

FAQS about NORTH CAROLINA GUARDIANSHIP AND ALTERNATIVES TO GUARDIANSHIP

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ACKNOWLEDGEMENTS & REFERENCES

Disclaimer

These FAQs are offered as a public service to provide information about guardianship and alternatives to guardianship. They also offer information for individuals under guardianship or who may come under guardianship, as well as people who have been or are about to be appointed as guardians in understanding their rights, duties, responsibilities and roles. It is not meant as substitute for legal advice. You should contact

an attorney or Disability Rights North Carolina (the Protection & Advocacy Agency in NC), if you have any legal questions about guardianship.

General Questions

1) What is guardianship?

Guardianship is a legal relationship under which a person or agency (the guardian) is appointed by a court to make decisions and act on behalf of an adult deemed incapacitated (the ward) with respect to their personal affairs, financial affairs, or both.

Less restrictive alternatives that can maintain the person safely in the community may be pursued before guardianship is considered.

2) Who needs a guardian?

The primary test for determining the need for guardianship focuses on the ability to make decisions and to communicate those decisions once made. Most guardianship focuses on the ability to make decisions regarding living arrangements, medical care, vocational and educational services, ancillary professional services, care for dependents and managing finances.

3) Who is a guardian?

A guardian is a legally appointed surrogate decision maker and advocate who helps the individual under guardianship make and communicate important decisions about their personal and/or financial affairs. Guardians have a fiduciary duty to the individual, meaning that they must make decisions that are best suited for that individual.

4) Can guardianship be reversed?

Yes. See, Restoration of Rights (#39).

5) How long does guardianship last?

The individual under guardianship remains under guardianship until their competency is restored through court proceedings, or until they die. A person appointed as a guardian remains a guardian until: the individual is restored to competency, the clerk or assistant clerk of superior court removes the guardian from their position, or the guardian dies.

6) Can guardianship be temporary?

Yes. A clerk may appoint an interim guardian if they have reasonable cause to believe that the respondent is incompetent, that there is an imminent or foreseeable risk to the person's physical wellbeing or to the person's estate, and that the respondent needs an interim guardian to be appointed immediately to intervene on his behalf prior to the adjudication hearing. The interim guardianship shall terminate on the earliest of the following: the date specified in the clerk's order; 45 days after entry of the clerk's order unless the clerk, for good cause shown, extends that period for up to 45 additional days; when any guardians are appointed following an adjudication of incompetence; or when the petition is dismissed by the court.

7) Where can I get a copy of the NC Guardianship Statute?

The relevant North Carolina statute is Chapter 35A: Incompetency and Guardianship:
<http://www.ncga.state.nc.us/gascripts/statutes/StatutesTOC.pl?Chapter=0035A>.

Types of Guardianship

8) What are the different types of guardianship?

There are four types of guardianship:

- Guardian of the Person (See #12)
- Guardian of the Estate (See #13)
- General or Plenary Guardian (a guardian of both the person and the estate) (See #9)
- Limited Guardian of the Person or of the Estate (See #10)

9) What is General Guardianship?

General Guardianship is guardianship of the “person” and of the “estate” of the person under guardianship.

10) What is Limited Guardianship?

Limited Guardianship is one in which the guardianship order expressly limits the guardian’s powers or permits a person under guardianship to retain certain legal rights or privileges that are within their comprehension and judgment. These limits must be specified in detail in the Order on Application for Appointment of Guardian.

11) What is Plenary Guardianship?

Plenary Guardianship is guardianship of the “person” and of the “estate” of the person under guardianship. This is more commonly referred to as a General Guardian.

12) What is a Guardian of the Person?

A Guardian of the Person is a guardian who is appointed solely for the purpose of performing duties relating to the care, comfort and maintenance of an individual. A Guardian of the Person gives full authority of the guardian to:

- Decide where the ward will live.
- Decide who the ward can visit and who they can communicate with.
- In North Carolina, a Guardian of the Person can determine whether or not family, friends or anyone else may see the person under guardianship. They can prevent the sending or receiving of mail if it is a decision of the treatment team.
- Can admit the ward to a hospital or institution and consent to medical treatment. All medical treatment is under the guardian’s authority. The one medical intervention that a guardian cannot authorize without permission from the clerk is sterilization.

13) What is a Guardian of the Estate?

A Guardian of the Estate is a guardian who is appointed solely for the purpose of managing the property, estate and business affairs of an individual.

A Guardian of the Estate has full and complete authority to manage all of the finances for the person under guardianship. That guardian can only make decisions about the person's money and property. They can:

- Initiate, defend, or settle lawsuits
- Lend or borrow money
- Make a Will for the ward
- Manage or possess the property or income of the person under guardianship
- Pay or collect debts

Note: In some states, Guardian of the Estate is referred to as a "Conservator."

14) What is Corporate Guardianship?

Corporate Guardianship is a for-profit or nonprofit corporation whose corporate charter expressly authorizes it to serve as a guardian or in a similar fiduciary capacity.

Alternatives to Guardianship

15) When are alternatives to guardianship appropriate?

Guardianship is a legal relationship under which a person or agency (the guardian) is appointed by a court to make decisions and act on behalf of an adult deemed incapacitated (the ward) with respect to the ward's personal affairs, financial affairs or both.

When a person does not meet the criteria for incompetency, but needs assistance managing some aspects of living, less restrictive alternatives that can maintain the person safely in the community may be pursued.

Example: Consider an elderly family member who lives in their home but is unable to manage their monthly finances and needs some assistance handling their medications. A family member or friend may be able to assist in organizing bills and payments might be automatically drafted from a bank account. A home healthcare worker may assist with any daily medical or personal care needs. In this scenario, the individual can be sufficiently supported with in-home services and fiscal arrangements so that their rights are retained to the maximum extent possible.

16) What are the alternatives to guardianship?

Alternatives to guardianship are many and varied and mostly fall into two categories. The first includes supported decision making, planning, and crisis management, and the second includes assistance with finances.

