

Standby Guardians for Minor Children: North Carolina Gives a Parent More Control Over Who Raises Minor Children if The Parent Becomes Incapacitated or Dies

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Introduction

What happens if your children become orphaned while they are still minors? Usually, the court will appoint a guardian to care for your children and their property. You may recommend a guardian for your children in your will, but it is a recommendation only. The court is not bound to follow your recommendation if the court determines that it is not in the best interest of your children. Thus, there is no way to know for sure who will be raising your children if you die

while they are minors. Without a will, you do not recommend anyone. Many parents are frustrated by their lack of control over this very important issue.

A recent law in North Carolina will give some parents more control over who will raise their children if the parent becomes incapacitated or dies. The new law allows a parent, under limited conditions, to name a standby guardian for his or her minor children before the need arises.

What is a Standby Guardian?

A "standby guardian" is a person appointed to become the [guardian of the person](#) or [general guardian](#) of a minor child upon the death of a parent, upon a determination of debilitation or incapacity of a parent, or with the consent of the parent. The law does not provide for a standby guardian to become a [guardian of the estate](#).

What is an Alternate Standby Guardian?

If the person named as standby guardian is unwilling or unable to serve as general guardian or guardian of the person, the "alternate standby guardian" will assume the duties of the standby guardian.

Who Can Name a Standby Guardian?

A person who may name a standby guardian must suffer from a progressive chronic illness or an irreversible fatal illness. Also, he or she must be the biological or adoptive parent, guardian of the person, or general guardian of a child under the age of 18.

How Do You Name a Standby Guardian?

The new law provides two methods for naming a standby guardian. A parent who qualifies may petition the clerk of superior court for an appointment of a standby guardian. Or, a parent who qualifies may name a standby guardian by a written designation that is signed and witnessed.

Appointment by Petition.

A parent who suffers from a chronic progressive illness or an irreversible fatal illness may file a petition with the clerk of superior court in the county where the child lives or is [domiciled](#). A hearing is scheduled. A copy of the petition and notification of the hearing must be served upon any biological or adoptive parent of the minor child, other than the petitioner. If before the hearing any parent entitled to notice makes a written claim for custody of the child, the clerk must postpone the hearing for 30 days. If within those 30 days the parent making the claim for

custody files a custody suit for the minor child, the clerk will dismiss the petition for appointment of a standby guardian. If no custody suit is filed, the clerk will conduct the hearing for appointment of a standby guardian. At the hearing, the clerk must find the following:

- The petitioner suffers from a progressive chronic illness or an irreversible fatal illness.
- The best interests of the minor child will be promoted by the appointment of a standby guardian of the person or a general guardian.
- The standby guardian and the alternate standby guardian, if any, are fit to serve as guardian of the person or general guardian of the minor child.

After making these findings, the clerk enters an order appointing the standby guardian named in the petition and issues letters of appointment to the standby guardian.

When is the standby guardian's authority effective? The authority of the standby guardian is effective when the guardian receives the following (as required by the letters of appointment):

- Proof of death of the petitioner, such as a copy of a death certificate or a funeral home receipt. The standby guardian must file proof of death with the court within 90 days of petitioner's date of death.
- A written statement from the petitioner's attending physician that the petitioner is [incapacitated](#). The standby guardian must file a copy of the [determination of incapacity](#) with the court within 90 days of receiving the determination.
- A written statement from the petitioner's attending physician that the petitioner is [debilitated](#), plus a written consent signed by the petitioner. The standby guardian has 90 days to file a copy of the [determination of debilitation](#) and the petitioner's written consent with the court.
- Petitioner's written consent that the standby guardian's authority is effective. The petitioner must sign the written consent in the presence of two witnesses who are at least 18 years old. In addition, the standby guardian must sign the consent. If the petitioner is physically unable to sign the consent, someone may sign for him or her in the presence of the petitioner and the two witnesses. The standby guardian has 90 days of the date of the written consent to file it with the court.

Appointment by Written Designation.

A parent who suffers from a chronic progressive illness or an irreversible fatal illness also may name a standby guardian by a written designation. The parent must sign the designation in the presence of two witnesses who are at least 18 years old. In addition, the standby guardian must sign the designation. If the parent is physically unable to sign the designation, someone may sign on his or her behalf, provided that it is signed in the presence of the parent and the two witnesses.

A designation of a standby guardian must identify the designator, the minor child, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian, if any. The designation must indicate that the designator intends for the standby guardian or the alternate standby guardian to become the minor child's guardian in the event that the designator either:

- Becomes incapacitated;
- Becomes debilitated and consents to the commencement of the standby guardian's authority;
- Dies before the commencement of a judicial proceeding to appoint a guardian of the person or general guardian of a minor child; or
- Consents to the commencement of the standby guardian's authority.

