

Understanding Guardianship

Presented by Angela Lassiter

Video Transcript

This educational video may have been ordered or recommended to help you better understand the roles and responsibilities of Guardians in North Carolina. The following information is not intended as legal advice. If you need legal assistance, please consult with an Attorney.

For complete and current guardianship laws in NC consult Chapter 35A and B of the General Statutes

Objectives

- Define guardianship
- Review types of guardianships
- Review duties of the guardian
- Review of subsequent hearings

Guardianship

A legal relationship between an individual (the guardian) who has been given the legal authority and duty to make decisions on behalf of another individual (the ward) who lacks sufficient capacity to manage his or her own affairs or make and communicate important decisions

N.C. General Statute 35A

Types of Guardianships

- Guardian of the Person
- Guardian of the Estate
- General Guardian
- Limited Guardian of the Person
- Limited Guardian of the Estate
- Limited General Guardian

Duties of the Guardian of the Person

Responsible for the care, comfort, and maintenance of the Ward's person

Charged with taking reasonable care of the Ward's personal effects, i.e. clothes, furniture

Arranges for the Ward's training, education, employment, rehabilitation or habilitation

Establishes where the ward will reside (in the least restrictive environment)

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Preference is given to residences within the State
Gives consent or approval for medical, psychological or other professional care, counsel or treatment for the Ward in his/her best interest
Allows the Ward to exercise rights that are within his/her comprehension
Support the Ward's right to participate in all decisions affecting him/her
Petitions for restoration of competency if it becomes a viable option
Cannot consent to sterilization unless by order of the clerk in cases of medical necessity

Duties of the Guardian of the Estate

Appointed for purposes of managing the Ward's property, estate, and business affairs

Must post an insurance bond before receiving the Ward's estate

Takes control of the Ward's estate (both real & personal property) for the Ward's use

Duties of the guardian of the Estate

Administers the estate in a prudent manner in the Ward's best interest

Pays the Ward's debts, property insurance, income taxes, property taxes and other taxes owed by the Ward from the Ward's estate

Many more specific duties are listed in N.C.G.S. 35A-1251

Duties of the General Guardian

Combines the Duties of Both the Guardian of the Person and the Guardian of the Estate into One Guardianship

Limited Guardianship

Clerk determines what rights and privileges the Ward has the capacity to perform and can continue to exercise N.C.G.S. 35A-1201(5)

Note: The Ward is allowed the possibility of error to the same degree as a competent person

Specifically listed in the Order on Application and in the Letters

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Frequently Asked Questions

Can my Ward get married? Divorced?

If the Ward understands the special nature of the contract of marriage, and the duties and responsibilities which it entails, on the day of the marriage then the marriage is valid. The Ward does not have to understand the inheritance rights that come along with marriage. However, if the Ward lacks sufficient understanding of the contract for marriage on the day of the marriage, then the marriage is voidable through a civil action initiated by the guardian.

Neither a Ward nor a Guardian can initiate the Divorce proceedings. The competent spouse may begin divorce proceeding and will serve the Guardian of Estate or General Guardian with the divorce complaint. Also, the Ward retains his/her parental rights unless terminated in another civil proceeding.

Does my Ward still have the Right to Vote?

If needed the Ward may have assistance in the voting booth.

Your Ward may need assistance due to physical disability or other disabilities including illiteracy or blindness. Assistance may be offered if the Ward is unable to enter the voting booth or is unable to mark a ballot without assistance.

The Ward or Guardian needs to inform the election officials at the polls of the desire/need for assistance before taking a family member or other assistant back to the booth with him/her.

Other assistance offered includes:

Curbside Voting

Absentee Voting

Remember it is the Ward's vote and not the Guardian's vote.

Are there any limitations on the Ward's Driving Privileges?

After adjudicating a person to be an incompetent adult, the Clerk of Court is required to notify the Department of Motor Vehicles.

DMV's present practice is upon receipt of notice of adjudication from the Clerk to send a letter to the incompetent person advising them that their license is suspended.

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The Ward has a right to ask for a hearing and prove that he or she can still drive. The request for hearing must be in writing, signed by the Ward, and sent to DMV.

Can the Ward make a Will or any other Estate Plans?

Comprehends the natural objects of his bounty: Can identify his/her family members and closest friends

Understands the kind, nature and extent of his or her property:
Understands what possessions he/she owns

Knows the manner in which he or she desires his act to take effect:
Who will receive what

Realizes the effect that his or her act (executing a will) will have on his or her estate: Comprehends that the Will takes effect after his/her death
A person who has been adjudicated incompetent is presumed to lack capacity to execute a valid will. However, that presumption can be overcome.

Once a guardianship is in place, a Ward will not be able to execute an effective health care or financial power of attorney.

What happens if my Ward is a victim of a crime or worse, commits a crime?

Victim:

If the Ward understands the oath to tell the truth and understands and is able to relate facts that will assist the court in reaching a decision, then presumably the Ward can testify.

The Ward's ability to testify will be decided by the judge.

Commits a Crime:

The Ward is entitled to the same constitutional and statutory rights as any other criminal defendant and will proceed through the criminal justice system as any other criminal defendant.

Inform all parties at each stage of the process beginning with the Magistrate who sets the bond and conditions of release. Then notify the District Attorney as some DA's depending on circumstances, may consider a dismissal in misdemeanor cases or reduce the charge depending on the severity of the crime.

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A person does not have capacity to proceed to trial if that person is unable to either:

1. Understand the crime he/she is charged with,
2. Understand the consequences of the crime: If a felony, then he/she may be imprisoned
3. Assist his/her attorney in his/her defense.

The Court will determine if the Ward/Defendant is incapable of proceeding to trial.