The following lists outline resources and tools to help people understand their rights and live to their fullest potential. Each bullet is further outlined in the remaining FAQs.

a) Tools for Supported Decision Making, Planning, and Crisis Management

- Supported Decision Making (See #17)
- Wellness Recovery Action Plan (WRAP) (See #18)
- Person Centered Planning (PCP) (See #19)
- A Comprehensive Crisis Plan (See #20)
- Health Care Advance Directive (See #21)
- Living Will (See #22)

- Health Care Power of Attorney (HCPOA) (See #25)
- Advance Instruction for Mental Health Treatment (AIMHT), also known as a Psychiatric Advance Directive (PAD) (See #26)
- Durable Power of Attorney (DPOA) (See #31)

b) Tools to assist with finances

- Power of Attorney (POA) (See #24)
- Durable Power of Attorney (DPOA) (See #31)
- Money Management (See #35)
- Representative Payee (See #36)
- Trust or Special Needs Trust (See #38)

17) What is Supported Decision Making?

“Supported Decision Making” consists of building a support team for a person who needs help making decisions. This model empowers the individual to make decisions with support from an individual or network of people. Support may include friends, family, community members or other trusted individuals.

Whether or not someone needs guardianship may depend on the supports the person has in the community and at home. A person with a cognitive disability who does not have the capacity to manage all of the details of their life may not need a guardian if they can and do rely on others who are available to support them. Home health agencies exist to assist with Activities of Daily Living (ADL), cooking and cleaning, but the individuals being supported can still make decisions about their own care. In addition to home health care agencies, Medicaid offers skilled nursing care that can provide nursing services.

Supported Decision Making expects that all people with disabilities can develop as decision makers. This model understands that making mistakes and poor choices are all part of being human and everyone has a right to make those mistakes.

The guardianship *PRACTICAL Tool* from the American Bar Association, while designed for lawyers, has a wealth of information about how to help individuals and families understand and recognize decision-making options that allow them to preserve their rights to the fullest extent.

“PRACTICAL” is an acronym for the nine steps lawyers can use in case analysis to identify legal and practical approaches to heighten self-determination before moving ahead with guardianship.

- **Presume** guardianship is not needed
- Clearly identify the **Reasons** for concern.
- **Ask** if a triggering concern may be temporary
- Determine if concerns can be addressed by **Community** resources
- Ask if the person already has a **Team** to help make decisions
- **Identify** the person’s abilities
- Screen for potential **Challenges**
- **Appoint** a legal supporter consistent with the person’s values
- **Limit** any necessary guardianship petition

(American Bar Association)

This resource guide aims to help lawyers identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship. The PRACTICAL Tool is a joint product of four American Bar Association entities—the Commission on Law and Aging, Commission on Disability Rights, Section on Civil Rights and Social Justice and Section on Real Property, Trust and Estate Law, with assistance from the National Resource Center for Supported Decision Making.

For more information see the following:

http://www.americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALGuide.authcheckdam.pdf

http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html

18) What is a Wellness Recovery Action Plan? (WRAP)

A Wellness Recovery Action Plan is a proactive tool designed to help an individual plan their overall care and avoid crisis. A Wellness Recover Action Plan can include the following information:

- A daily maintenance plan and a crisis plan
- Phone numbers for one's therapist, psychiatrist and other healthcare providers
- Phone numbers of family members or friends who would be helpful in a crisis
- Smart phone apps like "My Health Care Wishes" from the American Bar Association that holds all relevant documents (HCPOA etc.)
- Local crisis line numbers (find these by contacting the local NAMI affiliate or do an internet search for "mental health crisis services" and the county name)
- Addresses of walk-in crisis centers or emergency rooms
- The National Suicide Prevention Lifeline phone number
- One's diagnosis and medication information
- Previous psychosis or suicide attempts
- History of drug use
- Triggers
- Things that have helped in the past
- The local Mobile Crisis Unit phone number
- Note if police officers in the community have Crisis Intervention Team (CIT) training.

A Wellness Recovery Action Plan may be shared with family, friends, doctors, and other supports. Copies should be kept in several places, such as a kitchen drawer, glove compartment, smartphone, bedside table and wallet.

For more information see the following:

<http://psychcentral.com/library/id239.html>

19) What is a Person Centered Plan? (PCP)

A Person Centered Plan is an approach to life planning that promotes personal self-determination and enables individuals to improve their own independence. A PCP focuses

on the strengths, interests and needs of an individual. For more information see the following:

<https://www.ncdhhs.gov/document/person-centered-planning>

20) What is a Comprehensive Crisis Plan?

A Comprehensive Crisis Plan is a plan developed by the North Carolina Department of Health and Human Services (NC DHHS) and is a more thorough and complete version of the Wellness Recovery Action Plan. It includes resources outside the family such as government services and health care providers. The Comprehensive Crisis Plan first requires a Person Centered Plan (PCP).

For more information see the following:

<https://www.ncdhhs.gov/document/person-centered-planning>

21) What is an Advance Health Care Directive?

An Advance Health Care Directive is a legal document with written instructions about how to manage an individual's health care should they become incapacitated. It outlines an individual's health care wishes and assigns a person to implement them in the event the individual is not competent or able to communicate.

North Carolina recognizes four forms of advance directives that allow an individual to make certain medical decisions in advance:

- Advance Directive for Natural Death, also called a Living Will (#22)
- Health Care Power of Attorney (HCPOA) (#25)
- Advance Instruction for Mental Health Treatment (AIMHT), also known as a Psychiatric Advance Directive (PAD) (#26)
- A Declaration of an Anatomical Gift (organ or body donation upon death)

22) What is an Advance Directive for Natural Death, also known as a Living Will?

An Advance Directive for a Natural Death, or Living Will, is a written document that declares what medical treatment an individual wants or does not want to receive if they are about to die. It allows them to authorize the withholding or withdrawal of extraordinary medical treatment and feeding tubes under specified conditions. It only addresses end of life issues. A Living Will or Advanced Directive for Natural Death cannot be changed by a guardian.

NOTE: This form can be created without the help of an attorney. It can be downloaded from the North Carolina Department of Advance Health Care Directives. This website has a wealth of information from the state including the "Advance Health Care Directive Registry" for these documents. See the following for more information:

<https://www.sosnc.gov/ahcdr/>

23) What is a Will ("Last Will and Testament")?

A Will, also known as a Last Will and Testament, is a document that only takes effect after you die and specifies how you want to distribute your property and money, among other things.

NOTE: A guardian cannot change a will.