When is the standby guardian's authority effective? The authority of the standby guardian is effective when the guardian receives the following:

- Proof of death of the designator, such as a copy of a death certificate or a funeral home receipt.
- A written statement from the designator's attending physician that the designator is incapacitated.
- A written statement from the designator's attending physician that the designator is debilitated, plus written consent of the designator.
- Designator's written consent that the standby guardian's authority is effective. The designator must sign the written consent in the presence of two witnesses who are at least 18 years old. In addition, the standby guardian must sign the consent. If the designator is

physically unable to sign the consent, someone may sign for him or her in the presence of the designator and the two witnesses.

The standby guardian's authority is effective for 90 days to give him or her time to petition the court for appointment as guardian of the person or general guardian.

The standby guardian must file a petition with the court within 90 days. The standby guardian has 90 days to file a petition with the clerk of court for appointment as guardian of the person or general guardian of the minor child. The standby guardian's authority will lapse if the petition is not filed within 90 days.

A copy of the petition and written notice of the hearing must be served upon any biological or adoptive parent of the minor child, other than the designator. If before the hearing any parent entitled to notice makes a claim for custody, the clerk will postpone the hearing for 30 days. If a custody suit is filed within those 30 days, the clerk will dismiss the petition. If a custody suit is not filed, the clerk conducts the hearing. The clerk enters an order appointing the standby guardian as guardian of the person or general guardian if the clerk finds the following:

- The person was duly designated as standby guardian or alternate standby guardian;
- That there is the required proof of:
 - A determination of incapacity;
 - A determination of debilitation and the designator has consented to the commencement of the standby guardian's authority;
 - The designator has consented to that commencement; or
 - The designator has died.
- That the best interests of the minor child will be promoted by the appointment of the person designated as standby guardian or alternate standby guardian as guardian of the person or general guardian of the minor child.
- That the standby guardian or alternate standby guardian is fit to serve as guardian of the person or general guardian of the minor child; and
- That if the petition is by a person designated as an alternate standby guardian, the person designated as standby guardian is unwilling or unable to serve as standby guardian.

What Happens if the Parent Is Restored to Capacity or Ability to Care for the Child?

If the parent is subsequently restored to capacity or the ability to care for the child, the authority of the standby guardian is suspended. The parent's attending physician must make this determination in writing to a reasonable degree of medical certainty. The court order appointing the standby guardian as guardian of the person or general guardian will remain in full force and effect, and the authority of the standby guardian will recommence upon the standby guardian's receipt of a subsequent determination of the parent's incapacity, debilitation, death, or written consent.

What Rights Does the Parent Have After a Standby Guardian Has Been Appointed?

The commencement of a standby guardian's authority does not, by itself, divest the parent of any parental or guardianship rights, but gives the standby guardian concurrent authority with respect to the minor child.

How Long Does a Standby Guardianship Continue?

A standby guardianship continues until the child reaches age 18, unless terminated sooner. It may be terminated sooner:

- By order of court (terminating it, granting custody of the child to someone else, or [remancipating the minor](#)).
- By revocation (by the parent)
- By renunciation (by the standby guardian).

When Did This Law Become Effective?

This law became effective in North Carolina on December 1, 1995.

Source: *CHAPTER 313, SENATE BILL 682. AN ACT TO PROVIDE FOR THE APPOINTMENT OF STANDBY GUARDIANS. NORTH CAROLINA GENERAL STATUTES SECTION 35A-1370 THROUGH 35A-1381, ARTICLE 21.*

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Definitions:➤ **General Guardian**

A *general guardian* is appointed to take care of a minor child and his or her property. A general guardian has the duties of a guardian of the person and a guardian of the estate.

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➤ **Guardian of the Person**

A *guardian of the person* is appointed to take care of the minor child. A guardian of the person has custody of the minor and must provide for the minor's care, comfort, education, training, and maintenance. A guardian of the person does not have control over the minor's property.

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➤ **Guardian of the Estate**

A *guardian of the estate* has control over and responsibility for property belonging to the minor.

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➤ **Domicile**

Domicile is a person's permanent home, legal residence, or main residence.

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➤ **Emancipation of a Minor**

An *emancipated minor* is 16 or 17 years old and has been declared an adult by court order.

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➤ **Debilitation**

Debilitation means a chronic and substantial inability, as a result of a physically debilitating illness, disease, or injury, to care for one's minor child.

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➤ **Determination of Debilitation**

Determination of debilitation means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the debilitation of the petitioner or designator.

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➤ **Incapacity**

Incapacity means a chronic and 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.

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➤ **Determination of Incapacity**

Determination of incapacity means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the incapacity of the petitioner or designator.

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