



NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

Responsibilities of Guardians in North Carolina



GUARDIANSHIP LAW IN NORTH CAROLINA
for
General Guardians - Guardians of the Person-Guardians of the Estate

IMPORTANT

- The Clerk of Superior Court in all 100 counties in North Carolina serves as the judge of probate and cannot practice law or give legal advice. Therefore, you should not ask the clerk or the clerk's staff to prepare your petitions, orders or accounts or to advise you on the completion of forms or any legal issue.
- You must keep accurate records of the ward's accounts and investments.
- You must file timely and accurate accountings.
- You must use the ward's money for his or her own needs and not for yourself or anyone else.
- Court costs and fees must be paid to the Clerk of Superior Court. You will be informed about the amounts by the clerk's office.

DEFINITIONS

1. **Guardian** is the person (or corporation) who has the fiduciary duty and responsibility for caring for the ward's person and/or estate. Also, state agencies may be appointed as a disinterested public agent guardian.
2. **Guardian *ad litem*** is a person appointed by the Clerk of Superior Court to represent the ward if the ward does not have an attorney. The Guardian *ad litem* must be an attorney.
3. **Fiduciary** is a person who has a duty to act primarily for another person's benefit.
4. **Fiduciary duty** is like a trust (promise), in which the fiduciary is to protect the interest of ward, by managing the ward's estate, preserving the ward's assets in secure investments, or providing for the ward's shelter, food and health care. A fiduciary may not do anything which could appear to be for the fiduciary's own interest.
5. **Law** regarding guardians is found in Chapter 35A of the North Carolina General Statutes. The North Carolina General Statutes can be found at most public libraries, law schools and on-line at www.ncleg.net.
6. **Ward** is the person who has been declared incompetent (or a minor). [G.S. §35A-1202(15)] The ward is called the respondent at the incompetency proceeding stage.
7. **Clerk** means the clerk of superior court.

This pamphlet is provided as a public service to assist persons who have been or are about to be appointed guardians in understanding their duties, responsibilities and role. **It is not meant as substitute for legal advice. You should contact an attorney should you have any legal questions about the role of a guardian.**

PRINCIPLES FOR THE GUARDIAN

The Guardian must:

1. Ensure that the loyalty and duty of the guardian are to the “actual” needs of the ward.
2. Make decisions that ensure the health and well being of the ward.
3. Involve the person in all decision-making to the extent possible, consistent with the ward’s ability.
4. Ensure that the need for guardianship is periodically reviewed and alternatives, including restoration to competency or limited guardianship, are considered.

PRINCIPLES FOR THE WARD

1. The Ward should be involved in all decision making to the extent possible, consistent with the ward’s ability.
2. The Ward has the right to petition the court for periodic review of the guardianship, including restoration to competency,
3. The Ward is entitled to a guardian *ad litem* who represents the expressed interest of the Ward in the guardianships proceedings, and may make recommendations to the clerk concerning the best interests of the Ward, if those interests differ from the expressed interests. [G.S. 35A-1107]

TYPES OF GUARDIANS

1. **Guardian of the Estate:** A guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward. [G.S. 35A-1202(9)]

2. **Guardian of the Person:** A guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward. The guardian of the person does not handle any of the ward's money or property. [G.S. 35A-1202(10)]
3. **General Guardian:** A guardian of both the estate and the person. [G.S. 35A-1202(7)]
4. **NOTE:** The powers and duties of the guardian may be limited by the order of appointment. See 'Powers and Duties of the Guardian'.

