

1 **SUBCHAPTER IV. STANDBY GUARDIANS FOR MINOR CHILDREN.**

2 Article 21.

3 Standby Guardianship.

4 **§ 35A-1370. Definitions.**

5 For purposes of this Article:

- 6 (1) "Alternate standby guardian" means a person identified in either a petition or
7 designation to become the guardian of the person or, when appropriate, the
8 general guardian of a minor child, pursuant to G.S. 35A-1373 or to G.S.
9 35A-1374, when the person identified as the standby guardian and the
10 designator or petitioner has identified an alternate standby guardian.
- 11 (2) "Attending physician" means the physician who has primary responsibility
12 for the treatment and care of the parent or legal guardian. When more than
13 one physician shares this responsibility, or when a physician is acting on the
14 primary physician's behalf, any such physician may act as the attending
15 physician pursuant to this section. When no physician has this responsibility,
16 a physician who is familiar with the petitioner's medical condition may act as
17 the attending physician pursuant to this Article.
- 18 (3) "Debilitation" means a chronic and substantial inability, as a result of a
19 physically debilitating illness, disease, or injury, to care for one's minor
20 child.
- 21 (4) "Designation" means a written document voluntarily executed by the
22 designator pursuant to this Article.
- 23 (5) "Designator" means a person who suffers from a progressive chronic illness
24 or an irreversible fatal illness and who is the biological or adoptive parent,
25 the guardian of the person, or the general guardian of a minor child. A
26 designation under this Article may be made on behalf of a designator by the
27 guardian of the person or the general guardian of the designator.
- 28 (6) "Determination of debilitation" means a written determination made by the
29 attending physician which contains the physician's opinion to a reasonable
30 degree of medical certainty regarding the nature, cause, extent, and probable
31 duration of the debilitation of the petitioner or designator.
- 32 (7) "Determination of incapacity" means a written determination made by the
33 attending physician which contains the physician's opinion to a reasonable
34 degree of medical certainty regarding the nature, cause, extent, and probable
35 duration of the incapacity of the petitioner or designator.
- 36 (8) "Incapacity" means a chronic and substantial inability, as a result of mental
37 or organic impairment, to understand the nature and consequences of
38 decisions concerning the care of one's minor child, and a consequent
39 inability to make these decisions.
- 40 (9) "Minor child" means an unemancipated child or children under the age of 18
41 years.
- 42 (10) "Petitioner" means a person who suffers from a progressive chronic illness
43 or an irreversible fatal illness and who is the biological parent, the adoptive
44 parent, the guardian of the person, or the general guardian of a minor child.
45 A proceeding under this Article may be initiated and pursued on behalf of a
46 petitioner by the guardian of the person, the general guardian of the
47 petitioner, or by a person appointed by the clerk of superior court pursuant to
48 Rule 17 of the Rules of Civil Procedure as guardian ad litem for the purpose
49 of initiating and pursuing a proceeding under this Article on behalf of a
50 petitioner.

- 1 (11) "Standby guardian" means a person appointed pursuant to G.S. 35A-1373 or
2 designated pursuant to G.S. 35A-1374 to become the guardian of the person
3 or, when appropriate, the general guardian of a minor child upon the death of
4 a petitioner or designator, upon a determination of debilitation or incapacity
5 of a petitioner or designator, or with the consent of a petitioner or designator.
6 (12) "Triggering event" means an event stated in the designation executed or
7 order entered under this Article which empowers the standby guardian, or
8 the alternate standby guardian, if one is identified and the standby guardian
9 is unwilling or unable to serve, to assume the duties of the office, which
10 event may be the death of a petitioner or designator, incapacity of a
11 petitioner or designator, debilitation of a petitioner or designator with the
12 petitioner's or designator's consent, or the consent of the petitioner or
13 designator, whichever occurs first. (1995, c. 313, s. 1.)
14

15 **§ 35A-1371. Jurisdiction; limits.**

16 Notwithstanding the provisions of Subchapter II of this Chapter, the clerk of superior court
17 shall have original jurisdiction for the appointment of a standby guardian for a minor child
18 under this Article. Provided that the clerk shall have no jurisdiction, no standby guardian may
19 be appointed under this Article, and no designation may become effective under this Article
20 when a district court has assumed jurisdiction over the minor child in an action under Chapter
21 50 of the General Statutes or in an abuse, neglect, or dependency proceeding under Subchapter
22 I of Chapter 7B of the General Statutes, or when a court in another state has assumed such
23 jurisdiction under a comparable statute. (1995, c. 313, s. 1; 1998-202, s. 13(g).)
24

