

Permanency Planning for Children of HIV-Infected Parents

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Introduction

Your client is a 28-year-old woman with three children. Your client, Marissa, is HIV infected and is currently asymptomatic. Her children are aged 18 months, three and five. The 18-month-old boy, Carl, is also infected. The other two children, Molly and Dominique, are not infected. Marissa is a single parent. Carl's father is also infected with the HIV virus. Carl's father has been totally absent from Carl's life. Marissa has not heard from him since Carl was born. The girls' father, James, lives in South Carolina. He has had sporadic contact with the girls. He has never had them visit with him in South Carolina, but he occasionally comes to Durham to see the girls for a couple of hours. He comes on the average two times a year, and usually takes them to a fast food restaurant for a couple of hours. He pays some child support, but is several thousand dollars in arrears. Marissa has never lived with either father. She does tell you, however, that James used to strike her in the face when they argued. James has recently found out that Marissa is infected with the HIV virus. He is not infected. Marissa is afraid that James will fight any arrangement she makes for guardianship of her children. She feels strongly that neither father should have custody of her children. Marissa lives in the same community as her mother. Her mother has a close relationship with all three children and often takes care of them when Marissa is at work. Marissa would like for her mother to have custody of her children if something should happen to her. She would like to make permanent plans for her children while she is still healthy. She is asking for your advice.

Until December 1st of 1995, there were very few steps Marissa could take to ensure that her plans for her children would be honored, especially after her incapacity or death. She could execute a temporary custody document and name a guardian for the children in her will, thus postponing the custody determination until after her death; she could seek to terminate the

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father's parental rights to the children; or she could give up her parental rights to the children and place them in foster care or with a relative (assuming the father doesn't step in first). Even though HIV infected, Marissa may have several years of good health. If she develops full-blown AIDS, she may still have significant periods when she is capable of caring for her children. She is obviously reluctant to give up custody of her children while she remains able to carry out her parental responsibilities. On the other hand, she may postpone making custody plans for her children until it is too late and she is either incapacitated or dead.

All parents of minor children² should consider what would happen to their children if they were no longer able to care for them. Who would take care of the children on a daily basis - making sure they are fed and clothed; see to it that they attend school? Who would look after the financial interests of the children? Who would make health care decisions for the children?

Since we all live in an uncertain world, these are important concerns for all parents. However, these concerns are particularly prominent for the parent who is HIV positive. Not only are these parents faced with the uncertainties of modern life, they are constantly reminded of the imminent possibility of death or incapacity due to their illness. In fact, the number of children who will be orphaned by AIDS in this country alone is staggering. The Center for Disease Control estimates that nearly 280,000 women were living with HIV or AIDS in the United States as of the end of 2008.³ In 2006, more than 60% of newly infected women were in

² Minor children are those under the age of 18 who have not been legally emancipated. Emancipation is a fairly rarely-used court proceeding, the details of which can be found in N.C.G.S. §§7B-3500- 3509. Marriage before the age of 18 will automatically emancipate the child under the laws of North Carolina. N.C.G.S. §7B-3509.

³ CDC, *MMWR*, Vol. 57, No. 39:2008.

their child-bearing years: 13 to 39.⁴

The activities of the Duke AIDS Legal Assistance Project are specifically geared toward the client who is HIV positive. But the options discussed in this manuscript apply to a wide range of parents. The key permanency planning option discussed here, standby guardianship, does have a requirement that the parent or guardian have a progressively chronic or irreversible fatal illness. Any number of parents would meet this qualification, not just those who are HIV infection.

When a client comes to the Legal Project requesting planning for her minor children, we evaluate a number of options in our representation of that client (See Appendix C, *Checklist of Planning Considerations in Permanency Planning Cases*). This manuscript will touch on the legal options discussed with our HIV positive parents, but will focus on North Carolina's standby guardianship statute.

