

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2007

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HOUSE DRH50206-LUz-34 (02/12)

Short Title: Guardianship/Court-Appointed Counsel. (Public)

Sponsors: Representative Goodwin.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO REDEFINE THE ROLE OF COURT-APPOINTED ATTORNEYS IN  
INCOMPETENCY AND GUARDIANSHIP PROCEEDINGS UNDER THE  
LAWS PERTAINING TO GUARDIANSHIP AS RECOMMENDED BY THE  
HOUSE STUDY COMMITTEE ON STATE GUARDIANSHIP LAWS.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 35A-1101(4) reads as rewritten:

"When used in this Subchapter:

...

(4) "Designated agency" means the State or local human services agency designated by the clerk in the clerk's order to prepare, cause to be prepared, or assemble a multidisciplinary ~~evaluation and~~ evaluation, to serve as a guardian ad litem, or to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional, or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers. An agency may not be designated as a designated agency in connection with any proceeding in which the agency or an official or employee of the agency is a party or has been appointed as an interim guardian, general guardian, or guardian of the person.

...."

**SECTION 2.** G.S. 35A-1107 is repealed.

**SECTION 3.** Article 1 of Chapter 35A of the General Statutes is amended by adding a new section to read:

**§ 35A-1107.1. Right to counsel.**

1       (a) Upon filing a petition for adjudication of incompetence, an attorney shall be  
2 appointed to represent the respondent in accordance with rules adopted by the Office of  
3 Indigent Defense Services. However, the respondent is entitled to be represented by  
4 counsel retained by the respondent. If the respondent retains counsel, the attorney  
5 appointed to represent the respondent shall be discharged from further responsibility in  
6 the proceeding. A respondent who has not retained counsel may not discharge the  
7 attorney appointed to represent him or her or waive his or her right to counsel unless the  
8 clerk, after examining the respondent or hearing evidence, makes a finding that the  
9 respondent has sufficient capacity to make an informed decision regarding waiver of  
10 legal representation.

11       (b) Unless discharged pursuant to subsection (a) of this section, an attorney  
12 appointed under this section shall represent the respondent until the petition is dismissed  
13 or until a guardian is appointed under Subchapter II of this Chapter.

14       (c) An appointed or retained attorney who represents a respondent in a  
15 proceeding under this Subchapter or under Article 5 of this Chapter shall comply with  
16 the Revised Rules of Professional Conduct adopted by the North Carolina State Bar,  
17 including the rules that address representing clients with diminished capacity.

18       (d) An attorney appointed to represent a respondent under this section shall  
19 personally visit the respondent as soon as possible following the attorney's appointment,  
20 and, to the extent that the respondent is able to understand, shall:

- 21           (1) Explain to the respondent the substance of the petition, the nature,  
22 purpose, and effect of the proceeding, the respondent's rights at the  
23 hearing, and the general powers and duties of a guardian;
- 24           (2) Determine the respondent's views about the proposed guardian, the  
25 proposed guardian's powers and duties, and the scope and duration of  
26 the proposed guardianship; and
- 27           (3) Inform the respondent of the right to employ and consult with a lawyer  
28 at the respondent's own expense.

29 An attorney appointed to represent a respondent under this section shall make a  
30 reasonable investigation of the respondent's physical and mental condition, the  
31 respondent's mental and physical capacity, the respondent's needs, the appropriateness  
32 of guardianship, and the appropriateness of any proposed guardian.

33       (e) Notwithstanding the provisions of G.S. 1A-1, Rule 17, a guardian ad litem  
34 shall not be appointed for a respondent in a proceeding under this Subchapter or Article  
35 5 of this Chapter unless requested by the respondent's counsel."

36       **SECTION 4.** G.S. 35A-1109 reads as rewritten:

37       "**§ 35A-1109. Service of notice and petition.**

38       Copies of the petition and initial notice of hearing shall be personally served on the  
39 respondent. ~~Respondent's counsel or guardian ad litem shall be served pursuant to~~  
40 ~~G.S. 1A-1, Rule 4, Rules of Civil Procedure.~~ A sheriff who serves the notice and  
41 petition shall do so without demanding his fees in advance. The petitioner, within five  
42 days after filing the petition, shall mail or cause to be mailed, by first-class mail, copies  
43 of the notice and petition to the respondent's next of kin alleged in the petition and any  
44 other persons the clerk may designate, unless such person has accepted notice. Proof of

1 such mailing or acceptance shall be by affidavit or certificate of acceptance of notice  
2 filed with the clerk. The clerk shall mail, by first-class mail, copies of subsequent  
3 notices to the next of kin alleged in the petition and to such other persons as the clerk  
4 deems appropriate."

