

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009

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HOUSE BILL 1086\*

Short Title: Guardianship/Incompetency. (Public)

Sponsors: Representatives Burris-Floyd, Bordsen, Goodwin, Randleman (Primary Sponsors); Bell, Blue, Bryant, Cleveland, Cotham, Current, Earle, Harrison, Hughes, Jones, Killian, Lucas, Mackey, McCormick, McElraft, McGee, Moore, Neumann, and Samuelson.

Referred to: Mental Health Reform, if favorable, Judiciary III.

April 7, 2009

A BILL TO BE ENTITLED

AN ACT TO AMEND THE PROCEDURES FOR DETERMINING INCOMPETENCY UNDER THE LAWS RELATING TO GUARDIANSHIP AS RECOMMENDED BY THE HOUSE STUDY COMMITTEE ON STATE GUARDIANSHIP LAWS.

The General Assembly of North Carolina enacts:

**SECTION 1.** The Revisor of Statutes shall substitute in Chapter 35A of the General Statutes, wherever they occur, the terms "incompetent", "incompetency", "competency", and "competent", respectively, with the terms "incapacitated", "incapacity", "legal capacity", and "not capacitated", respectively, unless the terms are otherwise amended by this act.

**SECTION 2.** G.S. 35A-1101 reads as rewritten:

**"§ 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.~~



- 1 (6) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1,  
2 Rule 17, Rules of Civil Procedure.
- 3 (7) ~~"Incompetent adult"~~"Incapacitated adult" means an adult or emancipated  
4 minor who ~~lacks sufficient capacity to manage the adult's own affairs or to~~  
5 ~~make or communicate important decisions concerning the adult's person,~~  
6 ~~family, or property whether the lack of capacity is due to mental illness,~~  
7 ~~mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility,~~  
8 ~~disease, injury, or similar cause or condition.~~is unable to receive and  
9 evaluate information or make or communicate decisions to such an extent  
10 that the individual lacks the ability, even with the use of appropriate  
11 technological assistance, to meet essential requirements for physical health,  
12 safety, or self-care or manage the individual's property or business affairs.
- 13 (8) ~~"Incompetent child"~~"Incapacitated minor" means a minor who is at least 17  
14 1/2 years of age and who, ~~other than by reason of minority,~~ lacks sufficient  
15 capacity to make or communicate important decisions concerning the child's  
16 person, family, or property ~~whether the lack of capacity is due to mental~~  
17 ~~illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety,~~  
18 ~~disease, injury, or similar cause or condition.~~who is unable to receive and  
19 evaluate information or make or communicate decisions to such an extent  
20 that the individual lacks the ability, even with the use of appropriate  
21 technological assistance, to meet essential requirements for physical health,  
22 safety, or self-care or manage the individual's property or business affairs.
- 23 (9) "Indigent" means unable to pay for legal representation and other necessary  
24 expenses of a proceeding brought under this Subchapter.
- 25 (10) ~~"Inebriety" means the habitual use of alcohol or drugs rendering a person~~  
26 ~~incompetent to transact ordinary business concerning the person's estate,~~  
27 ~~dangerous to person or property, cruel and intolerable to family, or unable to~~  
28 ~~provide for family.~~
- 29 (11) "Interim guardian" means a guardian, appointed prior to adjudication of  
30 incompetence and for a temporary period, for a person who requires  
31 immediate intervention to address conditions that constitute imminent or  
32 foreseeable risk of harm to the person's physical well-being or to the person's  
33 estate.
- 34 (12) ~~"Mental illness" means an illness that so lessens the capacity of a person to~~  
35 ~~use self-control, judgment, and discretion in the conduct of the person's~~  
36 ~~affairs and social relations as to make it necessary or advisable for the~~  
37 ~~person to be under treatment, care, supervision, guidance, or control. The~~  
38 ~~term "mental illness" encompasses "mental disease", "mental disorder",~~  
39 ~~"lunacy", "unsoundness of mind", and "insanity".~~
- 40 (13) ~~"Mental retardation" means significantly subaverage general intellectual~~  
41 ~~functioning existing concurrently with deficits in adaptive behavior and~~  
42 ~~manifested before age 22.~~
- 43 (14) ~~"Multidisciplinary evaluation" means an evaluation that contains current~~  
44 ~~medical, psychological, and social work evaluations as directed by the clerk~~  
45 ~~and that may include current evaluations by professionals in other~~  
46 ~~disciplines, including without limitation education, vocational rehabilitation,~~  
47 ~~occupational therapy, vocational therapy, psychiatry, speech and hearing,~~  
48 ~~and communications disorders. The evaluation is current if made not more~~  
49 ~~than one year from the date on which it is presented to or considered by the~~  
50 ~~court. The evaluation shall set forth the nature and extent of the disability~~  
51 ~~and recommend a guardianship plan and program.~~