Rights and Obligations of the Absent Parent

Many parents who are in need of permanency planning are single parents. It is important, then, to obtain information about the absent parent. (See Appendix E, *Standby Guardian Intake Part II: Absent Parent Questionnaire*). Such information helps the attorney evaluate several options. For example, is the absent parent a viable choice as the future custodian for the child in the event your client becomes ill or dies? If not, would the absent parent consent to the client's guardianship plan? Can the client obtain some kind of financial support from the child's absent parent--child support or other benefits that might be available to the dependents of the absent parent? In situations where the absent parent has abandoned or

⁴ CDC, *MMWR*, Vol. 57. No. 36: 2008

neglected his or her children, should your client consider terminating his or her parental rights?
Are there financial benefits that would be lost if termination is pursued?

The legal options discussed in this manuscript assume an absent parent who, either because of lack of interest or lack of fitness, is not a viable candidate to obtain custody of his or her child.

Powers of Attorney for Minor Children

A parent faced with an illness that will prevent her from being consistently available to care for her children should consider executing powers of attorney relating to her minor children.

Health Care Power of Attorney.

In the State of North Carolina, a doctor or other health care provider must obtain informed consent before s/he can perform any procedure (except in an emergency situation where informed consent is either impractical or impossible). Since minor children are not legally responsible for themselves, this consent must come from a parent or guardian.⁵

⁵ There are a few limited forms of medical treatment for which a minor's consent alone is sufficient. These are outlined in N.C.G.S. §90-21.5.

The North Carolina Legislature has approved a statutory form called the Authorization to Consent to Health Care for Minor (hereinafter referred to as “Authorization”).⁶ (See Appendix G, *Authorization to Consent to Health Care for Minor*). This form allows the custodial parent⁷ of the child to designate another adult⁸ to make health care decisions regarding that child. This Authorization explicitly gives the health care agent⁹ the authority to admit the child to a health care facility, to employ health care providers, and to authorize performance of various procedures. Just as in a Health Care Power of Attorney for an adult, the custodial parent may place any number of limitations within the Authorization.¹⁰

One key difference between a Health Care Power of Attorney for an adult and an

⁶ This statutory form can be found at N.C.G.S. §32A-34.

⁷ The “custodial parent” is defined as “a parent having sole or joint legal custody of that parent’s minor child.” N.C.G.S. §32A-29(3). Although it is not entirely clear from the statute, it appears that only the custodial parent has the authority to give another adult the power to consent to health care for the minor child. It seems clear that the non-custodial parent does not have this power. An interesting question arises, however, when the minor child does not have a custodial parent (for example, when both of the parents of the minor child are dead). These statutes are silent of the issue of whether a non-parental guardian may authorize another adult to consent to health care for the minor child.

⁸ Note that the custodial parent must be at least 18 years of age or emancipated for such an Authorization to be valid. N.C.G.S. §32A-30.

⁹ The health care agent is defined as “the person authorized pursuant to this Article to consent to and authorize health care for a minor child.” N.C.G.S. §32A-29(1).

¹⁰ See; N.C.G.S. §32A-31(b).

Authorization to Consent to Health Care for Minor is that the custodial parent **may not** authorize the health care agent to consent to the removal or withholding of life-sustaining procedures. ¹¹

The Authorization can be revoked in a number of ways. The Authorization will be revoked automatically in the following three circumstances: (1) the Authorization may contain a date after which it is not valid; if so, the Authorization is terminated on that date; (2) the Authorization is terminated when the minor child reaches the age of 18; and (3) the Authorization shall be terminated should the parent making the Authorization lose custody of the child ¹². In case of disagreements between health care agents, or a disagreement between a health care agent and a parent of the minor child, whether custodial or not, the Authorization will be revoked automatically for the duration of the disagreement. ¹³

The custodial parent may also take steps to revoke the Authorization. First, the custodial parent may execute a document specifically revoking the Authorization. ¹⁴ Second, the custodial parent may execute a subsequent Authorization naming a different health care agent. ¹⁵ Finally, the custodial parent may revoke the Authorization in any manner which communicates

¹¹ *See*; N.C.G.S. §32A-31(c). Life-sustaining procedures are defined as “those forms of care or treatment which only serve to artificially prolong life and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of treatment which sustain, restore, or supplant vital bodily functions, but do not include care necessary to provide comfort or to alleviate pain.” N.C.G.S. §32A-29(5).

