

**Chapter 35A.**  
**Incompetency and Guardianship.**  
**SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.**

Article 1.

Determination of Incompetence.

**§ 35A-1101. Definitions.**

When used in this Subchapter:

- (1) "Autism" means a physical disorder of the brain which causes disturbances in the developmental rate of physical, social, and language skills; abnormal responses to sensations; absence of or delay in speech or language; or abnormal ways of relating to people, objects, and events. Autism occurs sometimes by itself and sometimes in conjunction with other brain-functioning disorders.
- (2) "Cerebral palsy" means a muscle dysfunction, characterized by impairment of movement, often combined with speech impairment, and caused by abnormality of or damage to the brain.
- (3) "Clerk" means the clerk of superior court.
- (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 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.
- (5) "Epilepsy" means a group of neurological conditions characterized by abnormal electrical-chemical discharge in the brain. This discharge is manifested in various forms of physical activity called seizures, which range from momentary lapses of consciousness to convulsive movements.
- (6) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure.
- (7) "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.
- (8) "Incompetent child" means a minor who is at least 17 1/2 years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition.
- (9) "Indigent" means unable to pay for legal representation and other necessary expenses of a proceeding brought under this Subchapter.
- (10) "Inebriety" means the habitual use of alcohol or drugs rendering a person incompetent to transact ordinary business concerning the person's estate, dangerous to person or property, cruel and intolerable to family, or unable to provide for family.
- (11) "Interim guardian" means a guardian, appointed prior to adjudication of incompetence and for a temporary period, for a person who requires immediate intervention to address conditions that constitute imminent or

1 foreseeable risk of harm to the person's physical well-being or to the person's  
2 estate.

3 (12) "Mental illness" means an illness that so lessens the capacity of a person to  
4 use self-control, judgment, and discretion in the conduct of the person's  
5 affairs and social relations as to make it necessary or advisable for the  
6 person to be under treatment, care, supervision, guidance, or control. The  
7 term "mental illness" encompasses "mental disease", "mental disorder",  
8 "lunacy", "unsoundness of mind", and "insanity".

9 (13) "Mental retardation" means significantly subaverage general intellectual  
10 functioning existing concurrently with deficits in adaptive behavior and  
11 manifested before age 22.

12 (14) "Multidisciplinary evaluation" means an evaluation that contains current  
13 medical, psychological, and social work evaluations as directed by the clerk  
14 and that may include current evaluations by professionals in other  
15 disciplines, including without limitation education, vocational rehabilitation,  
16 occupational therapy, vocational therapy, psychiatry, speech-and-hearing,  
17 and communications disorders. The evaluation is current if made not more  
18 than one year from the date on which it is presented to or considered by the  
19 court. The evaluation shall set forth the nature and extent of the disability  
20 and recommend a guardianship plan and program.

21 (15) "Respondent" means a person who is alleged to be incompetent in a  
22 proceeding under this Subchapter.

23 (16) "Treatment facility" has the same meaning as "facility" in G.S. 122C-3(14),  
24 and includes group homes, halfway houses, and other community-based  
25 residential facilities.

26 (17) "Ward" means a person who has been adjudicated incompetent or an adult or  
27 minor for whom a guardian has been appointed by a court of competent  
28 jurisdiction. (1987, c. 550, s. 1; 1989, c. 473, s. 11; 1997-443, s. 11A.11.)  
29

30 **§ 35A-1102. Scope of law; exclusive procedure.**

31 This Article establishes the exclusive procedure for adjudicating a person to be an  
32 incompetent adult or an incompetent child. However, nothing in this Article shall interfere with  
33 the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b)  
34 of the North Carolina Rules of Civil Procedure. (1987, c. 550, s. 1; 2003-236, s. 4.)  
35

36 **§ 35A-1103. Jurisdiction; venue.**

37 (a) The clerk in each county shall have original jurisdiction over proceedings under this  
38 Subchapter.

39 (b) Venue for proceedings under this Subchapter shall be in the county in which the  
40 respondent resides or is domiciled or is an inpatient in a treatment facility. If the county of  
41 residence or domicile cannot be determined, venue shall be in the county where the respondent  
42 is present.

43 (c) If proceedings involving the same respondent are brought under this Subchapter in  
44 more than one county in which venue is proper, venue shall be in the county in which  
45 proceedings were commenced first.