- 1 (15) "Respondent" means a person who is alleged to be incompetent in a  
2 proceeding under this Subchapter.
- 3 (16) "Treatment facility" has the same meaning as "facility" in G.S. 122C-3(14),  
4 and includes group homes, halfway houses, and other community-based  
5 residential facilities.
- 6 (17) "Ward" means a person who has been adjudicated incompetent or an adult or  
7 minor for whom a guardian has been appointed by a court of competent  
8 jurisdiction."

9 **SECTION 3.** G.S. 35A-1108 reads as rewritten:

10 **"§ 35A-1108. Issuance of notice.**

11 (a) Within five days after filing of the petition, the clerk shall issue a written notice of  
12 the date, time, and place for a hearing on the petition, which shall be held not less than 10 days  
13 nor more than 30 days after service of the notice and petition on the respondent, unless the  
14 clerk extends the time for good cause, for preparation of a ~~multidisciplinary-professional~~  
15 evaluation as provided in G.S. 35A-1111, evaluation, or for the completion of a mediation.

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

21 (c) Subsequent notices to the parties shall be served as provided by G.S. 1A-1, Rule 5,  
22 Rules of Civil Procedure, unless the clerk orders otherwise."

23 **SECTION 4.** G.S. 35A-1111 reads as rewritten:

24 **"§ 35A-1111. ~~Multidisciplinary~~ Professional evaluation.**

25 (a) To assist in determining the nature and extent of a respondent's ~~disability, incapacity,~~  
26 or to assist in developing an appropriate guardianship plan and program, the ~~clerk, on his own~~  
27 ~~motion or the motion of any party, clerk~~ may order that a ~~multidisciplinary-professional~~  
28 evaluation of the respondent be performed. A request for a multidisciplinary evaluation shall be  
29 made in writing and filed with the clerk within 10 days after service of the petition on the  
30 respondent. The clerk shall order a professional evaluation upon the request of the respondent or  
31 the respondent's counsel or guardian ad litem. The clerk may order that the respondent attend a  
32 professional evaluation for the purpose of being evaluated.

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

47 (c) ~~If a multidisciplinary evaluation does not contain medical, psychological, or social~~  
48 ~~work evaluations ordered by the clerk, the designated agency nevertheless shall file the~~  
49 ~~evaluation with the clerk and send copies as required by subsection (b). In a transmittal letter,~~  
50 ~~the agency shall explain why the evaluation does not contain such medical, psychological, or~~  
51 ~~social work evaluations. Unless otherwise directed by the clerk, the evaluation shall contain: (i)~~

1 a description of the nature, type, and extent of the respondent's specific cognitive and functional  
2 limitations; (ii) an evaluation of the respondent's mental and physical condition and, if  
3 appropriate, educational potential, adaptive behavior, and social skills; (iii) a prognosis for  
4 improvement and a recommendation as to the appropriate treatment or habilitation plan; and  
5 (iv) the date of any assessment or examination upon which the report is based.

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

8 ~~(e) The multidisciplinary~~ If otherwise admissible, the professional evaluation may be  
9 considered at the hearing for adjudication of ~~incompetence, incapacity,~~ the hearing for  
10 appointment of a guardian under Subchapter II of this Chapter, or both."