¹² *See*; N.C.G.S. §32A-32(a).

¹³ *See*; N.C.G.S. §32A-32(c).

¹⁴ *See*; N.C.G.S. §32A-32(b).

¹⁵ Id.

his or her intent to revoke the Authorization.¹⁶

It should be noted that neither subsequent incapacity nor subsequent mental incompetence of the custodial parent will affect the validity of the Authorization.¹⁷

Guardianship Clause in Will

In North Carolina, parents are authorized by statute to recommend a guardian for their children in their last will and testament.¹⁸ If there is not a surviving parent, the recommendation in the will “shall be a strong guide for the clerk in appointing a guardian”¹⁹ The clerk is not bound by the recommendation, however, if the clerk finds that a different appointment would be in the minor child’s best interest. It is also specifically noted in the statute that the testator’s recommendation in the will does not affect the rights of a surviving parent who has not wilfully abandoned the minor child.²⁰ Parents should be advised to include a guardianship clause in their wills. They should also be informed that, in the case of a surviving parent who has not wilfully abandoned the child, that parent will have rights to custody of his or her child. In the case of an absent parent who is unfit to have custody, use of North Carolina’s new standby guardianship law is strongly recommended.

Standby Guardianship

¹⁶ Id. Either of the other two methods is recommended over this third option.

¹⁷ N.C.G.S. §32A-32(d)

¹⁸ N.C.G.S. §35A-1225

¹⁹ Id.

²⁰ N.C.G.S. §35A-1224(d)

Introduction

In 1995, the state of North Carolina joined a growing number of states by enacting a law creating standby guardianships.²¹ (See Appendix H, *N.C. Standby Guardianship Statute*). This law went into effect on December 1, 1995. The goal of the legislation is to facilitate permanency planning for children whose primary parent suffers from a “progressively chronic illness” or an “irreversible fatal illness.” In most cases, the appointment of a standby guardian secures the eventual smooth transfer of legal guardianship from a parent or guardian to the standby guardian without impinging on any of the rights of the parent while s/he is still alive.

What is a standby guardian?

Standby Guardianship is available to North Carolina parents who suffer from a "progressively chronic illness" or from an "irreversible fatal illness." A standby guardian is a person appointed to become either the guardian of the person or the general guardian of a minor child after the occurrence of certain triggering events.²² Once the authority of the standby guardian begins with respect to the minor child, it is concurrent with that of the parent, provided that the parent is alive and competent at that time. The custodial parent or guardian does not lose her parental rights once the standby guardian is appointed nor is she divested of her parental rights by virtue of the commencement of the standby guardian's authority.

Benefits of Standby Guardianship

²¹ N.C.G.S. §§35A-1370-1382

²² N.C.G.S. §35A-1370(11).

There are a number of benefits offered by the appointment of a standby guardian. Chief among these is the flexibility such an appointment offers the parent or guardian who is battling a terminal or chronic illness. The law allows parents to care for their children for as long as they are able and to again resume parental responsibilities after periods of incapacity. At the same time, however, the standby guardian can step in as needed to assume parental responsibilities. In this way, the best interests of the child are met by allowing the child to remain with her parent when feasible and by providing a guardian with legal authority to care for her when her parent is not able to do so.

Another important benefit of standby guardianship is the peace of mind it can give the parent or guardian of a minor child. If the parent or guardian chooses to go through the standby guardianship hearing while he or she is still alive, that parent can have the comfort of knowing who will take care of her children after her death. If the parent does not go through the hearing process, she has the comfort of knowing that her wishes have been expressed and that they can be legally enforced by the guardians she has designated.