24) What is a Power of Attorney? (POA)

In a Power of Attorney, one person gives another person (the attorney-in-fact) the legal authority to act on his or her behalf. The Power of Attorney can either become effective immediately or at a future time if the person becomes temporarily or permanently unable to handle their affairs. The person decides how much or how little authority to give the attorney-in-fact. They may give the attorney-in-fact the authority to deal only with a specific piece of property or to do one specific act on their behalf. Or, the person may give the attorney-in-fact the authority to handle most of their personal and financial matters. There are several different kinds of Power of Attorney, but each one must be granted by someone who is competent. This can be done either before a person loses mental capacity or during a period in which the person has regained capacity, if only temporarily.

NOTE: In a Power of Attorney document, an individual may name a particular person for the Clerk of Court to consider as their guardian in the event a guardianship is required in the future. Unless there is good cause to disqualify the person named, the Clerk is directed by statute to appoint the named person as guardian. This NC statute allows the Clerk to change the individual's choice if he feels it is in the individual's best interest.

25) What is a Health Care Power of Attorney? (HCPOA)

A Health Care Power of Attorney is appointed by an individual to make health care decisions when they cannot do so for themselves. The health care POA, or agent, may be given the same power and authority as the individual to make medical decisions on their behalf. This includes the power to consent to a doctor giving, withholding or stopping any medical treatment, service or diagnostic procedure, including life-sustaining procedures.

NOTE: The following forms can be completed without the help of an attorney. The HCPOA form can be downloaded with instructions from the Duke University Program on Psychiatric Advance Directives:

<http://pad.duhs.duke.edu/index.html>

National Resource Center on Psychiatric Advance Directives:

<http://www.nrc-pad.org/states/nc-forms>

This form can also be downloaded from the North Carolina Department of Advance Health Care Directives. This website also has the "Advance Health Care Directive Registry" for these documents.

<https://www.sosnc.gov/ahcdr/>

26) What is a Mental Health Advance Directive, also known as Advance Instruction for Mental Health Treatment or Psychiatric Advance Directive (PAD)?

A Mental Health Advance Directive, Instruction for Mental Health Treatment, or Psychiatric Advance Directive is a written document that describes what treatment an individual

person wants or does not want from psychiatrists or other mental health professionals if at some time in the future they are unable to decide for themselves or to communicate effectively. It can also appoint an agent, not a guardian, to make these decisions for them when they are incapable of making them themselves. They should discuss this form with their doctor.

NOTE: This form can be created without the help of an attorney.

A form can be downloaded with instructions from the Duke University Program on Psychiatric Advance Directives:

<http://pad.duhs.duke.edu/index.html>

National Resource Center on Psychiatric Advance Directives:

<http://www.nrc-pad.org/states/nc-forms>

This form can also be downloaded from the North Carolina Department of Advance Health Care Directives. This website also has the North Carolina "Advance Health Care Directive Registry" for these documents.

<https://www.sosnc.gov/ahcdr/>

27) What is an Advance Instruction for Mental Health Treatment?

See #26

28) What is a Psychiatric Advance Directive? (PAD)

See #26

29) What is the difference between a Health Care Power of Attorney and a Living Will?

Health Care Power of Attorney allows an individual to name another person to make health care decisions anytime they are unable to do so. A Living Will is a more limited document that declares what medical treatment a person wants or does not want if they are about to die. The HCPOA may also include directions about the medical treatment an individual wants or does not want if they are about to die.

30) What is a Durable Power of Attorney?

A Durable Power of Attorney is appointed by an individual and becomes effective when the person becomes incapacitated or mentally incompetent. The designated attorney-in-fact is able to sign documents and take actions on behalf of the individual with regard to almost everything: real and personal property transactions; bond, share, stock, securities and commodity transactions; banking transactions; safe deposits; business operating transactions; insurance transactions; estate transactions; personal relationships and affairs; social security and unemployment; benefits from military service; tax matters; employment of agents; and gifts. The Durable Power of Attorney can accomplish some of the same goals as a "Guardian of the Estate" but does not strip an individual of all their legal rights.

NOTE: A guardian can revoke a durable POA. However, a guardian cannot revoke a Health Care Power of Attorney; only a Clerk of Court can do that.

31) Where can I get a Durable Power of Attorney?

You can get a DPOA form from:

<http://legalforms.org/poa/nc/north-carolina-durable-power-of-attorney-form/>

NOTE: Creating a DPOA does not require an attorney.

32) What is the difference between a Durable Power of Attorney and a Health Care Power of Attorney?

The DPOA may apply to many different types of decisions. A HCPOA applies only to health care decisions. Individuals may have both.

(33) Can a person choose who will be their guardian on their Power of Attorney if it becomes necessary in the future?

Yes. In both a Durable POA and Health Care POA document, an individual may name a particular person for the Clerk of the Court to consider serving as guardian. Unless there is good cause to disqualify the person named, the Clerk is directed by statute to appoint the named person as guardian.

NOTE: After appointment, a guardian can revoke any Power of Attorney.

34) If an individual has named someone as an agent in a valid Durable Power of Attorney, do they still need a guardian?

It depends upon several factors:

- What you need
- What the Durable Power of Attorney document allows your agent to do
- Whether the agent is meeting your needs

35) What is Money Management? What is a Joint Account?

If an individual needs help paying bills or keeping track of expenses they can open a joint checking and savings account and possibly have the bills forwarded to a trusted friend or family member so that they can better manage their money, credit cards, etc.

36) What is a Representative Payee?

An individual who has been determined to be unable to manage state or federal benefits such as Social Security (SS), Supplemental Security Income (SSI), or veteran's benefits, may be assigned a person or agency by the Social Security Administration, or another federal or state agency, to receive and use public benefits on their behalf and for their benefit.

NOTE: An individual does not need to be declared incompetent for a Representative Payee to be appointed.

37) What is the NC Achieving a Better Life Experience Act? (ABLE Account)

The NC Achieving a Better Life Experience (ABLE) Act allows people with disabilities to save (and their family members, friends and others to contribute) money in a 529A account for qualified disability expenses. This is similar to the tax-deferred accounts used by families to save for their children's college educations. The beneficiary can have no more than the federal gift limit contributed into their account in any one year. Currently, that limit is \$14,000. Up to \$100,000 saved to this account is not counted toward a person's eligibility for SSI or other federal means tested programs.

Any funds placed into this account, and earnings thereon, can be used to defray disability-related expenses, such as additional medical costs not covered by Medicaid, education, housing, employment support, and health and wellness.