46 (d) If the clerk in the county in which a proceeding under this Subchapter is brought has  
47 an interest, direct or indirect, in the proceeding, jurisdiction with respect thereto shall be vested  
48 in any superior court judge residing or presiding in the district, and the jurisdiction of the  
49 superior court judge shall extend to all things which the clerk might have done. (1987, c. 550, s.  
50 1.)  
51

1 **§ 35A-1104. Change of venue.**

2 The clerk, on motion of a party or the clerk's own motion, may order a change of venue  
3 upon finding that no hardship or prejudice to the respondent will result from a change of venue.  
4 (1987, c. 550, s. 1.)  
5

6 **§ 35A-1105. Petition before clerk.**

7 A verified petition for the adjudication of incompetence of an adult, or of a minor who is  
8 within six months of reaching majority, may be filed with the clerk by any person, including  
9 any State or local human services agency through its authorized representative. (1987, c. 550, s.  
10 1; 1989, c. 473, s. 22; 1997-443, s. 11A.12.)  
11

12 **§ 35A-1106. Contents of petition.**

13 The petition shall set forth, to the extent known:

- 14 (1) The name, age, address, and county of residence of the respondent;
- 15 (2) The name, address, and county of residence of the petitioner, and his interest  
16 in the proceeding;
- 17 (3) A general statement of the respondent's assets and liabilities with an estimate  
18 of the value of any property, including any compensation, insurance,  
19 pension, or allowance to which he is entitled;
- 20 (4) A statement of the facts tending to show that the respondent is incompetent  
21 and the reason or reasons why the adjudication of incompetence is sought;
- 22 (5) The name, address, and county of residence of the respondent's next of kin  
23 and other persons known to have an interest in the proceeding;
- 24 (6) Facts regarding the adjudication of respondent's incompetence by a court of  
25 another state, if an adjudication is sought on that basis pursuant to G.S.  
26 35A-1113(1). (1987, c. 550, s. 1.)  
27

28 **§ 35A-1107. Right to counsel or guardian ad litem.**

29 (a) The respondent is entitled to be represented by counsel of his own choice or by an  
30 appointed guardian ad litem. Upon filing of the petition, an attorney shall be appointed as  
31 guardian ad litem to represent the respondent unless the respondent retains his own counsel, in  
32 which event the guardian ad litem may be discharged. Appointment and discharge of an  
33 appointed guardian ad litem shall be in accordance with rules adopted by the Office of Indigent  
34 Defense Services.

35 (b) An attorney appointed as a guardian ad litem under this section shall represent the  
36 respondent until the petition is dismissed or until a guardian is appointed under Subchapter II of  
37 this Chapter. After being appointed, the guardian ad litem shall personally visit the respondent  
38 as soon as possible and shall make every reasonable effort to determine the respondent's wishes  
39 regarding the incompetency proceeding and any proposed guardianship. The guardian ad litem  
40 shall present to the clerk the respondent's express wishes at all relevant stages of the  
41 proceedings. The guardian ad litem also may make recommendations to the clerk concerning  
42 the respondent's best interests if those interests differ from the respondent's express wishes. In  
43 appropriate cases, the guardian ad litem shall consider the possibility of a limited guardianship  
44 and shall make recommendations to the clerk concerning the rights, powers, and privileges that  
45 the respondent should retain under a limited guardianship. (1987, c. 550, s. 1; 2000-144, s. 33;  
46 2003-236, s. 3.)  
47

48 **§ 35A-1108. Issuance of notice.**

49 (a) Within five days after filing of the petition, the clerk shall issue a written notice of  
50 the date, time, and place for a hearing on the petition, which shall be held not less than 10 days  
51 nor more than 30 days after service of the notice and petition on the respondent, unless the

1 clerk extends the time for good cause, for preparation of a multidisciplinary evaluation as  
2 provided in G.S. 35A-1111, or for the completion of a mediation.

3 (b) If a multidisciplinary evaluation or mediation is ordered after a notice of hearing has  
4 been issued, the clerk may extend the time for hearing and issue a notice to the parties that the  
5 hearing has been continued, the reason therefor, and the date, time, and place of the new  
6 hearing, which shall not be less than 10 days nor more than 30 days after service of such notice  
7 on the respondent.

8 (c) Subsequent notices to the parties shall be served as provided by G.S. 1A-1, Rule 5,  
9 Rules of Civil Procedure, unless the clerk orders otherwise. (1987, c. 550, s. 1; 2005-67, s. 2.)