5 **SECTION 5.** G.S. 35A-1110 reads as rewritten:

6 "**§ 35A-1110. Right to jury.**

7 The respondent has a right, upon request by ~~him, his~~the respondent, the respondent's  
8 counsel, or his-the respondent's guardian ad litem, to trial by jury. Failure to request a  
9 trial by jury shall constitute a waiver of the right. The clerk may nevertheless require  
10 trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by  
11 entering an order for trial by jury on his own motion. The jury shall be composed of 12  
12 persons chosen from the county's jury list in accordance with the provisions of Chapter  
13 9 of the General Statutes."

14 **SECTION 6.** G.S. 35A-1111(b) reads as rewritten:

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

27 **SECTION 7.** G.S. 35A-1112(a) reads as rewritten:

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

33 **SECTION 8.** G.S. 35A-1113 reads as rewritten:

34 "**§ 35A-1113. Hearing when incompetence determined in another state.**

35 When the petition alleges that the respondent is incompetent on the basis of an  
36 adjudication that occurred in another state, the clerk ~~in his discretion~~ may:

- 37 (1) Adjudicate incompetence on the basis of the prior adjudication, if the  
38 clerk first finds by clear, cogent, and convincing evidence that:
- 39 a. The respondent is represented by an ~~attorney or guardian ad~~  
40 ~~litem; and~~ attorney;
  - 41 b. A certified copy of an order adjudicating the respondent  
42 incompetent has been filed in the proceeding; ~~and~~

- 1 c. The prior adjudication was made by a court of competent  
2 jurisdiction on grounds comparable to a ground for adjudication  
3 of incompetence under this Article; and  
4 d. The respondent, subsequent to the adjudication of incompetence  
5 in another state, assumed residence in North Carolina and needs  
6 a guardian in this State; or

- 7 (2) Decline to adjudicate incompetence on the basis of the other state's  
8 adjudication, and proceed with an adjudicatory hearing as in any other  
9 case pursuant to this Article."

10 **SECTION 9.** G.S. 35A-1114(c) reads as rewritten:

11 "(c) Upon filing of the motion for appointment of an interim guardian, the clerk  
12 shall immediately set a date, time, and place for a hearing on the motion. The motion  
13 and a notice setting the date, time, and place for the hearing shall be served promptly on  
14 the respondent and on ~~his counsel or guardian ad litem~~ the respondent's counsel, the  
15 respondent's guardian ad litem, and other persons the clerk may designate. The hearing  
16 shall be held as soon as possible but no later than 15 days after the motion has been  
17 served on the respondent."

18 **SECTION 10.** G.S. 35A-1116(c) reads as rewritten:

19 **"§ 35A-1116. Costs and fees.**

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

- 24 (1) The clerk finds that the petitioner did not have reasonable grounds to  
25 bring the proceeding, in which case costs shall be taxed to the  
26 petitioner; or  
27 (2) The respondent is indigent, in which case the costs shall be waived by  
28 the clerk if not taxed against the petitioner as provided above or  
29 otherwise paid as provided in subsection (b) or (c).

30 (b) The cost of a multidisciplinary evaluation order pursuant to  
31 ~~G.S. 35A-1111~~ G.S. 35A-1111, witness fees, and fees of a guardian ad litem shall be  
32 assessed as follows:

- 33 (1) If the respondent is adjudicated incompetent and is not indigent, the  
34 cost shall be assessed against the respondent;  
35 (2) If the respondent is adjudicated incompetent and is indigent, the cost  
36 shall be borne by the Department of Health and Human Services;  
37 (3) If the respondent is not adjudicated incompetent, the cost may be taxed  
38 against either party, apportioned among the parties, or borne by the  
39 Department of Health and Human Services, in the discretion of the  
40 court.