11 **SECTION 5.** G.S. 35A-1112 reads as rewritten:

12 **"§ 35A-1112. Hearing on petition; adjudication order.**

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

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

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

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

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

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

37 (g) Except as provided in G.S. 35A-1114(f), a proceeding filed under this Article may  
38 be voluntarily dismissed as provided in G.S. 1A-1, Rule 41, Rules of Civil Procedure."

39 **SECTION 6.** G.S. 35A-1116(b) reads as rewritten:

40 "(b) The cost of a ~~multidisciplinary~~ professional evaluation order ~~pursuant to~~  
41 ~~G.S. 35A-1111~~ shall be assessed as follows:

42 (1) If the respondent is ~~adjudicated incompetent~~ adjudged incapacitated and is  
43 not indigent, the cost shall be assessed against the respondent;

44 (2) If the respondent is ~~adjudicated incompetent~~ adjudged incapacitated and is  
45 indigent, the cost shall be borne by the Department of Health and Human  
46 Services;

47 (3) If the respondent is not ~~adjudicated incompetent,~~ adjudged incapacitated, the  
48 cost may be taxed against either party, apportioned among the parties, or  
49 borne by the Department of Health and Human Services, in the discretion of  
50 the court."

51 **SECTION 7.** G.S. 35A-1120 reads as rewritten:

1 **"§ 35A-1120. Appointment of guardian.**

2 If the respondent is ~~adjudicated incompetent, adjudged incapacitated,~~ a guardian or  
3 guardians ~~shall~~ may be appointed in the manner provided for in Subchapter II of this Chapter."

4 **SECTION 8.** G.S. 35A-1130(c) reads as rewritten:

5 "(c) At the hearing on the motion, the ward shall be entitled to be represented by counsel  
6 or guardian ad litem, and a guardian ad litem shall be appointed in accordance with rules  
7 adopted by the Office of Indigent Defense Services if the ward is indigent and not represented  
8 by counsel. ~~Upon motion of any party or the clerk's own motion, the~~ The clerk may order a  
9 ~~multidisciplinary evaluation.~~ professional evaluation of the respondent pursuant to  
10 G.S. 35A-1111 upon motion of the respondent or the respondent's counsel or guardian ad litem.  
11 The ward has a right, upon request by ~~him, his counsel, or his~~ the ward or the ward's counsel or  
12 guardian ad litem to trial by jury. Failure to request a trial by jury shall constitute a waiver of  
13 the right. The clerk may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule  
14 39(b), Rules of Civil Procedure, by entering an order for trial by jury on ~~his~~ the clerk's own  
15 motion. ~~Provided, if~~ If there is a jury in a proceeding for restoration to ~~competency, capacity,~~ it  
16 shall be a jury of six persons selected in accordance with the provisions of Chapter 9 of the  
17 General Statutes."

18 **SECTION 9.** G.S. 35A-1202(13) is repealed.

19 **SECTION 10.** G.S. 35A-1210 reads as rewritten:

20 **"§ 35A-1210. Application before clerk.**

21 Any individual, corporation, or disinterested public agent may file an application for the  
22 appointment of a guardian for an ~~incompetent-incapacitated~~ person by filing the same with the  
23 clerk. The application may be joined with or filed subsequent to a petition for the adjudication  
24 of ~~incompetence-incapacity~~ under Subchapter I of this Chapter. The application shall set forth,  
25 to the extent known and to the extent such information is not already a matter of record in the  
26 case:

- 27 (1) The name, age, address, and county of residence of the ward or respondent;
- 28 (2) The name, address, and county of residence of the applicant, ~~his~~ the  
29 applicant's relationship if any to the respondent or ward, and ~~his~~ the  
30 applicant's interest in the proceeding;
- 31 (3) The name, address, and county of residence of the respondent's next of kin  
32 and other persons known to have an interest in the proceeding;
- 33 (4) A general statement of the ward's or respondent's assets and liabilities with  
34 an estimate of the value of any property, including any income and  
35 receivables to which ~~he~~ the ward or respondent is entitled; ~~and~~
- 36 (4a) If a plenary guardianship is requested, the reasons why a limited  
37 guardianship is inappropriate;
- 38 (4b) If a limited guardianship is requested, the powers that should be granted to  
39 the guardian and the rights that should be retained by the ward; and
- 40 (5) Whether the applicant seeks the appointment of a guardian of the person, a  
41 guardian of the estate, or a general guardian, and whom the applicant  
42 recommends or seeks to have appointed as such guardian or guardians."