For further information see:

<https://www.nctreasurer.com/able/Pages/NC-ABLE-Program-Frequently-Asked-Questions.aspx>

38) What is a Special Needs Trust?

A Special Needs Trust is a trust account set up to benefit an individual with a physical and/or mental disability. The trust is administered by a trustee who manages the assets and income of the trust. The beneficiary of the trust cannot be the trustee. The assets of the trust are for the benefit of the person with the disability.

With a properly drafted Special Needs Trust, the person may receive government benefits and still enjoy the funds provided for in the trust. No part of the trust can be used to duplicate public assistance benefits of any county, state, federal, or other governmental agency, but it may be used to supplement these benefits. For example, the trust might provide the means for the person to acquire some specific medical equipment (that government benefits do not cover), to have dental work performed, to buy clothes, or to buy a house. It also can be used to supplement the government funds provided to pay for home health services. A Special Needs Trust has stringent legal requirements and must be drafted by an attorney.

Restoration of Rights

39) What if an individual under guardianship and/or the guardian believes guardianship is no longer needed?

A guardian or an individual under guardianship may petition the court to have the individual's rights restored by filing a written petition to the Clerk in the county where the guardianship was initiated and notifying the original petitioner, if that individual is not the guardian.

NOTE: Contact Disability Rights NC, the Protection and Advocacy Agency for North Carolina, for more information.

<http://www.disabilityrightsn.org/guardianship>

Organizations that work with people who might need guardianship

40) What is a human services agency?

A human services agency may include a state, county, city, area, or regional social services agency, public health agency, mental health agency, intellectual disability or developmental disability agency, substance abuse agency, vocational rehabilitation agency, aging agency, or diagnostic evaluation agency or center. In an adult guardianship proceeding the court may designate a human service agency to submit a Multidisciplinary Evaluation (MDE) and to review status reports regarding an individual under guardianship. In North Carolina, the human services agency is usually the local Department of Social Services (DSS), which operates at the county level.

(See #50 for more on MDEs.)

41) What is Adult Protective Services? (APS)

Adult Protective Services (APS) is a division of the county Department of Social Services. APS receives and evaluates reports to determine whether adults with disabilities are in need of protective services. Adults with disabilities reported to be abused, neglected or exploited and in need of protective services are eligible to receive this service regardless of income.

42) What is Protection & Advocacy (P&A)?

Protection and Advocacy (P&A) is a designation assigned to an agency. P&As protect the rights of persons with disabilities through legally based advocacy. P&As are federally mandated and exist in each state, territory and qualified Native American consortium. Disability Rights North Carolina is the P&A in North Carolina.

P&As have the authority to provide legal representation and other advocacy services, under all federal and state laws, to all people with disabilities.

For further information, see the following:

<http://www.disabilityrightsn.org/about-pas>

Legal Processes and Procedures of Guardianship

43) Where and how do I file a petition for guardianship?

A petition for guardianship is filed with the Clerk of Superior Court in the county where the respondent lives. Steps in the process include:

- Completing several forms (Guardianship Petition & Capacity Questionnaire).
- Paying a fee (\$120 to petition, and \$120 if/when General guardianship or Guardian of the Estate is granted). Fees can sometimes be waived based on income and other assets of the respondent.
- The court notifies the respondent and any “interested parties” (typically family members). The county may also charge a fee to the petitioner for serving notices (sheriff’s office), typically around \$30.

- The court assigns the respondent a Guardian Ad Litem who must be an attorney and must be registered as a Guardian Ad Litem. He or she is often, but not always, from Indigent Defense Services.
- An initial hearing date is set.

44) What is a guardianship proceeding?

The guardianship proceeding is the legal process during which the need for guardianship is determined, and the details of the guardianship arrangement are assigned. Guardianship proceeding occurs in two parts:

A. Determination of incapacity (“incompetence”)

The Clerk will review the information provided by the respondent’s lawyer, if the respondent hires a lawyer, and/or by the Guardian Ad Litem assigned by the court. The Clerk will make a determination based on whether there is clear, cogent and convincing evidence that the respondent is in fact incapacitated (the legal term in North Carolina is “incompetent”). The respondent or the respondent’s attorney may request a jury for this hearing. In North Carolina, the petitioner may hire an attorney for the respondent. The hearing is informal. During the hearing, the petitioner and the respondent, if the respondent is present, have the ability to present evidence and witnesses. Each side is given the opportunity for cross-examination. The Clerk is not required to record guardianship hearings, so there may not be transcripts. Check with the Clerk ahead of time if you want the hearing transcribed.

B. Determine the type of guardianship and appoint a guardian

If a respondent is adjudicated incompetent, the Clerk must appoint a General Guardian, a Guardian of the Person, or a Guardian of the Estate for the incapacitated ward. To do this the Clerk must hear evidence regarding the nature and extent of the needed guardianship, the assets, liabilities, and needs of the individual under consideration for guardianship, as well as the suitability of prospective guardians.

45) How do I apply to become a guardian?

One becomes a guardian of an adult by petitioning the Clerk for guardianship of a particular person.

46) How much does it cost to become a guardian?

There is a fee of \$120 to petition the court or file for guardianship, and sheriff’s service fees of \$30.00. There is an additional \$120 fee if General Guardianship or Guardian of the Estate is granted. A Guardian of the Estate must file a bond.

47) Who pays the cost of securing guardianship?

The individual petitioning for guardianship generally pays the filing fees, although the Clerk may assess the cost to the respondent. Court costs can be “waived” or “taxed to” either the petitioner or the respondent.

Guardian Ad Litem fees are paid as follows:

- (1) The respondent, if:
 - a. The respondent is adjudicated incompetent; and

- b. The respondent is not indigent.
- (2) The respondent, if:
- a. The respondent is not adjudicated incompetent;
 - b. The Clerk finds that there were reasonable grounds to bring the proceeding; and
 - c. The respondent is not indigent.
- (3) The petitioner, if:
- a. The respondent is not adjudicated incompetent; and
 - b. The Clerk finds that there were not reasonable grounds to bring the proceedings.
- (4) The Office of Indigent Defense Services in all other cases.

48) Will the court appoint an attorney if the respondent or individual under guardianship cannot afford one?

The court will appoint a Guardian Ad Litem attorney for a respondent or individual under guardianship if they cannot afford one.

49) Does a respondent or individual under guardianship need an attorney?