Additionally, standby guardianship can help bring some measure of stability and security to the lives of the affected minor children. Once the parent has gone through the process of thinking about and naming a standby guardian, the child will have a greater opportunity to develop a relationship with that person. If the child is informed of the circumstances, the standby guardianship can give assurance to the child that someone will be there to look out for him if the parent becomes ill or dies. Additionally, since the standby guardianship can take affect before the death of the parent, the parent is given a greater opportunity to interact with the standby guardian and to give input and direction about the raising of the child.

Who may name a standby guardian?

There are a number of people who may name a standby guardian for a minor child, including a biological or adoptive parent, the guardian of the person or the general guardian of the minor child.²³ A person who has legal custody of a child may not name a standby guardian for that child unless that person is also a biological or adoptive parent, or a legal guardian of the child. The person naming the standby guardian must suffer from a “progressively chronic illness” or an “irreversible fatal illness²⁴.” These terms are not defined by the statute. The person naming the standby guardian must give the basis for the statement that s/he suffers from a progressive chronic illness or an irreversible fatal illness (such as the source and date of such a diagnosis), but is not required to disclose the specific illness.²⁵

How is a standby guardianship established?

A standby guardianship can be initiated in one of two ways: by parent or guardian petition or by written designation²⁶. The petition method involves the parent or guardian petitioning the Clerk of Court for the appointment of a standby guardian. The written designation method involves the named guardian petitioning the Clerk of Court to be named as guardian after having been designated in writing as the standby guardian by the parent or current guardian. Each of these methods will be discussed in detail below.

Whether the standby guardianship is initiated by petition or by written designation, the

²³ N.C.G.S. §35A-1370(5), (10).

²⁴ N.C.G.S. §35A-1370(5), (10).

²⁵ N.C.G.S. §35A-1373(b)(3).

²⁶ N.C.G.S. §35A-1372.

standby guardianship only takes effect upon the occurrence of one of the following four “triggering events”: 1) the death of the petitioner/designator;²⁷ 2) the incapacity of the petitioner/designator;²⁸ 3) the debilitation and written consent of the petitioner/designator;²⁹ or 4) the written consent of the petitioner/designator to the commencement of the standby guardian’s authority.³⁰ Here, “incapacity” is defined as the “chronic or substantial inability, as a result of mental or organic impairment, to understand the nature and consequences of decisions concerning the care of one’s minor child, and a consequent inability to make these decisions.”³¹ “Debilitation” is defined as, “a chronic and substantial inability, as a result of a physically debilitating illness, disease, or injury, to care for one’s minor child.”³²

Standby Guardianship Petition by Parent or Guardian

To begin a proceeding for appointment of a standby guardian, the petitioner (in this case, the parent, general guardian or guardian of the person of the minor child) must file a petition with the Clerk of Superior Court of the county in which the minor child resides.³³ The petition (See Appendix J, *Petition for Appointment of Standby Guardian for Minor, AOC-E-209.*) must:

²⁷ N.C.G.S. §§35A-1373(i), 35A-1374(c).

²⁸ N.C.G.S. §§35A-1373(j), 35A-1374(c).

²⁹ N.C.G.S. §§35A-1373(k), 35A-1374(c).

³⁰ N.C.G.S. §§35A-1373(l), 35A-1374(c).

³¹ N.C.G.S. §35A-1370(8).

³² N.C.G.S. §35A-1370(3).

³³ N.C.G.S. §35A-1373(a).