SPECIAL CONSIDERATIONS – GUARDIANS FOR MINORS

1. Children under the age of 18 are presumed to be incompetent by law, so there is no need for an incompetency proceeding before appointing a guardian. However, a hearing is required. A parent or other person may be appointed guardian of the estate of the minor.
2. A guardian of the person may be appointed only if the minor has no living parents, or the rights of the parents have been terminated. [G.S. 35A-1224(a)]
3. A minor's funds **SHOULD NOT** be used by the minor's parents (acting as appointed guardians) for maintenance (food, shelter, clothing) and education of the minor, since the parents are legally obligated to pay for their children's maintenance and education until the children reach age 18. Should a parent/guardian be unable to provide for the minor's basic maintenance needs the guardian may petition the Clerk for permission to use some of the minor's funds for those needs. The Clerk, however, has total discretion in determining whether the request should be granted. See "Prohibited Acts Of All Guardians".
4. A minor's real property may not be sold unless the guardian of the estate or the general guardian petitions the court in advance, and a court order is entered approving the sale. A guardian of the estate or general guardian, without court order, may sell up to \$5,000 of the ward's personal property in any one accounting period and report the sale and the use of the proceeds on the next annual accounting. A guardian of the estate or general guardian may not sell more than \$5,000 of the ward's personal property in any one accounting period without petitioning the court in advance and obtaining a court order approving the sale. See 'Property, Investments and Verifications.'
5. There are special duties and limitations on the types of property or investments that a guardian may make on behalf of a minor. See "Property, Investment and Verification".

6. There are special requirements regarding the duty of a guardian to file an inventory of the minor's property with the court, and to file annual accountings regarding all income, disbursements, distributions, investments and/or balances or property held or invested on behalf of the minor. See "Accountings".
7. When a minor ward reaches 18 years of age (or is sooner emancipated by marriage or court order) the guardianship shall terminate. [G.S. 35A-1295, 1202(12)] The guardian shall file a final accounting with the Clerk of Superior Court within 60 days of the termination. Any remaining assets of the estate must be paid to the former minor and a receipt should be obtained from the former minor and filed with the final accounting in the guardianship. See "Termination of Guardianship".

APPOINTMENT AND DUTIES OF GUARDIANS

All guardians are bound by the law and must abide by their fiduciary duties to protect the interests of the ward. Specific duties of a guardian depend on what type of guardianship (i.e., estate, person or general) was created.

1. Qualification As Guardian

(a) Application to Qualify

A person who seeks to serve as a guardian for an incompetent or a minor must apply to the Clerk of Superior Court of the county of residence of the minor or incompetent, or where the incompetent is an inpatient, on a form provided by the clerk's office. The form calls for a preliminary inventory of all assets and liabilities of the ward. Therefore, the applicant will need to have a general knowledge of the ward's real estate, bank accounts, stocks, bonds, motor vehicles, and other personal property, an estimated value of these assets, and estimated amount of the ward's debts (mortgages, taxes, credit cards, etc.) to complete the application. The instructions for that form should assist you in completing the form. [G.S. 35A-1210, 1251 (incompetents); 35A-1221, 1225 (minors)]. [*Forms -Application for Letters of Guardianship of the Estate, Guardianship of the Person, General Guardianship for an Incompetent Person, AOC-E-206 or Application for Appointment of Guardianship of the Estate, Guardianship of the Person, General Guardianship for a Minor, AOC-E-208.*]

(b) *Qualified Persons (to serve as guardian for an incompetent)*

The Clerk of Superior Court will grant letters of guardianship to a person(s) or corporation who applies and is qualified to serve, in the following order:

(1) An adult individual

If the individual is not a North Carolina resident, he or she must agree to submit to the jurisdiction of North Carolina courts and appoint a resident process agent.

(2) A corporation if its corporate charter authorizes the corporation to serve as a guardian or in other similar fiduciary capacities;

(3) A disinterested public agent (Director of the local Social Services, Health or Mental Health Departments, etc.).
[G.S. 35A-1213,1214]

(c) *Qualified Persons (to serve as guardian for a minor)*

(1) An adult individual

a. must appoint a resident process agent if serving as General Guardian or Guardian of the Estate and is not a resident of North Carolina. [G.S. 35A-1230]

(2) A corporation if its corporate charter authorizes the corporation to serve as a guardian or in other similar fiduciary capacities.
[G.S. 35A-1224]

(d) *Disqualified persons*

No person may serve as a guardian who in the opinion of the clerk would not look out for the best interest of the ward. [G.S. 35A-1214]