Yes. It is in the best interest of a respondent or individual under guardianship to have their own attorney.

50) What is a Multidisciplinary Evaluation? (MDE)

A Multidisciplinary Evaluation is a comprehensive evaluation of the individual under consideration for guardianship. An MDE must include current (within the past year) medical, psychological, and social work evaluations as directed by the Clerk and may include evaluations by other professionals regarding the respondent's or ward's needs with respect to education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech therapy, etc.

A Multidisciplinary Evaluation is prepared by a designated human service agency at the direction of the Clerk regarding the nature and extent of an individual's capacity in order to assist the Clerk in determining whether or to what extent the respondent is incapacitated, whether a Limited Guardianship is appropriate, and other issues regarding guardianship. An individual under guardianship, their family, attorney or Guardian Ad Litem can also request an MDE.

51) Who decides who the guardian will be?

The Clerk decides who will be the guardian. North Carolina law allows a person to request that the Clerk appoint a particular person as guardian, should guardianship be needed. A Durable Power of Attorney for finances may name a requested Guardian of the Estate, and a Health Care Power of Attorney may name a requested Guardian of the Person. Even so, the Clerk can decide to appoint someone else if, in his opinion, it is in the best interest of the individual under guardianship. The guardian can be any competent adult, such as a spouse, family member or friend.

The guardian need not be an individual. The Clerk can name the Department of Social Services (public guardian), a nonprofit agency, or private corporation as a guardian. The Clerk may name a public guardian when the family is in conflict and cannot agree or if there is no responsible family member available.

52) What is the role of the Clerk of Superior Court in determining guardianship?

The Clerk of Superior Court will determine if the respondent is incapacitated and, if so, will appoint a guardian.

A. Determination of incapacity

The Clerk reviews the information provided by the respondent's lawyer (if hired), the Guardian Ad Litem, the petitioner's lawyer (if hired) and any other interested parties, and makes a determination based on whether there is "clear, cogent, and convincing evidence" that the respondent is in fact incapacitated. The respondent has the right to have their case heard by a jury instead of the Clerk if they want, but must make this request to the Clerk.

B. Determine the type of guardianship and appoint a guardian

The Clerk determines an appropriate type of guardianship and appoints a guardian.

53) Can an individual name his or her possible future guardian?

Yes, individuals may name a possible future guardian in a Health Care Power of Attorney or Durable Power of Attorney. The final decision, however, lies with the Clerk. (See #33 for more information.)

54) Is guardianship a legal intervention?

Guardianship is a legal intervention by the state in which the right to make decisions are removed from one person and assigned to another.

55) Which court can answer questions about a guardianship?

The county court that originally assigned the guardianship.

56) Can a hospital administrator or a correctional institution require guardianship in order to provide services or authorize release?

A hospital administrator or correctional institution can recommend, but cannot require, a person to have a guardian.

People Involved in Guardianship Proceedings

57) Who is the Clerk of Superior Court?

The Clerk of Superior Court is a clerk for the Superior Court Judge. It is an elected position. In North Carolina, the Clerk of Superior Court has exclusive, original jurisdiction over guardianship proceedings except in cases in which the Clerk has a direct or indirect interest. In an appeal of a Clerk's decision, a case is then handled by the Superior Court for hearing from the beginning.

An Assistant Clerk may also exercise the Clerk's judicial authority.

58) Who is a Guardian Ad Litem? (GAL)

When used in the context of guardianship proceedings of adults, a GAL is an attorney who is appointed to represent an individual in the proceedings to determine that individual's

capacity and to appoint a guardian for that individual. *Ad litem* means, literally from the Latin, “of the proceeding.” In North Carolina the GAL both represents an individual in proceedings and serves the court by giving advice on the condition of the respondent.

59) Who is a Petitioner?

A petitioner is any person, including any state or local human services agency, who files a petition alleging that an individual is incapacitated and in need of a guardian. In most adult guardianship proceedings, the petitioner is also the applicant who is seeking appointment as guardian for the incapacitated adult.

60) Who is a Respondent?

A respondent is a person who is alleged to be incapacitated in an adult guardianship proceeding. If a respondent is adjudicated (determined to be) incapacitated and a guardian is appointed for the respondent, the respondent is legally referred to thereafter as the “ward.”

61) Who is a Ward?

A ward is an adult who has been deemed incapacitated and for whom a guardian has been appointed in an adult guardianship proceeding.

62) Who is an Incapacitated or Incompetent Person?

A person lacking sufficient mental capacity to manage their own personal affairs or financial affairs or property, or a person lacking sufficient mental or physical capacity to make or communicate important decisions concerning one’s own person, family or property due to mental illness, intellectual or developmental disability, inebriety, disease, injury, or similar cause or condition.

63) Who is an Incapacitated or Incompetent Adult?

An incapacitated person is a person who is at least 18 years old or who is a minor who is at least 17½ years old and, apart from their status as a minor, is incapacitated.

Appointing a Guardian

64) What is a Nominated Guardian?

A Nominated Guardian is a person who has been nominated by a competent adult, pursuant to a duly executed Durable Power of Attorney or Health Care Power of Attorney, or other writing, to serve as that adult’s guardian in the event that that adult is determined to be incapacitated and in need of a guardian.

65) Who has priority to be a guardian?

Generally the Clerk will appoint the guardian the individual in need of guardianship has selected if they selected one before incapacity and with an acceptable instrument, i.e. a Power of Attorney. The next choice would typically be a willing family member or friend. Finally, if no person is available, the Clerk will appoint the Department of Social Services, which may then contract out the guardianship to a corporation.

NOTE: If there are conflicts in the family, the Clerk will typically default to third party guardian.

66) What qualifications are necessary to be a guardian?

There are no qualifications for a family member or friend other than a willingness to serve.

67) Does an individual have to accept their appointment as guardian for a family member or friend?

No.

68) Can two people be guardians for the same person? For example, can spouses or siblings serve as “dual” guardians?

Yes. The Clerk may appoint two guardians of the same type (usually personal or general), such as both parents. There can also be two guardians in the case where one person is appointed as the Guardian of the Estate and another as the Guardian of the Person.

69) Can a guardian transfer guardianship to another family member?

The transfer or change of the appointed guardian is made through a petition to the court in a “Motion to Modify.” The Clerk has to approve any change or transfer of guardianship.

70) What if there are conflicts in the family over who should be guardian?

