

GUARDIANSHIP OF INCOMPETENT ADULTS IN

NORTH CAROLINA



North Carolina Department of
Health and Human Services

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What Is Guardianship?

Guardianship is a legal relationship in which someone (the guardian) is authorized by the clerk of superior court to be a substitute decision-maker for an incompetent adult (the ward). Incompetence is determined in a court proceeding and means an individual is unable to manage his own affairs, or is unable to make important decisions.

How Is a Proceeding to Determine Incompetence and Appoint a Guardian Started?

Anyone, including a family member, representative of a department of social services, mental health center, health department, or anyone else who knows the person, may file a written request (a petition) with the clerk of superior court alleging that an adult (the respondent) should be declared incompetent and have a guardian appointed. Every clerk's office has forms that may be completed and filed for the petition. The petition must include a sworn statement that the information is true. A filing fee may be required in some situations and may be reimbursed later unless the court finds the petitioner did not have a good reason to start the guardianship proceeding.

When a petition is filed, the clerk sets a date and time for a hearing. Copies of the petition and notice of the hearing are served by the sheriff on the respondent and on his attorney or other representative. The petitioner must mail copies to the respondent's spouse or other relatives.

The petitioner may not need to be represented by an attorney at the hearing. However, it is advisable to at least talk with an attorney before starting a proceeding to have someone declared incompetent. If the petitioner is represented by an attorney, he is responsible for paying his attorney's fee.

What Is Involved in a Guardianship Proceeding?

Before the hearing, the clerk may order medical, psychological, social work, and other evaluations of the respondent to help determine whether he is incompetent. The petitioner or the respondent may request such evaluations at the time the petition is filed, and both may receive a written report of the results.

The respondent may arrange for an attorney of his choice to represent him in the proceeding. If he doesn't have an attorney, the clerk of superior court appoints one, called a guardian ad litem, to represent him. The respondent is responsible for his attorney's fee, but if he is not financially able to pay the fee, the court will pay it.

At the hearing, the clerk serves as judge and he or a jury will consider the results of requested evaluations and other evidence that relates to whether the respondent is incompetent. The petitioner is responsible for presenting sufficient evidence to convince the clerk or jury that the respondent is incompetent. If the evidence does not convince the clerk or jury that the

respondent is incompetent, the clerk dismisses the petition. If the clerk or jury decides that the respondent is incompetent, the clerk hears additional evidence about who should be appointed the guardian or guardians for the adult.

Once the adult has been determined to be incompetent and a guardian(s) is appointed, the guardian will receive a written order of appointment from the clerk. This order explains the guardians' powers and duties. If the guardian has questions about his powers and duties, he may direct them to the clerk or to an attorney.



The clerk may appoint a *guardian of the person* and/or a *guardian of the estate*, or a *general guardian*.

What Are the Powers and Duties of a Guardian?

The specific powers and duties a guardian may be given are found in *North Carolina General Statutes, Chapter 35A*. Every guardian should have regular contact with his ward and understand his needs, problems and strengths. The guardian has a duty to make the best decisions he can for the ward so that the ward's life is as comfortable, healthy and safe as possible. The guardian also has the duty to permit the ward to participate as fully as possible in all decisions that the ward is able to understand and participate in.

If the ward becomes competent to make decisions for himself, the guardian has the duty to petition the clerk to have the ward legally restored to competence.

Unless limited by the clerk's order, a *guardian of the person* has authority to make decisions in most areas of a ward's personal life, including:

- ▲ Deciding where the ward will live. This decision should be based on the ward's preferences, needs and resources. It may mean deciding the community the ward will live in, whether the ward will live at home, in a group home, nursing home or other living arrangement. Preference for where the ward will live must be given to community based living situations over institutional settings.
- ▲ Seeing that the ward receives good care.

- ▲ Arranging for any appropriate training, education, employment, habilitation or rehabilitation that the ward may need.
- ▲ Giving consent or approval for the ward to receive any needed services (medical, dental, legal, psychological, etc.). The guardian may petition the clerk of superior court for the clerk's agreement with the guardian's decision about such consent. **The guardian may not consent to the sterilization of a ward with a mental illness or mental retardation.**
- ▲ Taking reasonable care of the ward's personal belongings.
- ▲ Taking any legal action needed to protect the ward.

A *guardian of the estate* has authority to manage the ward's income and property. He must keep good records and make regular reports (annual accounts) to the clerk of superior court about the ward's assets and all expenditures made on behalf of the ward from the ward's estate. The guardian of the estate is required to post a bond for the protection of the ward's estate. Certain actions, such as the sale of the ward's property, require the clerk's prior approval. A guardian of the estate (or general guardian) should talk with the clerk of superior court or an attorney to find out more about the legal requirements involved in managing a ward's estate.

A *general guardian* has the powers and duties of both a guardian of the person and a guardian of the estate.

What Are a Guardian's Financial Obligations?

A guardian is not required to support the ward financially or to contribute his own resources to the ward, and is not liable for the ward's debts. A guardian may be reimbursed from the ward's estate for reasonable expenses incurred in carrying out his duties as guardian. A guardian of the estate or general guardian may also receive a commission set by the clerk from the ward's estate for serving as guardian.



When Does a Guardianship End?

A guardianship, and the guardian's powers and duties end when any of the following occurs:

- ▲ the ward dies;
- ▲ the clerk of superior court removes the guardian from his position;
- ▲ the ward's competence is restored; or
- ▲ the guardian resigns.