43 **SECTION 11.** G.S. 35A-1212 reads as rewritten:

44 **"§ 35A-1212. Hearing before clerk on appointment of guardian.**

45 (a) The clerk shall make such inquiry and receive such evidence as the clerk deems  
46 necessary to determine:

- 47 (1) The nature and extent of the ~~needed guardianship;~~ ward's need for a guardian;
- 48 (1a) Whether the ward's needs can be met by means other than the appointment  
49 of a guardian;
- 50 (2) The assets, liabilities, and needs of the ward; and

1 (3) Who, in the clerk's discretion, can most suitably serve as the guardian or  
2 guardians.

3 If the clerk determines that the nature and extent of the ward's capacity justifies ordering a  
4 limited guardianship, the clerk ~~may~~ shall do so.

5 (b) ~~If a current multidisciplinary evaluation is not available and the clerk determines~~  
6 ~~that one is necessary, the clerk, on his own motion or the motion of any party, may order that~~  
7 ~~such an evaluation be performed pursuant to G.S. 35A-1111. The provisions of that section~~  
8 ~~shall apply to such an order for a multidisciplinary evaluation following an adjudication of~~  
9 ~~incompetence.~~ If a professional evaluation has not been performed, the clerk may order that a  
10 professional evaluation of the respondent be performed pursuant to G.S. 35A-1111 upon the  
11 request of the respondent or the respondent's counsel or guardian ad litem.

12 (c) The clerk may require a report prepared by a designated agency to evaluate the  
13 suitability of a prospective guardian, to include a recommendation as to an appropriate party or  
14 parties to serve as guardian, or both, based on the nature and extent of the needed guardianship  
15 and the ward's assets, liabilities, and needs.

16 (d) If a designated agency has not been named pursuant to G.S. 35A-1111, the clerk  
17 may, at any time he finds that the best interest of the ward would be served thereby, name a  
18 designated agency."

19 **SECTION 12.** G.S. 35A-1215 reads as rewritten:

20 "**§ 35A-1215. Clerk's order; issuance of letters of appointment.**

21 (a) When appointing a guardian, the clerk shall enter an order setting forth:

22 (1) The nature of the guardianship or guardianships to be created and the name  
23 of the person or entity appointed to fill each guardianship; and

24 (2) The powers and duties of the guardian or guardians, which shall include,  
25 unless the clerk orders otherwise, (i) with respect to a guardian of the person  
26 and general guardian, the powers and duties provided under G.S. 35A,  
27 Article 8, and (ii) with respect to a guardian of the estate and general  
28 guardian, the powers, and duties provided under G.S. 35A, Article 9 and  
29 Subchapter III; and

30 (3) The identity of the designated agency if there is one.

31 (a1) The clerk may not enter an order appointing a guardian for an incapacitated person  
32 unless the clerk finds that the ward's identified needs cannot be met adequately by means other  
33 than appointment of a guardian.

34 (a2) The clerk shall grant to a guardian only those powers necessitated by the ward's  
35 limitations and demonstrated needs and make appointive or other orders that encourage the  
36 development of the ward's maximum self-reliance and independence.

37 (b) If the clerk orders a limited guardianship as authorized by G.S. 35A-1212(a), the  
38 clerk may order that the ward retain certain legal rights and privileges to which the ward was  
39 entitled before the ward was adjudged ~~incompetent.~~ incapacitated. Any order of limited  
40 guardianship shall include findings as to the nature and extent of the ward's ~~incompetence~~  
41 incapacity as it relates to the ward's need for a guardian or guardians.

42 (c) The clerk shall issue the guardian or guardians letters of appointment as provided in  
43 G.S. 35A-1206."

44 **SECTION 13.** This act becomes effective October 1, 2009, and applies to  
45 proceedings filed or pending on or after that date.