The Clerk will review the evidence, including speaking with family members who are in dispute, and will make their best determination of who will serve the best interest of the individual under guardianship. The Clerk has the right to assign a third party (i.e. not a family member) when it would be in the best interest of the individual needing guardianship.

71) Who else can serve as guardian if no one in the family can serve?

Almost anyone can serve as a guardian: the Department of Social Services, a private guardianship agency, an individual, or a lawyer.

72) Does North Carolina have public/professional guardians?

Yes, many North Carolina Departments of Social Services contract with for-profit or non-profit guardianship agencies (“corporate guardians”) to serve as guardians.

73) Who qualifies as a Disinterested Public Agent Guardian?

Presently in North Carolina, the Director and Assistant Director of the Department of Social Services are the only officials authorized to serve as the “disinterested public agent” guardian.

74) What happens if a guardian dies?

The Clerk will appoint a new guardian, upon someone filing a motion to modify the guardianship.

75) What is the Certificate of Appointment, also known as Letters of Guardianship?

The clerk will issue letters to the person appointed guardian. The letters are the guardian's proof of authority to act on behalf of the ward. They may be used to inform hospitals, police and emergency services of the guardianship arrangement.

76) What type of training is required to be a guardian?

There is no statutory training requirement for individuals acting as guardian, although some clerks may require that individuals receive training, but there is wide variation. Training is required for a disinterested public agent (the department of social services), or a corporation.

Rights and Protections of People under Guardianship

77) What are the Best Interest Perspective, Substituted Judgment Model, and Zealous Advocate Model for advocating or representing a respondent?

In the **Best Interest Perspective** the attorney or Guardian Ad Litem determines what is in the best interest of the respondent or individual under guardianship, and uses their own judgment to make decisions for them. This is the perspective used in guardianship proceedings in North Carolina.

In the **Substituted Judgment Model** the attorney or Guardian Ad Litem makes the decision that the respondent or individual under guardianship would make if they had the mental capacity to do so.

In the **Zealous Advocate Model** the attorney or Guardian Ad Litem makes decisions with the respondent or individual under guardianship by being a Zealous Advocate for that individual's wishes based on all information available about how the person has chosen to live their life and the kinds of decisions they have made in the past. This model relies on information from family, friends or caregivers and, in so far as is possible, the respondent or ward themselves. The Zealous Advocate Model most closely resembles a standard lawyer-client relationship.

78) What if someone abuses an individual under guardianship?

The guardian is responsible for protecting or otherwise ensuring the safety of the individual under guardianship. If you suspect a person under guardianship is being abused you need to make a determination of the best way to help that person. Depending on the circumstances, options are: inform the guardian of the issue so that they can address it; make a report to adult protective services; call the police; or get in contact with an advocacy group such as Disability Rights North Carolina.

NOTE: Information on this website does not constitute legal advice.

79) What protections are in place to protect the rights of the individual under guardianship?

North Carolina does not have a systematic review process for protecting the rights and wellbeing of all people under guardianship. Clerks have the discretion to order reviews of cases in individual circumstances, though this is not widespread practice. General

Guardians and Guardians of the Estate must submit routine financial accountings to the court, which are meant to ensure that the ward's funds are being used appropriately. Disinterested public agent guardians and corporate guardians serving as Guardian of the Person are required to submit annual status reports to the Clerk. Depending on the situation, submit complaints regarding the welfare of the person under guardianship to: the guardian, clerk of court, police, Adult Protective Services, or Disability Rights North Carolina (North Carolina's Protection and Advocacy organization).

80) What rights do I have as a Ward?

People placed under guardianship lose most of their decision-making rights, unless specifically noted by the Clerk in a limited guardianship. The guardian, depending on whether it is a General Guardian, Guardian of the Person, or Guardian of the Estate, will have full decision-making authority for the person under guardianship. The individual under guardianship retains the right to vote, to marry, and not to be sterilized against their will. They are also entitled to the same basic rights as all citizens to be free from abuse or neglect and have their basic food, shelter, and medical needs met.

81) What happens if the individual under guardianship disagrees with his guardian?

The guardian has the right to make decisions (given the constraints of the type of guardianship assigned) regardless of whether the ward agrees with the decision. The individual under guardianship however always retains the right to petition the court for a modification of guardian or restoration of rights. Additionally, advocacy organizations may be able to help the individual under guardianship and/or the individual's family navigate conflicts with the guardian.

82) What is a Sixty Day APS? (60-Day Adult Protective Service)

The 60-Day Adult Protective Services is a court order authorizing the provision of protective services to adults who have been found to lack capacity to consent to protective services.

If Adult Protective Services reasonably determines that a disabled adult is being abused, neglected or exploited and lacks capacity to consent to protective services, then the agency may petition the district court for an order authorizing the provision of protective services for a period of sixty days.

Within 60 days from the order, the district court will conduct a review to determine whether there is cause for an additional 60 day period and/or whether to initiate a petition for guardianship.

Disabled adults may not be committed to a mental health facility under a 60-Day APS, although commitment laws still apply.

A determination by the court that a person lacks the capacity to consent to protective services does not affect incompetency proceedings and has no effect upon the question of capacity to consent to protective services.

General Responsibilities of Guardians

83) What does a guardian have to do?

When appointing a guardian, the Clerk will enter an order that sets forth the powers and duties of the guardian. The order may limit the guardian's powers and duties, depending upon the capacities of the individual under guardianship. The Clerk's order should be consulted to determine the specific duties of any particular guardian.

84) What are the guardian's basic duties?

There are three types of guardians – General Guardian, Guardian of the Person, and Guardian of the Estate (See #9, #12, #13). Each type of guardian has specific duties; however, all types of guardians must follow general guardianship principles.

All guardians must:

- A. Ensure that the guardianship is tailored to meet the actual needs of the individual under guardianship.
- B. Make decisions that ensure the health and wellbeing of the individual under guardianship, based on what that individual would decide if capable of making the decision.
- C. Seek information about the individual under guardianship's value system, wishes, and needs from the individual, their family, friends, or legal documents such as a Living Will.
- D. Involve the individual under guardianship in all decisions to the extent possible.
- E. Allow the individual under guardianship the opportunity to exercise rights that are within their comprehension and judgment, allowing them the same possibility for error as a person who is not under guardianship.
- F. Support the individual under guardianship in developing the necessary skills to assume responsibility for their own decision-making.
- G. Ensure the guardianship is periodically reviewed and consider alternatives to guardianship, including restoration to competency or a Limited Guardianship.