(e) *Oath (Affirmation)*

All guardians must take an oath (or affirmation) in which the guardian swears (or affirms) to faithfully and honestly discharge the duties of the guardian to the best of the guardian's ability and according to law. [Forms-Oath, AOC-E-400]

(f) *Bond*

When serving as a General Guardian or Guardian of the Estate, the guardian must post a bond, approved by the clerk, to secure the faithful performance of the guardian's duties. There are some limited circumstances in which a bond may be reduced based on a dispository agreement approved by the clerk. The Clerk of Superior Court also has the *discretion to require a bond for non-resident guardian of the person*. [G.S. 35A-1230]. [Forms-Bond, AOC-E-401]

(g) *Orders*

The clerk may, with or without a hearing, authorize letters of guardianship to be issued to the named fiduciary (guardian). [G.S. 35A-1213, 1214, 1215, 1226]. [*Forms-Order on Application for Appointment of Guardian, AOC-E-406; Order Authorizing Issuance of Letters, AOC-E-402*]

(h) *Letters*

The clerk will issue letters to the person who is appointed guardian. The letters are the guardian's proof of authority to act on behalf of the ward. (See above for definitions of different types of guardianships). [*Forms-Letters of Appointment, Guardian of the Estate, AOC-E-407; Guardian of the Person, AOC-E-408; General Guardian, AOC-E-413*]

2. Powers and Duties of Guardian

(a) *Guardian of the Estate*

Unless limited by court order, the Guardian of the Estate has the general power to “perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest....” The complete listing of powers can be found in G.S. 35A-1251 and 1253 (Incompetent) and G.S. 35A-1252 and 1253 (Minor).

In addition to duties imposed by law or by order of the clerk, the guardian of the Estate also has the duty to take possession, for the ward's use, of the ward's estate, to collect monies due the ward, to pay debts of the ward including taxes, to obey all lawful orders of the court and to observe the standard of judgment and care that an ordinary prudent person serving as a fiduciary would take in acquiring and maintaining the ward's property.

(b) *Guardian of the Person*

Unless limited by court order, a guardian of the person has custody of the ward and is responsible for making provisions for the ward's care, including medical and psychological treatment; comfort, including shelter; and maintenance, including education, training, and employment. [G.S. 35A-1241] If the ward has written advance instructions for the ward's medical or mental health care, the guardian should honor those instructions.

(c) *General Guardian*

Unless otherwise limited by court order, a General Guardian has all the powers and duties of a guardian of the estate and guardian of the person. [G.S.35A-1202(7)]

NOTE: The powers and duties of the guardians referenced in subparagraphs (a), (b), and (c) may be limited by court order allowing the ward to retain certain designated rights and responsibilities.

3. **Property, Investments and Verifications**

(a) *Property*

The ward's property, real and personal, must be maintained in such a manner to ensure the ward has a place to live or money with which to pay for his or her living expenses. The guardian must maintain an accurate accounting of the ward's property, income, expenses and disbursements.

To the extent possible, only the ward's income (rather than any portion of the principal) should be used to pay for his or her care. The guardian of the estate or general guardian must petition the clerk in advance should real property need to be sold to pay for the ward's needs, or if more than \$5,000 of the ward's personal property needs to be sold in any one accounting period to pay for the ward's needs.

(b) *Investments*

The ward's funds shall be invested in interest bearing accounts or other approved investment accounts [G.S. 35A-1251; 1252] in the name of the ward, and showing the name of the guardian who is acting on behalf of the ward. The guardian must properly manage the funds to ensure money is available to pay for the ward's needs, such as shelter, food, clothing and medical care.

NOTE: Failure to properly manage and secure the ward's funds may result in personal liability for the guardian's breach of fiduciary duty. Investment of the ward's funds in securities or other investment devices that subject those funds to loss of principal, may, under the reasonable prudent man rule, subject the guardian to personal liability for breach of fiduciary duty.