10  
11 **§ 35A-1109. Service of notice and petition.**

12 Copies of the petition and initial notice of hearing shall be personally served on the  
13 respondent. Respondent's counsel or guardian ad litem shall be served pursuant to G.S. 1A-1,  
14 Rule 4, Rules of Civil Procedure. A sheriff who serves the notice and petition shall do so  
15 without demanding his fees in advance. The petitioner, within five days after filing the  
16 petition, shall mail or cause to be mailed, by first-class mail, copies of the notice and petition to  
17 the respondent's next of kin alleged in the petition and any other persons the clerk may  
18 designate, unless such person has accepted notice. Proof of such mailing or acceptance shall be  
19 by affidavit or certificate of acceptance of notice filed with the clerk. The clerk shall mail, by  
20 first-class mail, copies of subsequent notices to the next of kin alleged in the petition and to  
21 such other persons as the clerk deems appropriate. (1987, c. 550, s. 1; 1989, c. 473, s. 18.)

22  
23 **§ 35A-1110. Right to jury.**

24 The respondent has a right, upon request by him, his counsel, or his guardian ad litem, to  
25 trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk  
26 may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil  
27 Procedure, by entering an order for trial by jury on his own motion. The jury shall be  
28 composed of 12 persons chosen from the county's jury list in accordance with the provisions of  
29 Chapter 9 of the General Statutes. (1987, c. 550, s. 1.)

30  
31 **§ 35A-1111. Multidisciplinary evaluation.**

32 (a) To assist in determining the nature and extent of a respondent's disability, or to  
33 assist in developing an appropriate guardianship plan and program, the clerk, on his own  
34 motion or the motion of any party, may order that a multidisciplinary evaluation of the  
35 respondent be performed. A request for a multidisciplinary evaluation shall be made in writing  
36 and filed with the clerk within 10 days after service of the petition on the respondent.

37 (b) If a multidisciplinary evaluation is ordered, the clerk shall name a designated  
38 agency and order it to prepare, cause to be prepared, or assemble a current multidisciplinary  
39 evaluation of the respondent. The agency shall file the evaluation with the clerk not later than  
40 30 days after the agency receives the clerk's order. The multidisciplinary evaluation shall be  
41 filed in the proceeding for adjudication of incompetence, in the proceeding for appointment of  
42 a guardian under Subchapter II of this Chapter, or both. Unless otherwise ordered by the clerk,  
43 the agency shall send copies of the evaluation to the petitioner and the counsel or guardian ad  
44 litem for the respondent not later than 30 days after the agency receives the clerk's order. The  
45 evaluation shall be kept under such conditions as directed by the clerk and its contents revealed  
46 only as directed by the clerk. The evaluation shall not be a public record and shall not be  
47 released except by order of the clerk.

48 (c) If a multidisciplinary evaluation does not contain medical, psychological, or social  
49 work evaluations ordered by the clerk, the designated agency nevertheless shall file the  
50 evaluation with the clerk and send copies as required by subsection (b). In a transmittal letter,

1 the agency shall explain why the evaluation does not contain such medical, psychological, or  
2 social work evaluations.

3 (d) The clerk may order that the respondent attend a multidisciplinary evaluation for the  
4 purpose of being evaluated.

5 (e) The multidisciplinary evaluation may be considered at the hearing for adjudication  
6 of incompetence, the hearing for appointment of a guardian under Subchapter II of this  
7 Chapter, or both. (1987, c. 550, s. 1.)

8  
9 **§ 35A-1112. Hearing on petition; adjudication order.**

10 (a) The hearing on the petition shall be at the date, time, and place set forth in the final  
11 notice of hearing and shall be open to the public unless the respondent or his counsel or  
12 guardian ad litem requests otherwise, in which event the clerk shall exclude all persons other  
13 than those directly involved in or testifying at the hearing.

14 (b) The petitioner and the respondent are entitled to present testimony and documentary  
15 evidence, to subpoena witnesses and the production of documents, and to examine and  
16 cross-examine witnesses.

17 (c) The clerk shall dismiss the proceeding if the finder of fact, whether the clerk or a  
18 jury, does not find the respondent to be incompetent.

19 (d) If the finder of fact, whether the clerk or the jury, finds by clear, cogent, and  
20 convincing evidence that the respondent is incompetent, the clerk shall enter an order  
21 adjudicating the respondent incompetent. The clerk may include in the order findings on the  
22 nature and extent of the ward's incompetence.