85) What are the duties of a General Guardian?

A General Guardian makes decisions for the care and maintenance of the ward's person and of the ward's estate.

86) What are as the duties of a Guardian of the Person?

A Guardian of the Person is appointed to make decisions about the individual under guardianship's personal care, including medical and psychological treatment. Specific duties of a Guardian of the Person include:

- A. Take custody of the individual under guardianship's person.
- B. Make provisions for the individual under guardianship's care, comfort, and maintenance.
- C. Take any responsible action necessary to protect the individual under guardianship from further mistreatment in instances where the guardian learns they are being mistreated.
- D. Arrange for the individual under guardianship's training, education, employment, habilitation, or rehabilitation.
- E. Take reasonable care of the individual under guardianship's clothing, furniture, vehicles, and other personal property.

- F. Establish the individual under guardianship's residence.
- G. Give consent or approval necessary to enable the individual under guardianship to receive medical, legal, psychological, or other professional care, counsel, treatment, or service.
- H. Honor any written advance instructions for the individual under guardianship medical or mental health care.
- I. Obtain expert consultation in any instances where there is a question about appropriate medical or psychological treatment, or whether treatment should be provided.
- J. Give any other type of consent or approval on the individual under guardianship's behalf that is required or is in their best interest.
- K. Arrange for regular medical and dental examinations for the individual under guardianship as needed and as required for annual status reports.
- L. Turn over the individual under guardianship's personal effects to the executor or administrator of the individual under guardianship's estate upon their death.
- M. Give status reports as required by North Carolina law or Clerk's order.

87) What are the duties of a Guardian of the Estate?

A Guardian of the Estate is appointed to collect, preserve, manage and use the individual under guardianship's estate to administer the estate in the individual's best interest. These duties may be modified by the Clerk to give some financial responsibility to the individual in a Limited Guardianship. Specific duties of a Guardian of the Estate include:

- A. Management of the individual under guardianship's estate.
- B. Management of the individual under guardianship's assets and contracts.
- C. Acquisition, management, and disposal of the individual under guardianship's property and investments.
- D. Payment of the individual under guardianship's expenses and management of their debts and obligations.
- E. Use of the individual under guardianship's land and operation of their business.
- F. Take actions on the individual under guardianship's behalf.
- G. Pay advancements to the individual under guardianship's children or grandchildren with prior court approval.
- H. Employ experts (such as lawyers or investment advisors) to advise or assist the guardian in the performance of their duties as guardian.
- I. Execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian.
- J. Obey all orders of the court pertaining to the guardianship.
- K. Comply with the statutory accounting requirements.
- L. File a final accounting with the Clerk upon the individual under guardianship's death.

88) What are the Accounting Requirements of a Guardian of the Estate?

Accountings must be filed with the Clerk at the following times:

- A. Within three months of the guardian's initial appointment.

- B. Within three months of discovering the existence of additional property not included in previous accountings.
- C. Within 30 days of the expiration of one year from the date of the guardian's initial appointment, and annually thereafter.
- D. Within 60 days after the guardianship is terminated.

With each accounting, the guardian must produce vouchers or verified proof for all deposits into the estate and payments made out of the estate. The guardian must provide with the accounting all investment and bank statements showing the cash balances of the accounts.

89) What are the guardianship duties of a Disinterested Public Agent?

A Disinterested Public Agent (the Department of Social Services), appointed as a General Guardian, Guardian of the Person, or Guardian of the Estate must comply with both the basic guardianship duties and those duties specific to the type of guardian of which the public agent is acting.

In addition, there are further duties imposed specifically upon disinterested public agents. They are:

- A. Visit the individual under guardianship as frequently as needed and appropriate.
- B. Have contact related to the individual under guardianship no less than once every 90 days.
- C. Obtain training on the powers and responsibilities of guardians.
- D. Notify the Clerk when they cease to qualify as a disinterested public agent so that the Clerk can appoint a successor guardian.
- E. File status reports to the designated agency assigned at the time of the guardian's appointment, or if none was assigned, to the Clerk.

90) What actions by the guardian are prohibited?

- A. Using the individual under guardianship's real or personal property for anything or anyone else other than the individual.
- B. Intermingling the individual under guardianship's money with the guardian's personal funds.
- C. Appearing on any of the individual under guardianship's accounts as a joint account holder or as a payee upon that individual's death.
- D. Borrowing money from the individual under guardianship.
- E. Loaning the individual under guardianship's money to someone else without a court order.
- F. Writing checks for "cash" without court authorization of regular cash distributions to the individual under guardianship.
- G. Disbursing the individual under guardianship's funds to oneself.
- H. Paying oneself a commission or reimbursement without court approval.
- I. Selling the individual under guardianship's personal or real property without court order when the aggregate value of items sold is more than \$1,500.
- J. Leasing the individual under guardianship's land for more than three years.

K. Consenting to sterilization of the individual under guardianship without medical necessity and court approval.

Other Responsibilities and Abilities of Guardians

91) Does the guardian receive payment for their work as guardian?

Family/friend guardians receive no payment to be the guardian. Corporate Guardians receive approximately \$213.00 per month for each individual under guardianship.

92) Can a guardian take a break from being a guardian?

No.

93) Can the guardian change the Last Will and Testament of the individual under guardianship?

No, a guardian may not legally alter the Will of an individual under guardianship.

94) Does the guardian have to pay for the individual under guardianship's food, housing and other expenses?

No. If the individual under guardianship has funds, the Clerk may approve payment to the guardian or another person to pay the individual under guardianship's share of the household expenses, food and other necessary items. If the person under guardianship does not have assets of their own, they may be eligible for public benefits such as Social Security Disability, Medicaid, or food stamps, and the guardian would be responsible for applying for those programs as applicable on their behalf.

95) Can the guardian be reimbursed for expenses?

The Clerk may approve certain expenses of the guardian to be reimbursed from the individual under guardianship's money or estate, such as bond premiums and court costs. If the individual under guardianship is living with the guardian or some other person, the Clerk may also approve payment to the guardian or other person to pay the individual's share of the household expenses, food and other necessary items.

96) How much time do the duties of a guardian typically take?