25 **§ 35A-1372. Standby guardianship; applicability.**

26 This Article provides two methods for appointing a standby guardian: by petition pursuant
27 to G.S. 35A-1373 or by designation pursuant to G.S. 35A-1374. If a standby guardian is
28 unwilling or unable to serve as a standby guardian and the designator or petitioner has
29 identified an alternate standby guardian, then the alternate standby guardian shall become the
30 standby guardian, upon the same conditions as set forth in this Article. (1995, c. 313, s. 1.)
31

32 **§ 35A-1373. Appointment by petition of standby guardian; petition, notice, hearing,
33 order.**

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

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

- 41 (1) Identify the petitioner, the minor child, the person designated to be the
42 standby guardian, and the person designated to be the alternate standby
43 guardian, if any;
44 (2) State that the authority of the standby guardian is to become effective upon
45 the death of the petitioner, upon the incapacity of the petitioner, upon the
46 debilitation of the petitioner with the consent of the petitioner, or upon the
47 petitioner's signing of a written consent stating that the standby guardian's
48 authority is in effect, whichever occurs first;
49 (3) State that the petitioner suffers from a progressively chronic illness or an
50 irreversible fatal illness, and the basis for such a statement, such as the date

1 and source of a medical diagnosis, without requiring the identification of the
2 illness in question;

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

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

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

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

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

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

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

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

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

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

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

22 (l) Notwithstanding subsections (i), (j), and (k) of this section, a standby guardian's
23 authority shall commence upon the standby guardian's receipt of the petitioner's written consent
24 to such commencement, signed by the petitioner in the presence of two witnesses who are at
25 least 18 years of age, other than the standby guardian or the alternate standby guardian, who
26 shall also sign the writing. Another person may sign the written consent on the petitioner's
27 behalf and at the petitioner's direction if the petitioner is physically unable to do so, provided
28 such consent is signed in the presence of the petitioner and the two witnesses. The standby
29 guardian shall file the written consent in the office of the clerk who entered the order within 90
30 days of the date of such written consent, or the standby guardian's authority may be rescinded
31 by the clerk.

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

35 (n) A person appointed standby guardian pursuant to this section may at any time
36 before the commencement of the person's authority renounce the appointment by executing a
37 written renunciation and filing it with the clerk who entered the order and promptly providing
38 the petitioner with a copy of the renunciation. Upon the filing of a renunciation, the clerk shall
39 issue letters of appointment to the alternate standby guardian, if any. (1995, c. 313, s. 1.)
40

41 **§ 35A-1374. Appointment by written designation; form.**

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

48 (b) A designation of a standby guardian shall identify the designator, the minor child,
49 the person designated to be the standby guardian, and the person designated to be the alternate
50 standby guardian, if any, and shall indicate that the designator intends for the standby guardian

1 or the alternate standby guardian to become the minor child's guardian in the event that the
2 designator either:

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

9 (c) The authority of the standby guardian under a designation shall commence upon the
10 same conditions as set forth in G.S. 35A-1373(i) through (l).

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

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

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

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

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

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

50 (h) If at or before the hearing any parent entitled to notice under subsection (c) of this
51 section presents to the clerk a written claim for custody of the minor child, the clerk shall stay

1 further proceedings under this Article pending the filing of a complaint for custody of the
2 minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint,
3 shall dismiss the petition. If no such complaint is filed within 30 days after the claim is
4 presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

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

9 (1) The person was duly designated as a standby guardian or alternate standby
10 guardian;

11 (2) That (i) there has been a determination of incapacity; (ii) there has been a
12 determination of debilitation and the designator has consented to the
13 commencement of the standby guardian's authority; (iii) the designator has
14 consented to that commencement; or (iv) the designator has died, such
15 information coming from a document, such as a copy of a death certificate or
16 a funeral home receipt;

17 (3) That the best interests of the minor child will be promoted by the
18 appointment of the person designated as standby guardian or alternate
19 standby guardian as guardian of the person or general guardian of the minor
20 child;

21 (4) That the standby guardian or alternate standby guardian is fit to serve as
22 guardian of the person or general guardian of the minor child; and

23 (5) That, if the petition is by a person designated as an alternate standby
24 guardian, the person designated as standby guardian is unwilling or unable to
25 serve as standby guardian.