- 1) State the name of the petitioner, the name of the minor child, the name of the standby guardian and of any alternate standby guardian;³⁴
- 2) State that the authority of the standby guardian is to become effective on the occurrence of one of the four triggering events;³⁵
- 3) State that the petitioner suffers from a progressively chronic or irreversibly fatal illness. Note: The petition does NOT have to identify the specific illness. There must simply be a basis for the statement, such as the date and source of such a diagnosis;³⁶ (See Appendix V, *Physician Affidavit*)
- 4) Identify any law suits which involve the minor child. Such identification should include party names, file numbers and the states and counties where filed;³⁷ and
- 5) Be verified in front of a notary public.³⁸

Once the petition has been filed, written notice of the time, date and place set for the hearing must be served upon any biological or adoptive parent of the child who is not the petitioner, and upon any other party that the court may so direct³⁹. Service must be made pursuant to Rule 4 of the North Carolina Rules of Civil Procedure.⁴⁰ Any party to the proceeding may waive his or her right to notice.⁴¹ The non-petitioning parent may also consent to the appointment of a standby guardian.

³⁴ N.C.G.S. §35A-1373(b)(1).

³⁵ N.C.G.S. §35A-1373(b)(2).

³⁶ N.C.G.S. §35A-1373(b)(3).

³⁷ N.C.G.S. §35A-1373(b)(4).

³⁸ N.C.G.S. §35A-1373(b)(5).

³⁹ N.C.G.S. §35A-1373(c).

⁴⁰ N.C.G.S. §35A-1373(c).

⁴¹ N.C.G.S. §35A-1373(c).

If at any time before or during the hearing for standby guardianship, a parent presents to the clerk a written claim for custody, the clerk must stay any further standby guardianship proceedings for thirty days pending the filing of a complaint for custody.⁴² If a custody complaint is filed, the standby guardianship petition will be dismissed; if no such complaint is filed within 30 days after the custody claim is presented, the clerk shall proceed with the standby guardianship proceeding⁴³.

Generally, the petitioner should be present at the hearing. Her presence is not required however, if she is medically unable to attend the proceedings, unless the clerk finds that the petitioner could appear with reasonable accommodations and that the interests of justice require her presence.⁴⁴ At the hearing, the clerk must find the following:

- 1) The petitioner suffers from a progressively chronic illness or an irreversibly fatal illness.
- 2) The best interests of the child are met by the appointment of a standby guardian.

⁴² N.C.G.S. §35A-1373(d).

⁴³ N.C.G.S. §35A-1373(d).

⁴⁴ N.C.G.S. §35A-1373(e).

3) The person named as standby guardian, and any alternate, are fit to serve in that capacity⁴⁵.

If the clerk finds that these three elements are met, s/he will enter an order appointing the named standby guardian. (See Appendix Z, *Order on Petition for Appointment of Standby Guardian for Minor, AOC-E-409*). The order may also appoint an alternate standby guardian⁴⁶.

The clerk will also issue Letters of Appointment at the conclusion of the hearing. The Letters may include the statement that the authority of the standby guardian will not begin until the occurrence of one of the four triggering events.⁴⁷ (See Appendices AA, BB, CC, *Letters of Appointment Standby Guardian of the Person, AOC-E-412; Letters of Appointment Guardian of the Person, AOC-E-408; Letters of Appointment Standby General Guardian, AOC-E-411*).

Upon the occurrence of one of those four events, the standby guardian must file proof of the occurrence of the triggering event with the Clerk of Court within 90 days of the parent's death, or in the case of incapacity, debilitation or consent, within 90 days of the guardian's receipt of the written determination and/or consent.⁴⁸ Proof of the triggering event is then attached to the Letters of Appointment to effectuate the authority of the standby guardian.

⁴⁵ N.C.G.S. §35A-1373(f).

⁴⁶ N.C.G.S. §35A-1373(f).

⁴⁷ N.C.G.S. §35A-1373(g).

⁴⁸ N.C.G.S. §35A-1373(i)-(l).

