

## NORTH CAROLINA GUARDIANSHIP ASSOCIATION

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We all prefer to decide for ourselves how we will live our lives -- where we will live, how we will dress, what we will eat, with whom we will share friendship -- but, unfortunately, this is not always possible. Every day, people suffer injuries or experience health failures that lead to being unable to make good decisions for themselves. These people need someone to assume their rights and make decisions about many aspects of their daily lives. If there are no alternatives, a guardian can be court-appointed to advocate and support the person.

A guardianship is the legal proceeding by which a corporation or disinterested public agent can be appointed to manage the personal or financial affairs of an individual who has been judged to lack the capacity to do so on his or her own. It is a legal relationship between a capable adult entity (the guardian) and a person who has been declared legally disabled in a court of law (a ward).

The guardian may be a family member, a close friend or neighbor, or a professional guardian (an unrelated person who has received specialized training). He or she will support the right of the incapacitated ward to make decisions whenever possible, and will solicit and respect the views and wishes of the ward, unless these views and wishes must be overridden in the ward's best interest.

When an individual is determined to be incapacitated and there is no alternative to guardianship such as power of attorney, a healthcare directive, or a living trust, the court may appoint a guardian to exercise those delegable rights which have been taken away. For that reason, the initiation of guardianship proceedings should be considered only after all other possible alternatives have been explored.

Medical evidence is normally sought to support a finding of incapacity, but it is important to remember that *incapacity* is a legal term, not a medical definition and the threshold issue is whether or not the alleged incapacitated person is capable of exercising certain legal rights, such as the right to manage money or to consent to medical treatment. Many factors, including mental and physical health, personal environment, and financial status can impact an individual's capacity.

### **FREQUENTLY ASKED QUESTIONS**

#### **Who can best serve as an individual's guardian?**

The person who cares most about the incompetent individual, and who has been interested and involved with him or her is the first choice. Usually, that person is a family member. If the individual has no family, another interested person will be asked to serve as his or her guardian.

#### **Can parents take part in deciding who should be appointed as their child's guardian even if they do not wish to be appointed themselves?**

Yes. Parents can help locate and recommend an interested person to serve as legal guardian for

their son or daughter. For example, elderly parents may prefer that one of their other children be appointed as guardian. A testamentary guardian can only be named in the parent's will for a child who is under 18 years of age.

### **Who may file an incompetency petition?**

Any person with good intentions who feels that a person would benefit from having an appointed guardian may file a guardianship (incompetency) petition. It could be a family member, representative from a department of social services, mental health center or other person who knows the individual, may file a petition with the Clerk of Superior Court.

### **What information is needed in petition for incompetence?**

The petitioner completes a special form which includes the person's name, address and county of residence of the respondent and petitioner, a general statement about the respondent's assets and liabilities, facts to show the respondent is incompetent and why incompetence is sought. These statements and petitions have to be notarized before being filed with the Clerk of Court.

### **How does one become a guardian for a relative?**

The petitioner can file for guardianship with the Clerk of Court of the county in which the individual alleged to be incompetent lives/resides. The Clerk may appoint as guardian an adult individual, a corporation, or a public agency. The Clerk decides the qualifications of the guardian. The petitioner files for guardianship with the Clerk. The Clerk may appoint counsel or a guardian ad litem to act on the individuals behalf during the guardianship proceedings. The Clerk can order a multi-disciplinary evaluation if requested or needed. The Clerk sets a hearing date and conducts the hearing. The clerk then decides whether to dismiss the petition or declare the individual incompetent. If the individual is found to be incompetent the Clerk must appoint a guardian after hearing testimony as to who should be the guardian. During the hearing, the Clerk and guardian ad litem generally ask the social worker and other witnesses about the individuals abilities and needs. The Clerk then asks the relative or other potential guardian if he or she understands the responsibilities and duties required to be a guardian, and whether or not he or she is willing to serve.

### **Where is the guardianship hearing held?**

The hearing to decide competency and guardianship can be held in the county in which the petition is filed or where the respondent lives or is from.

### **Does the respondent's family need a lawyer?**

Not usually. However, sometimes the family wishes to speak to an attorney about guardianship. If the respondent is not represented by legal counsel, the Clerk of Court will appoint an attorney to serve as Guardian Ad Litem.

### **Is there a fee for the guardianship proceedings?**

There is a filing fee which is charged for filing the petition. In addition, while there is no fee charged to the guardian of the person, a bond is fixed in cases in which a general guardian or guardian of the estate is appointed. (e.g., in estates in which the guardian will be responsible for managing large amounts of money or other property belonging to the incompetent individual.)

The amount of the bond is set according to the value of the estate, and it is generally purchased like an insurance policy.

**Is the legal guardian financially responsible for the ward, and is he or she required to take the ward home?**

No. The law does not place these responsibilities on the guardian.

**What are a guardian's responsibilities?**

A general guardian or guardian of the person is expected to take part in planning for living arrangements for the ward, as well as being responsible for seeing that the ward is cared for and has the training, education, employment, or other services that he or she needs. The guardian must take reasonable care of the ward's personal property. The guardian is also expected to take any legal action needed to protect the ward. The guardian can give any consent or approval that may be needed to enable the ward to receive most medical, legal, or psychological services. The guardian may be requested to give other types of consent such as permission for the ward to participate in recreational activities. An annual report of financial transactions by a general guardian or guardian of the estate should be filed with the Clerk of Court.

**What happens when a guardian dies?**

The Clerk of Court will appoint another guardian if the first guardian dies, and will use the same guidelines in selecting the new guardian as were used in choosing the first one. In other words, another family member would be sought first as a replacement for the guardian.

**What happens when a guardian moves out-of-state?**

A nonresident of the State of North Carolina, to be appointed as general guardian, guardian of the person, or guardian of the estate of a North Carolina resident, must indicate in writing his willingness to submit to the jurisdiction of the North Carolina courts in matters relating to the guardianship and must appoint a resident agent to accept service of process for the guardian in all actions or proceedings with respect to the guardianship. Such appointment must be approved by and filed with the clerk, and any agent so appointed must notify the clerk of any change in the agent's address or legal residence. The clerk shall require a nonresident guardian of the estate or a nonresident general guardian to post a bond or other security for the faithful performance of the guardian's duties. The clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties.

**What is the benefit to serving as guardian for a relative?**

Serving as the legal guardian for a relative allows one to continue the same level of involvement as in the past with that relative's life. The guardian has the right to be involved in decision-making and has the right to recommend, accept, or reject certain kinds of treatment, such as surgery, behavior programs, and residential placement.