Can my Ward own a firearm?

No. Once the Ward is adjudicated incompetent, his/ her name is added to the National Instant Criminal Background Check System (NICS) Registry, which is a federally maintained database and means the Ward cannot purchase or possess a firearm or ammunition.

Misconceptions of the Guardian's Role

CANNOT FORCE PEOPLE TO TAKE MEDICATIONS

DOES NOT SPEED UP HOSPITAL DISCHARGE

DOES NOT SPEED UP ACCESS TO SERVICES

Involuntary Commitment

Obtained from the Magistrate

Grounds:

Mentally ill and dangerous to self or others OR

Mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness
OR

A substance abuser and dangerous to self or others

Magistrate provides an Order authorizing a Law Enforcement Office to take the Ward into custody and transport the Ward to a 24 hour facility for examination by a physician

Termination of Guardianship

Upon the death of the Ward

Upon the transfer of the Guardianship to another State pursuant to
N.C.G.S. 35B

Upon the entry of an order restoring the Ward's competency

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Guardian of the Estate or General Guardian must file a final account within 60 days of the termination of the Guardianship, then can be discharged.

Subsequent proceedings

- Successor Guardianship

- Modify rights 'add or limit

- Seek Guardian of the Estate

- Restoration of Rights

- Petition for Sale of Real Property or to Establish a Trust or Recurring Expenses

- Petition to Transfer Incompetency Proceeding & Guardianship to another state

- Permission for a medical procedure that might sterilize an individual

Guardians of the Estate Must:

- Obey all lawful orders of the court pertaining to the guardianship

- Keep the Ward's finances separate from their own finances

- Act in a reasonable and prudent manner in administering the Ward's estate

- Comply with the accounting requirements of the Court

Remember

- DON 'T Use a Credit Card in the name of the WARD

- DON 'T Use a Debit Card for the Guardianship Bank Account

- DON 'T make checks payable to CASH or to yourself (Without Court APPROVAL)

- DO keep your receipts/invoices

- DO consult with Professionals, i.e. Attorneys or Accountants, if you need assistance. Remember the Clerk CANNOT give you legal advice.

- DO keep the Clerk's Office informed

Discovery of Assets

- Have the Ward's mail forwarded to your address

- Perform your own investigation at the Ward's residence

- Run a Credit Report: www.AnnualCreditReport.com

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Search Public Data Bases: County Register of Deeds, County Tax Department

Contact suspected vendors and financial institutions: Duke Progress Energy, AT&T, Bank of America, and State Employees 'Credit Union

Talk to the Ward, Family Members, and Friends

What to do with the Ward's existing Accounts

If the account is a regular checking or savings account, those accounts will be closed and the monies will transfer directly into a guardianship bank account.

Retirement Accounts

CD's that have NOT Matured

Stocks

Bonds

Other Investment Accounts

Contact these companies by telephone and follow up in writing, provide them with your identification and address, your letters of appointment, and let them know that no one is to access those accounts

Inventory

Must be submitted within 3 months after your appointment as Guardian of Estate or General Guardian

Can be amended or supplemented any time up to the time of filing your first Annual Account

Your inventory will include Personal Property like vehicles in the name of the Ward, Use the Kelly Blue Book Value to assess the value

Also, the wards account value at the time of closing will be listed on the inventory and this MUST be Accurate to the last penny.

Annual Account / Final Account

Remember to ensure that your bank is providing you with copies of your cancelled checks

You must submit with your accountings all investment and bank statements and show the balance up to the date on your accounting period

You will also submit your receipts with your accounting

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The bond may be increased or decreased at the time of filing the annual account. Remember the bond premium is paid annually from the Ward's assets.

Commissions

You are entitled to commissions for your time and trouble in the management of the Ward's Estate

It is determined by Statute and can be fixed in the discretion of the Clerk

It will not exceed five percent (5%) of the amounts of receipts, including the value of all personal property when received, and the expenditures made in accordance with law

You will need to petition for your commissions at the time of filing the Annual/Final Account

Actions by the GOE/General Guardian without Court Order/Approval

You may lease the Ward's real estate but not more than 3 years per lease period

You may sell personal property as long as the collective value does not exceed \$5,000 in any one accounting period

Actions by the GOE/General Guardian Requiring Court Approval

1. To fund, revoke, amend a Trust
2. To provide financial support to the Ward's dependents
3. To sell Real Estate belonging to the Ward

Procedure for Selling Real Property

FIRST: Petition the Clerk for the sale of the property. The Ward's interest would be materially promoted by the sale of the property.

SECOND: There will be a Hearing. At the Hearing, the Clerk determines whether to authorize the Sale and on what conditions, whether it is a Public Sale or Private Sale

THIRD: Once the Order is entered authorizing the Sale, when an offer is made a Report of Sale is filed with the Clerk.

FOURTH: The Sale will remain open for upset bids for a period of 10 days and the Offer with the Report will be posted at the Courthouse. ETC

IT IS COMPLICATED. PLEASE CONSULT WITH AN ATTORNEY.

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Life insurance

If purchased by the Guardian of Estate or General Guardian with the Ward's assets, you may NOT name yourself as the beneficiary

In this circumstance, the beneficiary should be the Ward's Estate

For an existing life insurance policy, you may petition for a cash-out of the policy if it's in the best interest of the Ward or you can convert the policy for pre-need burial purposes.

This is only necessary if the Ward does not have sufficient assets to continue paying the premium or if it's in the Ward's best interest not to maintain the policy.

Gifts

All gifts for any monetary amount must be approved by a Superior Court Judge

However, the Ward can give gifts if he/she retained the right to handle a specific amount of money through a Limited Guardianship.

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