

Standby Me: New Legislation on Standby Guardianship

Vern and Jane are divorced and have one son, Teddy, who has severe intellectual and developmental disabilities. When Teddy turns 17 ½ years old, Vern files a petition with the clerk of superior court of Unreal County to have Teddy adjudicated incompetent and an application to be appointed as Teddy's guardian. [G.S. 35A-1105](#); [G.S. 35A-1210](#). After a hearing, the clerk finds clear, cogent, and convincing evidence of Teddy's incapacity and enters an order adjudicating Teddy incompetent. [G.S. 35A-1112\(d\)](#). The clerk appoints Vern as Teddy's guardian of the person and Jane, who also filed an application to be Teddy's guardian, as his guardian of the estate.

Vern is subsequently diagnosed with terminal lung cancer. Vern and Teddy move to Faux County so that Vern may get regular treatment at the hospital there. Vern begins to research options available to him to ensure Teddy is cared for after his death. In his research, Vern comes across [S.L. 2015-205](#) and learns that, **effective August 11, 2015**, an incompetent adult such as Teddy may have a standby guardian appointed. This law expands an existing law that allows for the appointment of standby guardians for minors under Article 21 of Chapter 35A of the N.C. General Statutes to incompetent adults. For purposes of the standby guardian statute, "incompetent adult" is defined as "an **adult** or emancipated minor who is **subject to a guardianship of the person or a general guardianship.**" [G.S. 35A-1370\(8a\)](#).

A standby guardian is a guardian that acts essentially as a back-up guardian, poised to take on the responsibilities of a guardian of the person or a general guardian upon a triggering event, including the current guardian's:

- death,
- physical debilitation and consent,
- mental incapacity, or
- written consent.

[G.S. 35A-1370\(12\)](#). Standby guardianship is a planning tool that that may be used by the current guardian of the person or general guardian of an incompetent adult to ensure a person chosen by the guardian and approved by the court will have the authority to act as guardian when the current guardian is no longer able to do so. In Vern's case, it allows him to identify a specific person to ensure Teddy's care, custody, and control after Vern's incapacity or death. [G.S. 35A-1202\(10\)](#).

The process for obtaining a standby guardian for an incompetent adult largely mirrors the existing process for a minor. First, the person seeking the appointment or making the designation, in this case, Vern, must suffer from a progressive chronic or irreversible fatal illness. [G.S. 35A-1370\(5\) and \(10\)](#). Second, Vern may elect one of two methods for appointing a standby guardian.

1. **Option #1: By Petition.** Vern could file a petition ([AOC Form E-209](#) may be used) with the

clerk of superior court for appointment of a standby guardian. [G.S. 35A-1373](#). After holding a hearing, if the clerk finds evidence necessary to determine (i) Vern suffers from a progressive chronic or irreversible fatal illness, (ii) the best interests of Teddy are promoted by the appointment, and (iii) the standby guardian identified by Vern in the petition is fit to serve, the clerk shall enter an order appointing the person designated in the petition as the standby guardian. *Id.* The clerk then issues letters of appointment which state that the authority of the standby guardian is effective only upon the receipt by the standby guardian of one of the documents set forth in G.S. 35A-1373 (i) through (l), such as Vern's death certificate or a determination of Vern's incapacity. [G.S. 35A-1373\(g\)](#). After receiving the document that identifies the triggering event, the standby guardian must file a copy of the document with the clerk within 90 days. [G.S. 35A-1373\(i\) through \(l\)](#).

- Option #2: By Written Designation.** As an alternative to filing a petition with the court, Vern could designate a standby guardian in a written designation signed by the standby guardian and Vern in the presence of two witnesses at least 18 years of age. [GS 35A-1374\(a\)](#). Upon the standby guardian's receipt of one of the documents set forth in G.S. 35A-1373 (i) through (l), the authority of the standby guardian to act as the guardian commences. [G.S. 35A-1374\(c\)](#). Within 90 days of receipt of the written documentation, the **standby guardian must file a petition** with the clerk of superior court to be appointed as guardian of the person or general guardian. [G.S. 35A-1374\(e\)](#). If the clerk finds evidence of the five elements set forth in G.S. 35A-1374(i), then the clerk shall enter an order appointing the standby guardian as the guardian of the person or general guardian, as applicable. [G.S. 35A-1374\(i\)](#).

Whether Vern chooses to proceed with option #1 or #2, Vern should be aware that [S.L. 2015-205](#) creates a few differences between the previously existing process for a minor and the new process for an incompetent adult, including:

- Who May Petition/Designate.** A guardian of the person or general guardian has the authority to seek the appointment of a standby guardian for an incompetent adult. [G.S. 35A-1370\(5\) and \(10\)](#). Neither a parent of an adult child, nor a guardian of the estate may be a petitioner or designator for standby guardianship. *Id.* This is unlike the existing statute for a minor, which gives a parent as well as a guardian of the person or a general guardian the right to petition or designate a standby guardian for his or her minor child. *Id.* In the example, Jane could not seek the appointment of a standby guardian, either as Teddy's parent or his guardian of the estate. Only Vern, as Teddy's guardian of the person, could seek the appointment of a standby guardian for Teddy.
- Where Petition Filed.** In the case of a minor, the petition required in option #1 and option #2, must be filed in the county where the minor resides or is domiciled at the time the petition is filed. [G.S. 35A-1373\(a\)\(i\)](#). Unlike a petition filed for a minor, the petition for an incompetent adult, whether filed pursuant to option #1 or option #2, is filed in the county where the guardianship is docketed. [G.S. 35A-1373\(a\)\(ii\)](#). Vern should file the petition in

Unreal County, the county where Teddy's guardianship is docketed, despite the fact that he and Teddy now reside in Faux County.

3. **How Petition Served.** A petition for the appointment of a standby guardian for a minor must be served on each parent and any other person that the clerk directs via Rule 4 service. [G.S. 35A-1373\(c\)](#); [G.S. 35A-1374\(g\)](#). In contrast, a petition for the appointment of a standby guardian for an incompetent adult must be served in the same manner as a motion in the cause via Rule 5 service, unless the clerk directs otherwise. *Id.* The petition must be served on "all other parties" and any other person that the clerk directs. [G.S. 35A-1207\(c\)](#). The statute does not identify who else is included as a party to the standby guardianship proceeding in addition to the petitioner. A party likely includes the proposed standby guardian and the current guardian if he or she is alive. A party also may include, or the clerk may direct service on, the incompetent adult, any guardian of the estate, any applicant for guardianship in the original guardianship proceeding, and any of the incompetent adult's next of kin who were noticed in the original incompetency proceeding. [G.S. 35A-1109](#).
4. **Termination of Standby Guardianship.** There is no difference in how a standby guardianship may be terminated for a minor or an incompetent adult. There is a risk that a standby guardianship for an incompetent adult could be unintentionally terminated if the standby guardian is appointed before the minor turns 18. In Teddy's case, Vern filed a petition to adjudicate Teddy incompetent when Teddy was 17 ½. If after Vern's appointment as guardian of the person but before Teddy turns 18, a standby guardian is appointed for Teddy, the standby guardianship appointment would automatically terminate when Teddy turns 18 under [G.S. 35A-1382\(a\)\(1\)](#).