26 (j) The designator may revoke a standby guardianship created under this section by:

27 (1) Notifying the standby guardian in writing of the intent to revoke the standby
28 guardianship prior to the filing of the petition under this section; or

29 (2) Where the petition has already been filed, by executing a written revocation,
30 filing it in the office of the clerk with whom the petition was filed, and
31 promptly providing the standby guardian with a copy of the written
32 revocation. (1995, c. 313, s. 1.)
33

34 **§ 35A-1375. Determination of incapacity or debilitation.**

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

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

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

41 (2) Be in writing; and

42 (3) Contain the attending physician's opinion regarding the cause and nature of
43 the incapacity or debilitation, as well as its extent and probable duration.

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

47 (d) The standby guardian shall ensure that the petitioner or designator is informed of the
48 commencement of the standby guardian's authority as a result of a determination of incapacity
49 or debilitation and of the possibility of a future suspension of the standby guardian's authority
50 pursuant to G.S. 35A-1376. (1995, c. 313, s. 1.)
51

1 **§ 35A-1376. Restoration of capacity or ability; suspension of guardianship.**

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

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

17 Any order appointing the standby guardian as guardian of the person or general guardian of
18 the minor child shall remain in full force and effect, and the authority of the standby guardian
19 shall recommence upon the standby guardian's receipt of a subsequent determination of the
20 petitioner's or designator's incapacity, pursuant to G.S. 35A-1373(j), or upon the standby
21 guardian's receipt of a subsequent determination of debilitation pursuant to G.S. 35A-1373(k),
22 or upon the receipt of proof of death of the petitioner or designator, or upon the written consent
23 of the petitioner or designator, pursuant to G.S. 35A-1373(l). (1995, c. 313, s. 1.)
24

25 **§ 35A-1377. Authority concurrent to parental rights.**

26 The commencement of the standby guardian's authority pursuant to a determination of
27 incapacity, determination of debilitation, or written consent shall not itself divest the petitioner
28 or designator of any parental or guardianship rights, but shall confer upon the standby guardian
29 concurrent authority with respect to the minor child. (1995, c. 313, s. 1.)
30

31 **§ 35A-1378. Powers and duties.**

32 A standby guardian designated pursuant to G.S. 35A-1374 and a guardian of the person or
33 general guardian appointed pursuant to this Article have all of the powers, authority, duties, and
34 responsibilities of a guardian appointed pursuant to Subchapter II of this Chapter. (1995, c. 313,
35 s. 1.)
36

37 **§ 35A-1379. Appointment of guardian ad litem.**

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

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

44 (c) The court may order the guardian ad litem to conduct an investigation to determine
45 the fitness of the intended standby guardian and alternate standby guardian, if any, to perform
46 the duties of standby guardian. (1995, c. 313, s. 1.)
47

48 **§ 35A-1380. Bond.**

49 The bond requirements of Article 7 of this Chapter shall apply to a guardian of the person
50 or general guardian appointed pursuant to G.S. 35A-1373 or G.S. 35A-1374, provided that: (i)
51 the clerk need not require a bond if the bond requirement is waived in writing by the petitioner

1 or designator; and (ii) a general guardian appointed pursuant to G.S. 35A-1373 shall not be
2 required to furnish a bond until a triggering event has occurred. (1995, c. 313, s. 1.)

3
4 **§ 35A-1381. Accounting.**

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

7
8 **§ 35A-1382. Termination.**

9 Any standby guardianship created under this Article shall continue until the child reaches
10 18 years of age unless sooner terminated by order of the clerk who entered the order appointing
11 the standby guardian, by revocation pursuant to this Article, or by renunciation pursuant to this
12 Article. A standby guardianship shall terminate, and the authority of the standby guardian
13 designated pursuant to G.S. 35A-1374 or of a guardian of the person or general guardian
14 appointed pursuant to this Article shall cease, upon the entry of an order of the district court
15 granting custody of the minor child to any other person. (1995, c. 313, s. 1.)