 capacity or ability shall:

15 (1) Be made by the attending physician to a reasonable degree of medical
16 certainty;

17 (2) Be in writing; and

18 (3) Contain the attending physician's opinion regarding the cause and nature
19 of the parent's or legal guardian's restoration to capacity or ability.

20 Any order appointing the standby guardian as guardian of the person or general
21 guardian of the minor child shall remain in full force and effect, and the authority of the
22 standby guardian shall recommence upon the standby guardian's receipt of a subsequent
23 determination of the petitioner's or designator's incapacity, pursuant to G.S. 35A-1372(j),
24 or upon the standby guardian's receipt of a subsequent determination of debilitation
25 pursuant to G.S. 35A-1372(k), or upon the receipt of proof of death of the petitioner or
26 designator, or upon the written consent of the petitioner or designator, pursuant to G.S.
27 35A-1372(l).

28 **"§ 35A-1376. Authority concurrent to parental rights.**

29 The commencement of the standby guardian's authority pursuant to a determination of
30 incapacity, determination of debilitation, or written consent shall not itself divest the
31 petitioner or designator of any parental or guardianship rights, but shall confer upon the
32 standby guardian concurrent authority with respect to the minor child.

33 **"§ 35A-1377. Powers and duties.**

34 A standby guardian designated pursuant to G.S. 35A-1373 and a guardian of the
35 person or general guardian appointed pursuant to this Article have all of the powers,
36 authority, duties, and responsibilities of a guardian appointed pursuant to Subchapter II of
37 this Chapter.

38 **"§ 35A-1378. Appointment of guardian ad litem.**

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

42 (b) The duties of the guardian ad litem, when appointed, shall be to make an
43 investigation to determine the facts, the needs of the minor child and the available

1 resources within the family to meet those needs, and to protect and promote the best
2 interests of the minor child until formally relieved of the responsibility by the clerk.

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

6 **"§ 35A-1379. Bond.**

7 The bond requirements of Article 7 of this Chapter shall apply to a guardian of the
8 person or general guardian appointed pursuant to G.S. 35A-1372 or G.S. 35A-1373,
9 provided that: (i) the clerk need not require a bond if the bond requirement is waived
10 in writing by the petitioner or designator; and (ii) a general guardian appointed pursuant
11 to G.S. 35A-1372 shall not be required to furnish a bond until a triggering event has
12 occurred.

13 **"§ 35A-1380. Accounting.**

14 The accounting requirements of Article 10 of this Chapter apply to a general guardian
15 appointed pursuant to this Article.

16 **"§ 35A-1381. Termination.**

17 Any standby guardianship created under this Article shall continue until the child
18 reaches 18 years of age unless sooner terminated by order of the clerk who entered the
19 order appointing the standby guardian, by revocation pursuant to this Article, or by
20 renunciation pursuant to this Article. A standby guardianship shall terminate, and the
21 authority of the standby guardian designated pursuant to G.S. 35A-1373 or of a guardian
22 of the person or general guardian appointed pursuant to this Article shall cease, upon the
23 entry of an order of the district court granting custody of the minor child to any other
24 person."

25 Sec. 2. This act becomes effective December 1, 1995, and applies to
26 designations executed and petitions filed on or after that date.