23 (e) Following an adjudication of incompetence, the clerk shall either appoint a guardian  
24 pursuant to Subchapter II of this Chapter or, for good cause shown, transfer the proceeding for  
25 the appointment of a guardian to any county identified in G.S. 35A-1103. The transferring  
26 clerk shall enter a written order authorizing the transfer. The clerk in the transferring county  
27 shall transfer all original papers and documents, including the multidisciplinary evaluation, if  
28 any, to the transferee county and close his file with a copy of the adjudication order and transfer  
29 order.

30 (f) If the adjudication occurs in any county other than the county of the respondent's  
31 residence, a certified copy of the adjudication order shall be sent to the clerk in the county of  
32 the ward's legal residence, to be filed and indexed as in a special proceeding of that county.

33 (g) Except as provided in G.S. 35A-1114(f), a proceeding filed under this Article may  
34 be voluntarily dismissed as provided in G.S. 1A-1, Rule 41, Rules of Civil Procedure. (1987, c.  
35 550, s. 1.)

36  
37 **§ 35A-1113. Hearing when incompetence determined in another state.**

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

- 40 (1) Adjudicate incompetence on the basis of the prior adjudication, if the clerk  
41 first finds by clear, cogent, and convincing evidence that:
- 42 a. The respondent is represented by an attorney or guardian ad litem;  
43 and
  - 44 b. A certified copy of an order adjudicating the respondent incompetent  
45 has been filed in the proceeding; and
  - 46 c. The prior adjudication was made by a court of competent jurisdiction  
47 on grounds comparable to a ground for adjudication of incompetence  
48 under this Article; and
  - 49 d. The respondent, subsequent to the adjudication of incompetence in  
50 another state, assumed residence in North Carolina and needs a  
51 guardian in this State; or

- 1 (2) Decline to adjudicate incompetence on the basis of the other state's  
2 adjudication, and proceed with an adjudicatory hearing as in any other case  
3 pursuant to this Article. (1987, c. 550, s. 1.)  
4

5 **§ 35A-1114. Appointment of interim guardian.**

6 (a) At the time of or subsequent to the filing of a petition under this Article, the  
7 petitioner may also file a verified motion with the clerk seeking the appointment of an interim  
8 guardian.

9 (b) The motion shall set forth facts tending to show:

- 10 (1) That there is reasonable cause to believe that the respondent is incompetent,  
11 and  
12 (2) One or both of the following:  
13 a. That the respondent is in a condition that constitutes or reasonably  
14 appears to constitute an imminent or foreseeable risk of harm to his  
15 physical well-being and that requires immediate intervention;  
16 b. That there is or reasonably appears to be an imminent or foreseeable  
17 risk of harm to the respondent's estate that requires immediate  
18 intervention in order to protect the respondent's interest, and  
19 (3) That the respondent needs an interim guardian to be appointed immediately  
20 to intervene on his behalf prior to the adjudication hearing.

21 (c) Upon filing of the motion for appointment of an interim guardian, the clerk shall  
22 immediately set a date, time, and place for a hearing on the motion. The motion and a notice  
23 setting the date, time, and place for the hearing shall be served promptly on the respondent and  
24 on his counsel or guardian ad litem and other persons the clerk may designate. The hearing  
25 shall be held as soon as possible but no later than 15 days after the motion has been served on  
26 the respondent.

27 (d) If at the hearing the clerk finds that there is reasonable cause to believe that the  
28 respondent is incompetent, and:

- 29 (1) That the respondent is in a condition that constitutes or reasonably appears to  
30 constitute an imminent or foreseeable risk of harm to his physical  
31 well-being, and that there is immediate need for a guardian to provide  
32 consent or take other steps to protect the respondent, or  
33 (2) That there is or reasonably appears to be an imminent or foreseeable risk of  
34 harm to the respondent's estate, and that immediate intervention is required  
35 in order to protect the respondent's interest,

36 the clerk shall immediately enter an order appointing an interim guardian.

