

## **ABOUT GUARDIANSHIP AND ALTERNATIVES IN NORTH CAROLINA**

- Minors (under 18) can have a Testamentary Guardian, named in the will of parents;
  - At the time of the parent's death a guardian will be appointed by the Clerk of Court.
  - The Clerk will generally defer to a parent's testamentary preference but can appoint a different guardian if necessary.
  - If no guardian is named in a parent's will, then the Clerk will select a guardian.
- At age 18, all adults are presumed to be competent.
  - "Incapacity" has to be determined in a court procedure decided by Clerk of Court.
  - The "incapacitated" person is called the "ward" or the "protected person" sometimes.
- A parent or testamentary guardian can seek court appointment for himself 6 months before the 18th birthday of the person with a disability, but a competency hearing will have to still be held. ***Guardianship is "an extreme form of intervention in another person's life because control over personal and/or financial decisions is transferred to someone else for an indefinite period of time, and is often permanent.*** Once incompetency is established, it can be difficult to restore legal competency, therefore it should be considered only as a last resort" (Disability Rights NC) because so many rights are removed.
  - NCGS 35A-1201(a) describes the purpose and basic principles of guardianship: "(3) ...to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions. (4) Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights. (5) Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.
  - ***"Wards" retain the rights to: marry, vote, procreate, enter into a contract, be treated with equality, dignity, respect, confidentiality, and the right to petition to modify or terminate guardianship, among many others.*** Some of these rights can be limited by the court.
- Three types of guardianship include:
  - Guardianship of the Person (related to individual needs of the ward)
  - Guardianship of the Estate (related to monetary holdings, personal and real property); this could be same person as the "trustee" in case of a ward with a trust.
  - General (plenary) Guardianship (covers both)
- Guardianship may also be either full or limited in scope. Guardianship should be tailored to the specific needs of the "ward". Guardianship that is limited in scope can be formalized by the Clerk of Court, as determined through:
  - Suggestions from attorneys or petitioners;
  - Use of the Assessment of Skills checklist.

## ALTERNATIVES TO GUARDIANSHIP IN NORTH CAROLINA

Alternatives available whether the person is competent\* OR incompetent:

1. Social Security Representative Payee;
2. Establishment of a special bank account;
3. Special Needs trust;
4. Home health care;
5. Lifetime Connections Personal Network;
6. Supported Decision-Making Agreement

Alternatives available **ONLY** if the person is competent:

6. Power of Attorney;
7. Health Care Power of Attorney;
8. Advance Instruction for Mental Health Treatment

*A given individual and their family will likely choose a combination of these if they choose to use Alternatives to Guardianship.*

**PLEASE NOTE:** First In Families of NC does not give legal advice nor profess to be expert in matters of guardianship nor alternatives to guardianship. We can refer individuals to experts who can assist in their particular cases.

\*Competent means that the person must understand the powers that they are granting to the Agent and the implications of having someone else make decisions for them. Many attorneys are experienced at working with people with I/DD to make sure they understand these concepts in a clear, simple way.

### **Other useful information about Guardianship:**

- A **cautionary note** about “co-guardians” (two people): **both** must be consulted on every decision, not one or the other.
- A power of attorney does not confer guardianship or transfer it from one person to another (i.e. one parent who is guardian, and is away serving in the military, cannot transfer that responsibility to their spouse by giving their spouse POA for their affairs).
- An attorney is not needed to file the petition for guardianship or a motion to restore competency with Clerk of Court (form AOC-SP-200). After that form is filed, the Clerk will set a date for the hearing, usually within 30 days.
- A guardian can be a family member, friend, a corporation, or a disinterested public agency.
- A guardian should know clearly what their rights and responsibilities are because a guardian can become personally liable for their actions if they act improperly (G.S.35A-1253)
- A guardian is required to file an “Annual Account” each year on a form provided by the Court. A guardian is allowed by law to charge “commission” to ward’s estate for their services in the same manner as executors and trustees can charge for their services. There are special forms for this, normally submitted annually at the time that the Annual Account is submitted, but most family members serving as guardians are uncompensated.
- See all guardianship related official forms at [www.nccourts.org](http://www.nccourts.org)