(c) *Verifications*

The guardian must maintain cancelled checks and receipts of all expenditures, and provide them to the clerk with each accounting, together with bank statements, titles, or other documentary evidence of balances still held or invested.

4. Miscellaneous Responsibilities

- (a) Promptly notify the clerk if you change your name or address.
- (b) Promptly notify the clerk if you change the residence of the ward.

5. Prohibited Acts of all Guardians

- The real and personal property of the ward may not be used for anything or anyone other than the ward.
- The money belonging to the ward must be kept separate from the personal funds of the guardian. The guardian should appear on any guardianship account as acting on behalf of the ward. The guardian should not be listed on any such account as a joint account holder with or without right of survivorship, or as a payee on death.
- The guardian may not borrow money from the ward or loan the ward's money to anyone unless ordered by the court.
- The guardian shall not write any checks for "cash" unless regular cash distributions to the ward are authorized by the court.
- The ward's real property may not be sold unless the sale is ordered in advance by the court. A guardian of the estate or general guardian, without court approval, may not sell more than \$5,000 of the ward's personal property in any one accounting period.
- The ward's real property may not be sold unless the general guardian or the guardian of the estate files a special proceeding seeking authority and approval of the court in advance.
- If the general guardian or guardian of the estate wishes to sell personal property of the ward, during any one accounting period, which has a value of over \$5,000.00, the guardian must file a motion in the estate proceeding seeking authority and approval by the court, prior to the sale. Sales of less than \$5,000.00 in value during any one accounting period do not need prior court approval, and need only be reported on the next annual accounting.
- Minor's funds should not be used by the minors parents for maintenance (food, shelter, clothing) and education of the minor, since the parents are legally obligated to pay for their children's maintenance and education until the children reach age 18. Should a parent or guardian be unable to provide for the minor's basic maintenance needs the guardian may petition the Clerk for permission to use some of the minor's funds for those needs. The clerk, however, has total discretion in determining whether the request should be granted.
- The minor's property must be delivered to the minor once the minor has reached 18 and the clerk has approved the final accounting.
- Guardian may not consent to have the ward sterilized. A ward may only be sterilized when medically necessary treatment for an illness may result in sterilization and that treatment is approved by the clerk.

EXPENSES, REIMBURSEMENTS AND COMMISSIONS

1. Allowable Expenses and Reimbursements

The Clerk may approve certain expenses of the guardian to be reimbursed from the ward's estate, such as bond premiums and court costs.

[G.S. 35A-1267]

If the ward is living with the guardian or some other person, the Clerk may also approve payment to the guardian or other person to pay the ward's share of the household expenses, food and other necessary items.

2. Commissions (Applies only to Guardians of the Estate and General Guardians)

The guardian may receive a commission for the guardian's time and trouble in handling of the ward's estate. The amount or method of compensation is set by the Clerk of Superior Court, in the clerk's discretion, up to, but not to exceed five percent (5%) of the qualified estate receipts and disbursements. [NOTE: Any commissions with respect to principal are allocated (divided) over the time remaining in the estate (i.e., the number of years until the minor reaches age 18, or the remaining life expectancy of the incompetent calculated under G.S. 8-46).] The clerk will consider the time, responsibility, trouble, and skill involved in the management of the estate. Commissions to guardians are accounted for as costs and expenses of administration. The commission is to cover any ordinary expenses, such as telephone, mailing, and travel, incurred by the guardian in performing the duties of the guardian, as well as paying the guardian for his or her services in managing the estate. In limited circumstances, the clerk may approve additional reimbursement for out of pocket expenses. The guardian must petition the Clerk for approval of a commission or additional reimbursement for out of pocket expenses before making distribution of that commission. [G.S. 35A-1269]

3. Attorney's Fees (Applies only to Guardians of the Estate and General Guardians)

The guardian may choose to hire an attorney to represent the estate. However, the funds of the estate may not be used to pay the attorney's fee unless the clerk finds that the fee is reasonable. Unless the attorney's services are beyond the normal scope of estate administration, the attorney's fees allowed may reduce the amount of the guardian's commission. Not all attorney's fees may be approved by the clerk and if not allowed, the guardian will be personally responsible for the attorney's fees.