If the parent or guardian wishes to have the standby guardian's authority begin immediately following the hearing, the parent can sign a written consent, which can then be filed with the clerk at the hearing and immediately attached to the Letters of Appointment. (See Appendix Y, *Consent to Commencement of the Standby Guardian's Authority*). The parent and the standby guardian would then have concurrent legal authority over the child.⁴⁹

Standby Guardianship begun by Written Designation

In many instances the parent or guardian is physically unable or psychologically unprepared to proceed with the standby guardianship hearing. In those cases, the parent or guardian can sign a written designation to initiate the eventual appointment of a standby guardian for her child(ren).⁵⁰ A written designation is a document executed by the parent or guardian designating a standby guardian and any alternate.⁵¹ A designation may be executed by a parent, guardian of the person, or general guardian of the minor child.⁵² The designation must contain, at a minimum, the following information: 1) the name of the designator; 2) the name of the minor child(ren); 3) the name of the standby guardian; 4) the name of any alternate standby guardian; and 5) the circumstances under which the standby guardianship is to take effect.⁵³ (See Appendix N, *Designation of Standby Guardian*). The written designation must be signed by the maker in the presence of at least two witnesses who are 18 or older and who are not the

⁴⁹ N.C.G.S. §35A-1377

⁵⁰ N.C.G.S. §35A-1374

⁵¹ N.C.G.S. §35A-1370(4).

⁵² N.C.G.S. §35A-1370(5).

⁵³ N.C.G.S. §35A-1374(b).

standby guardian or an alternate standby guardian.⁵⁴ These witnesses must also sign the document. The person named as standby guardian must also sign the document.⁵⁵ The designation may be signed for the designator if she is physically unable to do so, provided that the designation is signed in her presence in front of the two witnesses.⁵⁶

The written designation does not, in and of itself, confer authority on the standby guardian. The legal authority of a standby guardian named in a written designation begins only upon the occurrence of one of the four triggering events.⁵⁷ As with the petition method, if the parent or guardian wishes to have the standby guardian's authority begin immediately, the parent can sign a written consent simultaneously with the written designation. (See Appendix EE, *Consent to Commencement of Guardianship after Written Designation signed*). Once a triggering event occurs, the standby guardian's authority begins immediately upon receipt of written proof of the triggering event.⁵⁸ Within 90 days of that triggering event,⁵⁹ however, the standby guardian must file a petition with the Clerk of Superior Court of the county in which the

⁵⁴ N.C.G.S. §35A-1374(a).

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ N.C.G.S. §35A-1374(c).

⁵⁸ Written proof in the case of death consists of a death certificate or a funeral home receipt-N.C.G.S. §35A-1374(d)(4); written proof in the case of incapacity shall consist of a written determination of incapacity pursuant to N.C.G.S. §35A-1375; written proof in the case of debilitation shall consist of a written determination of debilitation pursuant to N.C.G.S. §35A-1375, as well as the written consent of the designator; written proof in the case of the designator's consent shall consist of the designator's written consent, signed in the presence of two witnesses who are at least 18 years of age- N.C.G.S. §35A-1374(d)(3)

⁵⁹ N.C.G.S. §35A-1374(e).

minor child lives in order to be appointed guardian of the person or general guardian.⁶⁰ If the petition is not filed within 90 days of the triggering event, the authority of the standby guardian lapses until a petition is filed.⁶¹ The petition must:

- 1) Attach a copy of the written designation.
- 2) Attach a copy of either: i) the determination of incapacity of the designator; ii) the determination of debilitation of the designator⁶² plus the designator's written consent; iii) the designator's written consent; or iv) proof of the designator's death, such as a copy of the death certificate or funeral bill.
- 3) Contain a statement as to whether there are any law suits involving the minor child, and, if so, an identification of the parties, the case numbers and the states and counties where filed; and
- 4) Be signed in front of a notary public or other individual authorized to administer oaths.⁶³

(See Appendix FF, *Standby Guardian's Petition for Appointment as Guardian of the Person or General Guardian for Minor, AOC-E-210*).