Every case is different. As an example, if the individual under guardianship has no money and is in a home, the guardian may not need to spend much time there. Alternatively, if the individual under guardianship cannot complete activities of daily living (ADLs) independently, the guardian may have to spend a great deal of time at the home assisting the individual under guardianship.

97) What are the monitoring or reporting requirements for guardians?

Statute requires only Disinterested Public Guardians and Corporate Guardians that are Guardians of the Person to provide regular status reports. The Clerk may order any other Guardian of the Person to file status reports. Reports are submitted to the Clerk annually and include the following information:

- A. A report of recent medical and dental examinations of the individual under guardianship by one or more physicians or dentists.
- B. A report on the guardian's performance of their duties.
- C. A report of the individual under guardianship's residence, education, employment, and rehabilitation or habilitation.
- D. A report on what steps are being taken towards restoration of competency and to identify alternatives to guardianship.
- E. If the guardian is a disinterested public agent or corporation, a report of the efforts to identify alternative guardians.
- F. The guardian's recommendations for implementing a more limited guardianship, preserving for the ward the opportunity to exercise rights that are within the ward's comprehension and judgment.

In addition, General Guardians and Guardians of the Estate must file a periodic inventory or account of the estate (See #89).

98) How can a guardian affect a Power of Attorney?

If a guardian is appointed after the execution of any type of POA, the attorney-in-fact (the person assigned the duties in the POA — a family member, friend, lawyer, etc.) is accountable to the guardian as well as to the individual under guardianship.

99) Can a guardian revoke a Durable Power of Attorney? A Health Care Power of Attorney?

A guardian can revoke a Durable Power of Attorney, but cannot revoke a Health Care Power of Attorney.

100) Must a guardian reside in the same county or state as the individual under guardianship?

No, in fact North Carolina law allows a guardian to live outside the state if they visit the individual under guardianship four times per year and assign an in-state agent to receive mail.

101) Is the guardian liable if the individual under guardianship breaks the law or hurts someone?

If the guardian negligently allows the individual under guardianship to injure another person or damage property, the guardian might be liable.

102) Does a guardian need to be bonded?

A bond is required for a Guardian of the Estate, but not for Guardian of the Person. The Clerk may approve reimbursement of certain expenses of the guardian from the individual under guardianship's estate, such as bond premiums and court costs.

Transferring Guardianship

103) Can guardianship be transferred between counties?

Guardianship stays in the county in which it was initiated unless a motion is filed with the Clerk in the original county for a change of venue to transfer the guardianship to another county.

In practice, the guardianship stays in the county where the individual under guardianship lives and will not change as they move around or are transferred between care facilities.

104) Can guardianship be transferred between states?

Guardianship may be transferred between states, if the state has enacted the “Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.”

<http://www.uniformlaws.org/Acts.aspx>

In states without the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act individuals would have to apply for guardianship again.

Guardianship in Different Locations

105) Is there much difference in guardianship procedures among the North Carolina counties?

No, but the Clerk has wide discretion in the particulars of the operation of their court. For instance, in some courts there are no recorded or written records of the hearings.

106) Is North Carolina guardianship law significantly different from other states?

Yes, the written law varies widely from state to state.

ACRONYMS COMMONLY USED IN GUARDIANSHIP

ADL, Activities of Daily Living

AIMHT, Advanced Instruction for Mental Health Treatment

AOC, Administrative Office of the Courts

APS, Adult Protective Service

CIT, Crisis Intervention Training

DHHS, Department of Health and Human Services

DPOA, Durable Power of Attorney

DSS, Department of Social Services

GAL, Guardian ad litem

HCPOA, Health Care Power of Attorney

I/DD, Intellectual and or Developmental Disability

LME/MCO, Local Management Entity/Managed Care Organization

MDE, Multidisciplinary Evaluation

MI, Mentally Ill

NC, North Carolina

PAD, Psychiatric Advance Directive
PCP, Person-Centered Plan
POA, Power of Attorney
P&A, Protection and Advocacy
SS, Social Security
SSDI, Social Security Disability Insurance
SSI, Supplemental Security Income
WRAP, Wellness Recovery Action Plan

ACKNOWLEDGEMENTS & REFERENCES

The answers to these frequently asked questions were derived from:

National Resource Center for Supported Decision-Making

<http://supporteddecisionmaking.org/>

“Protecting Individual Rights: Limited Guardianship & Alternatives to Guardianship”

pamphlet by Disability Rights NC.

<http://www.disabilityrightsn.org/sites/default/files/Limited%20Guardianship%20brochure%20revised%2010-8-14.pdf>

“North Carolina Guardianship Manual” by John L. Saxon

<http://defendermanuals.sog.unc.edu/defender-manual/5>

“Duties of a Guardian” 8 pages, by Disability Rights NC.

<http://www.disabilityrightsn.org/sites/default/files/Guardian%20Duties%20GU-02.pdf>

Disability Rights North Carolina

<http://www.disabilityrightsn.org/guardianship>

“Assisting the Guardian of an Incompetent Adult”

North Carolina State University

<https://ncsu.edu/ffci/publications/1999/v4-n1-1999-spring/assisting-the-guardian.php>

North Carolina department of Health and Human Services

www.ncdhhs.gov

“Responsibilities of Guardians in North Carolina” 17 page booklet by NC Administrative Office of the Courts & is a summary of “NC General Statutes Chapter 35A Incompetency and Guardianship”

<http://www.nccourts.org/forms/documents/1184.pdf>

North Carolina Law

<http://www.ncga.state.nc.us/gascripts/statutes/StatutesTOC.pl?Chapter=0035A>

“A Model Code of Ethics for Guardians”

National Guardianship Association, 17 page paper

http://www.guardianship.org/documents/Code_of_Ethics.pdf

National Alliance on Mental Illness

<https://www.nami.org>

North Carolina Mental Health Consumers’ Organization

<https://www.facebook.com/ncmhco/>

National Guardianship Association

<http://www.guardianship.org>

North Carolina Council on Developmental Disabilities

<http://nccdd.org/public-policy/public-policy-topics/guardianship.html>

“Public Guardianship: In the Best Interests of Incapacitated People?” book, Pamela B. Teaster, Ph.D.; Erica F. Wood, J.D.; Winsor C. Schmidt, Jr., J.D., LL.M.; Susan A. Lawrence, Ph.D.

American Bar Association

http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html