ACCOUNTINGS

(Applies only to Guardians of the Estate and General Guardians)

1. **Types of Accountings**

(a) *Inventory [Inventory For Guardianship Estate, AOC-E-510]*

Within three (3) months from the date of qualification, the guardian must file with the Clerk of Superior Court's office an accurate inventory of the ward's estate, giving descriptions and values of all real and personal property owned by the ward as of the date of qualifying. The guardian should obtain copies of signature cards and deposit contracts associated with any joint accounts from the depository financial institution and submit them with the inventory. [G.S. 35A-1261] Property discovered later must be reported on a supplemental inventory. [G.S. 35A-1263.1] Income of the ward's estate (e.g., pension payments, interest, social security, etc.), property later acquired by the estate, or asset conversions (e.g., sale of real estate or stock, foreclosure of deed of trust, etc.) must be reported on the next annual accounting.

(b) *Annual Accounting [Account, AOC-E-506]*

The guardian **must** file an annual accounting no later than thirty (30) days after the expiration of one year from the date on which he or she qualified to serve. The accounting **may** be filed earlier. The guardian must then file annual accounts every year thereafter until the final accounting is filed. [G.S. 35A-1264]

(c) *Final Accounting [Account, AOC-E-506]*

The guardian **must** file a final accounting within sixty (60) days after the termination of the guardianship. [G.S. 35A-1266]

2. **Proofs**

All accountings must be accompanied by cancelled checks or other proof satisfactory to the clerk for all disbursements and distributions, and for all balances held or invested (e.g., bank or brokerage statement showing balance held, vehicle title, recorded deed to real estate, etc.). [G.S. 35A-1268]

3. **Contents Of Accountings**

All accountings filed with the Clerk of Superior Court must be signed under oath and contain:

- (a) The period which the account covers and whether it is an annual accounting or final accounting;
- (b) The amount and value of the property of the estate according to the inventory and appraisal, or according to the previous accounting; the manner and nature of any investments; the amount of income and additional property received during the accounting period; and all gains or losses from the sale of any property or otherwise;
- (c) All payments, charges, losses, and distributions;
- (d) The property on hand constituting the balance of the estate, if any;
- (e) Any other facts and information determined by the clerk to be necessary to an understanding of the account. [G.S. 35A-1264, 1266]

4. **Failure to File Accountings**

If the guardian fails to account as required, or if he or she renders an unsatisfactory account, the Clerk of Superior Court may, after notice, issue an order for the guardian to appear and show cause as to why she or he failed to file an inventory or account. If, within 20 days after service of such an order, she or he does not make the required filing, the clerk may have the sheriff serve the guardian with an order of contempt and commitment, and the sheriff will place the guardian in the county jail until she or he complies with the order. The guardian shall be personally liable for all costs associated with such proceedings. The clerk may also remove the guardian from office and appoint someone else to complete the administration of the estate. [G.S. 35A-1265]

TERMINATION OF GUARDIANSHIP

1. **Resignation or Death of Guardian**

(a) *Resignation*

A guardian who wishes to resign, must petition the Clerk of Superior Court for an order authorizing the resignation. [G.S. 35A-1292] The clerk may approve the resignation upon approval of a final account.

(b) *Death*

Upon the death of a guardian, the clerk will appoint a successor guardian following the same procedure for the initial appointment.
[G.S. 35A-1293]

2. **Removal**

(a) *Mandatory*

The clerk must remove a guardian or take other action when the guardian has been adjudged incompetent, has been convicted of a felony, was initially unqualified, fails to renew a bond, fails to file accountings, fails to obey any citation, notice or process served on the guardian or the guardian's process agent, or the clerk finds the guardian to be unsuitable to continue serving. The complete listing of bases for mandatory removal is found at G.S. 35A-1290(c).