41 (c) ~~Witness fees and the~~ The fees of the respondent's court-appointed counsel or  
42 ~~guardian ad litem~~ shall be paid by:

- 43 (1) The respondent, if the respondent is adjudicated incompetent and is not  
44 indigent;

1 (2) The petitioner, if the respondent is not adjudicated incompetent and the  
 2 clerk finds that there were not reasonable grounds to bring the  
 3 proceeding;

4 (3) ~~The Administrative Office of the Courts~~Office of Indigent Defense  
 5 Services in all other cases.

6 (c1) Mediator fees and other costs associated with mediation shall be assessed in  
 7 accordance with G.S. 7A-38.3B.

8 (d) The provisions of this section shall also apply to all parties to any  
 9 proceedings under this Chapter, including a guardian who has been removed from office  
 10 and the sureties on the guardian's bond."

11 **SECTION 11.** G.S. 35A-1130(c) reads as rewritten:

12 "(c) At the hearing on the motion, the ward shall be entitled to be represented by  
 13 counsel ~~or guardian ad litem, and a guardian ad litem shall be appointed in accordance~~  
 14 ~~with rules adopted by the Office of Indigent Defense Services if the ward is indigent~~  
 15 ~~and not represented by counsel retained by the ward or by an attorney appointed in~~  
 16 accordance with G.S. 35A-1107.1. Upon motion of any party or the clerk's own motion,  
 17 the clerk may order a multidisciplinary evaluation. The ward has a right, upon request  
 18 by ~~him, his~~the ward, the ward's counsel, or ~~his~~the ward's guardian ad litem to trial by  
 19 jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk  
 20 may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules  
 21 of Civil Procedure, by entering an order for trial by jury on his own motion. ~~Provided,~~  
 22 ~~if~~If there is a jury in a proceeding for restoration to competency, it shall be a jury of six  
 23 persons selected in accordance with the provisions of Chapter 9 of the General  
 24 Statutes."

25 **SECTION 12.** G.S. 35A-1202(3) reads as rewritten:

26 "When used in this Subchapter, unless a contrary intent is indicated or the context  
 27 requires otherwise:

28 ...  
 29 (3) "Designated agency" means the State or local human services agency  
 30 designated by the clerk in an order to prepare, cause to be prepared, or  
 31 assemble a multidisciplinary ~~evaluation and~~evaluation, to serve as a  
 32 guardian ad litem, or to perform other functions as the clerk may order.  
 33 A designated agency includes, without limitation, State, local, regional  
 34 or area mental health, mental retardation, vocational rehabilitation,  
 35 public health, social service, and developmental disabilities agencies,  
 36 and diagnostic evaluation centers. An agency may not be designated as  
 37 a designated agency in connection with any proceeding in which the  
 38 agency or an official or employee of the agency is a party or has been  
 39 appointed as a general guardian or guardian of the person.

40 ...."

41 **SECTION 13.** G.S. 35A-1211(a) reads as rewritten:

42 "(a) Application for appointment of a guardian and related motions and notices  
 43 shall be served on the ~~respondent,~~respondent or guardian ad litem, respondent's ~~counsel~~

1 ~~or guardian ad litem, counsel,~~ other parties of record, and such other persons as the clerk  
2 shall direct."

3           **SECTION 14.** On or before October 1, 2008, the Office of Indigent Defense  
4 Services shall adopt and implement rules governing the appointment, discharge, and  
5 compensation of attorneys appointed to represent respondents under Chapter 35A of the  
6 General Statutes in accordance with G.S. 35A-1107.1, as enacted in Section 3 of this  
7 act.

8           **SECTION 15.** There is appropriated from the General Fund to the Judicial  
9 Department, Office of Indigent Defense Services, the sum of thirty thousand dollars  
10 (\$30,000) for the 2007-2008 fiscal year to develop educational and training resources  
11 for attorneys who represent respondents in incompetency and guardianship proceedings.

12           **SECTION 16.** There is appropriated from the General Fund to the Judicial  
13 Department, Office of Indigent Defense Services, the sum of thirty thousand dollars  
14 (\$30,000) for the 2007-2008 fiscal year and the sum of thirty thousand dollars (\$30,000)  
15 for the 2008-2009 fiscal year to partially offset personnel costs related to the  
16 appointment, supervision, and training of attorneys who are appointed to represent  
17 respondents in incompetency and guardianship proceedings.

18           **SECTION 17.** Sections 15 and 16 of this act become effective July 1, 2007.  
19 The remainder of this act becomes effective October 1, 2008, and applies to  
20 proceedings, motions, orders, or applications filed on or after that date.