37 (e) The clerk's order appointing an interim guardian shall include specific findings of  
38 fact to support the clerk's conclusions, and shall set forth the interim guardian's powers and  
39 duties. Such powers and duties shall be limited and shall extend only so far and so long as  
40 necessary to meet the conditions necessitating the appointment of an interim guardian. In any  
41 event, the interim guardianship shall terminate on the earliest of the following: the date  
42 specified in the clerk's order; 45 days after entry of the clerk's order unless the clerk, for good  
43 cause shown, extends that period for up to 45 additional days; when any guardians are  
44 appointed following an adjudication of incompetence; or when the petition is dismissed by the  
45 court. An interim guardian whose authority relates only to the person of the respondent shall  
46 not be required to post a bond. If the interim guardian has authority related to the respondent's  
47 estate, the interim guardian shall post a bond in an amount determined by the clerk, with any  
48 conditions the clerk may impose, and shall render an account as directed by the clerk.

49 (f) When a motion for appointment of an interim guardian has been made, the  
50 petitioner may voluntarily dismiss the petition for adjudication of incompetence only prior to

1 the hearing on the motion for appointment of an interim guardian. (1987, c. 550, s. 1; 1989, c.  
2 473, s. 12.)

3  
4 **§ 35A-1115. Appeal from clerk's order.**

5 Appeal from an order adjudicating incompetence shall be to the superior court for hearing  
6 de novo and thence to the Court of Appeals. An appeal does not stay the appointment of a  
7 guardian unless so ordered by the superior court or the Court of Appeals. The Court of Appeals  
8 may request the Attorney General to represent the petitioner on any appeal by the respondent to  
9 the Appellate Division of the General Court of Justice, but the Department of Justice shall not  
10 be required to pay any of the costs of the appeal. (1987, c. 550, s. 1.)

11  
12 **§ 35A-1116. Costs and fees.**

13 (a) Costs. – Except as otherwise provided herein, costs shall be assessed as in special  
14 proceedings. Costs, including any reasonable fees and expenses of counsel for the petitioner  
15 which the clerk, in his discretion, may allow, may be taxed against either party in the discretion  
16 of the court unless:

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

22 (b) Multidisciplinary Evaluation. – The cost of a multidisciplinary evaluation order  
23 pursuant to G.S. 35A-1111 shall be assessed as follows:

- 24 (1) If the respondent is adjudicated incompetent and is not indigent, the cost  
25 shall be assessed against the respondent;  
26 (2) If the respondent is adjudicated incompetent and is indigent, the cost shall be  
27 borne by the Department of Health and Human Services;  
28 (3) If the respondent is not adjudicated incompetent, the cost may be taxed  
29 against either party, apportioned among the parties, or borne by the  
30 Department of Health and Human Services, in the discretion of the court.

31 (c) Witness. – Witness fees shall be paid by:

- 32 (1) The respondent, if the respondent is adjudicated incompetent and is not  
33 indigent;  
34 (2) The petitioner, if the respondent is not adjudicated incompetent and the clerk  
35 finds that there were not reasonable grounds to bring the proceeding;  
36 (2a) The petitioner for any of the petitioner's witnesses, and the respondent for  
37 any of the respondent's witnesses, when the clerk finds all of the following:  
38 a. There were reasonable grounds to bring the proceeding.  
39 b. The respondent was not adjudicated incompetent.  
40 c. The respondent is not indigent.  
41 (3) The Administrative Office of the Courts for witness fees for the respondent,  
42 if the respondent is indigent.

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

45 (c2) Guardian Ad Litem. – The fees of an appointed guardian ad litem shall be paid by:

- 46 (1) The respondent, if:  
47 a. The respondent is adjudicated incompetent; and  
48 b. The respondent is not indigent.  
49 (2) The respondent, if:  
50 a. The respondent is not adjudicated incompetent;

- 1                   b.     The clerk finds that there were reasonable grounds to bring the  
2                   proceeding; and  
3                   c.     The respondent is not indigent.  
4           (3)    The petitioner, if:  
5                   a.     The respondent is not adjudicated incompetent; and  
6                   b.     The clerk finds that there were not reasonable grounds to bring the  
7                   proceedings.  
8           (4)    The Office of Indigent Defense Services in all other cases.  
9           (d)    The provisions of this section shall also apply to all parties to any proceedings under  
10 this Chapter, including a guardian who has been removed from office and the sureties on the  
11 guardian's bond. (1987, c. 550, s. 1; 1989, c. 473, s. 15; 1995, c. 235, s. 9; 1997-443, s.  
12 11A.118(a); 2005-67, s. 3; 2009-387, s. 1.)  
13  
14   **§§ 35A-1117 through 35A-1119: Reserved for future codification purposes.**