(b) *Discretionary*

The clerk may remove a guardian or take other action when the clerk determines that the guardian has mismanaged or wasted the ward's money or estate, neglected to provide care for the ward, violated a fiduciary duty or has become insolvent. The complete listing of bases for discretionary removal is found at G.S. 35A-1290(a) and (b).

(c) *Emergency*

The clerk may remove a guardian without a hearing upon finding reasonable cause to believe an emergency exists that threatens the well being of the ward or the ward's estate.

(d) *Interim Orders*

When a guardian is removed the clerk may make such interim orders as the clerk finds necessary for the protection of the ward or ward's estate.

3. **Restoration to Competency**

When a ward's competency is restored (See, Restoration below) the guardianship shall terminate and a final accounting must be filed within sixty (60) days.
[G.S. 35A-1295]

4. **Death of the Ward**

Upon the death of the ward, guardianship shall terminate and a final accounting must be filed within sixty (60) days. [G.S. 35A-1295] Any remaining assets of the estate must be paid to the personal representative of the estate of the deceased ward and a receipt should be obtained from the personal representative and filed with the final accounting in the guardianship.

5. **Minor Reaches Majority**

When a minor ward reaches 18 years of age (or is sooner emancipated by marriage or court order) the guardianship shall terminate. [G.S. 35A-1295, 1202(12)] The guardian shall file a final accounting with the Clerk of Superior Court within 60 days of the termination. Any remaining assets of the estate must be paid to the former minor and a receipt should be obtained from the former minor and filed with the final accounting in the guardianship.

RESTORATION TO COMPETENCY

1. **Petition**

A guardian, ward, or other interested person may file a petition (as a motion in the cause) with the Clerk of Superior Court for partial or full restoration of the ward's competency. The petition must be served on the ward and guardian. There is no AOC form for this proceeding. No petition or proceeding is required for a minor reaching the age of 18.

2. **Hearing**

The clerk will schedule and hold a hearing to consider evidence of the ward's competency.

3 **Guardian ad litem or attorney**

The ward is entitled to be represented at the hearing by an attorney or the clerk will appoint a guardian ad litem attorney.

4. **Order**

(a) *Full restoration.*

If the clerk finds by a preponderance of the evidence that the ward is competent, the clerk will enter an order restoring the ward to competency. The ward may then handle his or her own affairs and enter into contracts as if he or she had never been adjudicated incompetent.

(b) *Alternative to full restoration*

If the clerk finds that the ward is able to make some of his own decisions, the clerk may enter an order changing the guardianship to a limited guardianship. A limited guardianship permits the ward to have input into or to make certain decisions, such as housing and medical care, as designated by the clerk.

(c) *Against restoration.*

If the clerk finds there is insufficient evidence to restore the ward's competency, the clerk will enter an order to that effect. The guardian of the ward will continue to serve. [G.S. 35A-1130]

IMPORTANT INFORMATION, DATES AND CHECKLIST

<i>Name Of Ward</i>		<i>Social Security Number</i>	
<i>File No.</i>		<i>County Of Appt.</i>	
<i>Name Of Guardian</i>		<i>Date Qualified</i>	
<i>Name Of Attorney</i>		<i>Telephone No.</i>	
<i>Bond</i> \$	<i>Name Of Surety (Bonding Company, etc.)</i>		
<i>Date Inventory Due</i>	<i>Date Inventory Filed</i>	<i>Date Of Annual Account(s)</i>	
<i>Date Final Account Due Upon Termination of Guardianship</i>		<i>Date Final Account Filed</i>	
FOR GENERAL GUARDIANS AND GUARDIANS OF THE ESTATE ONLY		<input type="checkbox"/> Court approval obtained to sell property	
<input type="checkbox"/> Determine all assets and debts		<input type="checkbox"/> Income tax returns filed	
<input type="checkbox"/> Lock box searched		<input type="checkbox"/> Other:	
<input type="checkbox"/> Guardianship bank account opened in name of ward		_____	
Bank _____ No. _____		_____	
_____		_____	
_____		_____	
_____		_____	
_____		_____	
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