Additionally, if the petition is filed by an alternate standby guardian, it must contain a statement declaring that the person designated as standby guardian is either unwilling or unable to act as standby guardian.⁶⁴

In an exercise of caution, a written designation should be executed by the parent, even if

⁶⁰ N.C.G.S. §35A-1374(d).

⁶¹ N.C.G.S. §35A-1374(e).

⁶² The petitioner, designator, or standby guardian may request that the attending physician make a determination as to incapacity or debilitation. The determination of incapacity or debilitation shall i) be made by the attending physician to a reasonable degree of medical certainty, ii) be in writing, and iii) contain the physician's opinion regarding the cause or nature of the incapacity or debilitation and its extent and expected duration. N.C.G.S. §35A-1375.

⁶³ N.C.G.S. §35A-1374(f).

⁶⁴ N.C.G.S. §35A-1374(f)(3).

the parent or guardian intends to file the petition herself. This will ensure that the Written Designation is in place in the event of the parent's sudden or unexpected death or loss of competence before the full standby guardianship process can be completed.

Once the petition by the designated standby guardian is filed, the process is very similar to the petition method explained above. Written notice of the time, date and place set for the hearing must be served upon any biological or adoptive parent of the child who is not the designator, and upon any other party that the court may so direct.⁶⁵ Service must be made pursuant to Rule 4 of the North Carolina Rules of Civil Procedure.⁶⁶ Any party to the proceeding may waive their right to notice.⁶⁷ The non-petitioning parent may also consent to the appointment of a standby guardian.

If at any time before or during the hearing for standby guardianship, a parent presents to the clerk a written claim for custody, the clerk must stay any further standby guardianship proceedings for thirty days pending the filing of a complaint for custody.⁶⁸ If a Chapter 50 custody complaint is filed, the standby guardianship petition will be dismissed; if no such complaint is filed in District Court within 30 days after the claim is presented, the clerk shall proceed with the standby guardianship proceeding.⁶⁹

At the hearing the clerk must determine that the following requirements are met:

⁶⁵ N.C.G.S. §35A-1374(g).

⁶⁶ N.C.G.S. §35A-1374(g).

⁶⁷ N.C.G.S. §35A-1374(g).

⁶⁸ N.C.G.S. §35A-1374(h).

⁶⁹ N.C.G.S. §35A-1374(h).

(1) The petitioner was designated as either standby guardian or alternate standby guardian.⁷⁰

(2) That one of the four triggering events has occurred.⁷¹

(3) That the best interests of the child will be promoted by the appointment of the standby guardian as either guardian of the person or general guardian of the minor child.⁷²

(4) That the standby guardian is fit to serve as general guardian or guardian of the person of the minor child.⁷³

(5) If the petitioner is the alternate standby guardian, the clerk must find that the person originally designated as standby guardian is either unable or unwilling to serve as general guardian or guardian of the person of the minor child.⁷⁴

If the clerk finds that these elements are met, s/he will enter an order appointing the petitioner as either guardian of the person or general guardian of the minor child. (See Appendix GG, *Order on Standby Guardian's Petition for Appointment as Guardian of Minor, AOC-E-410*).

The clerk will also issue Letters of Appointment which will become immediately effective upon the attachment of evidence of the triggering event.

Bond Requirement

⁷⁰ N.C.G.S. §35A-1374(i)(1).

⁷¹ N.C.G.S. §35A-1374(i)(2).

⁷² N.C.G.S. §35A-1374(i)(3).

⁷³ N.C.G.S. §35A-1374(i)(4).

⁷⁴ N.C.G.S. §35A-1374(i)(5).

The statute provides that the bond requirements of Article 7 of Chapter 35A “shall” apply to both the appointment of a guardian of the person and a general guardian. The clerk need not require a bond, however, if the petitioner or designator waives the bond requirement in writing.⁷⁵ (See Appendix M, *Waiver of Bond Requirement for Standby Guardian*).

Accounting Requirement

General guardians appointed pursuant to the standby guardianship statute are subject to the accounting requirement of Article 10 of Chapter 35A.⁷⁶

Out-of-State Guardians

A person appointed as a general guardian must be a resident of North Carolina. An out-of-state resident may be appointed guardian of the person after indicating his or her willingness to submit to the jurisdiction of the North Carolina courts in matters relating to the guardianship. The out-of-state resident must also appoint a resident agent to accept service of process for the guardian in all actions or proceedings relating to the guardianship.⁷⁷ (See Appendix HH, *Appointment of Resident Process Agent and Acceptance of Appointment*).

Rights of Absent Parents Upon Appointment of a Standby Guardian

Appointment of a standby guardian does not terminate the absent parent’s rights. That parent still has all the legal rights and obligations of parenthood. Child support or visitation orders remain in effect. The child may inherit from the parent or receive Social Security benefits

⁷⁵ N.C.G.S. §35A-1380

⁷⁶ N.C.G.S. §35A-1381

⁷⁷ N.C.G.S. §35A-1213(b)

on the parent's record. We do not yet have any guidance from the courts as to the weight that will be given to an appointment of a standby guardian should the absent parent decide to file a Chapter 50 custody action following that appointment.

Suspension of Guardianship ⁷⁸

If the standby guardian's authority has begun as a result of a determination of incapacity of the parent or as a result of a determination of debilitation rather than solely by consent or the death of the parent, the authority of the standby guardian will be suspended upon the restoration of capacity or ability to care for the child by the parent. This determination of restored capacity or ability must:

1. be made by the attending physician to a reasonable degree of medical certainty;
2. be in writing, and
3. contain the attending physician's opinion regarding the cause and nature of the parent's restoration to capacity or ability.

The attending physician must provide a copy of this determination to the standby guardian, if the guardian's identity is known by the physician. The determination of restored capacity or ability must then be filed with the clerk's office by the standby guardian if an order has been entered appointing the standby guardian as guardian of the minor child.

The original order appointing the standby guardian as guardian of the person or general guardian of the minor child remains in full force and effect despite the parent's restoration of capacity or ability. The authority of the standby guardian does not recommence, however, unless the standby guardian again receives a new determination of incapacity, debilitation,

⁷⁸ N.C.G.S. §35A-1376

written consent of the parent or proof of death of the parent and files the appropriate proof with the Clerk of Court's office.

The ability under the statute for the standby guardian's authority to be suspended in times of relative good health by the parent without the necessity of repeating the hearing process is particularly valuable for parents with HIV disease, a condition that can be characterized by extremely variable levels of functioning.

Revocation of Standby Guardianship⁷⁹

The designating parent may revoke a standby guardianship. If the clerk has already entered the guardianship order, the parent may revoke the standby guardianship by executing a written revocation, filing it in the office of the clerk who entered the order and promptly providing the standby guardian with a copy of the revocation.

If the parent has executed a written designation naming a standby guardian, and the named standby guardian has not yet filed a petition, the parent may revoke the standby guardianship by notifying the standby guardian in writing of the intent to revoke the standby guardianship.

Renunciation of Standby Guardianship⁸⁰

Any time before commencement of the standby guardian's authority, the appointed standby guardian may renounce his or her appointment by executing a written renunciation and filing it with the clerk who entered the order and promptly providing the petitioner with a copy of the renunciation. The clerk must then issue letters of appointment to the alternate standby

⁷⁹ N.C.G.S. Sec. 35A-1373(m)-1374(j).

⁸⁰ N.C.G.S. Sec. 35A-1373(n)

guardian, if any.

Termination of Standby Guardianship⁸¹

Standby guardianship continues:

1. until the child reaches the age of 18;
2. the guardianship is terminated by order of the clerk who entered the original order;
3. the guardianship is revoked by the parent; or
4. the guardianship is renounced by the standby guardian.

⁸¹ N.C.G.S. Sec. 35A-1382.

