

DUKE DEMENTIA FAMILY SUPPORT PROGRAM

Caregiver Connections

An Educational Webinar Series With The Experts

**The presentation will begin shortly.
Thank you for your patience!**

**dukefamilysupport.org
919-660-7510**



Guardianship and Dementia: Perspective from a Professional Guardianship Provider

Presented by Meike Wiest, MSW, CMC

- **OBJECTIVES:**

Define guardianship

Review types of guardianship

Explain the process of appointing a guardian

Discuss alternatives to guardianship

Address common misconceptions about guardianship



Disclaimer: I am not a legal professional and it is always advisable to consult with an elder law attorney when considering guardianship



What is Guardianship?



Guardianship is a legal relationship in which a person or agency (the guardian) is appointed by the court to make decisions and act on behalf of a person who does not have adequate *capacity* to make such decisions involving the management of personal affairs, property, or both.

A court process is required to create a guardianship.

According to North Carolina's state mandates, in order to be considered incompetent and thusly require guardianship, an individual must be one **“who lacks sufficient capacity to manage [his or her] own affairs or to make or communicate important decisions** concerning [his or her] person, family, or property whether the **lack of capacity** is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, **senility**, disease, injury, or similar cause or condition.”





Historically, the term “**competence**” was used in legal settings and the term “**capacity**” was used in clinical settings. Most states have recently been moving away from global legal determinations that a person is “**incompetent**,” — which often meant the loss of virtually all control over one’s affairs — and are increasingly favoring determinations of incapacity for certain types of decisions or life functions, such as:

- Medical consent capacity
- Financial capacity
- Testamentary capacity
- Capacity to drive
- Capacity to live independently

Capacity is not all or nothing. It is situational/contextual and can fluctuate. (Health, time, stress, familiarity etc.)

CAPACITY

Understanding of what is proposed

Does the person understand that a decision needs to be made?

Appreciation of how it applies to one's person

Does the person understand how they are affected and why a decision is necessary?

Reasoning on how to come to a decision

Does the person understand the options available when making the decision and the potential consequences of the decision?

Expressing a clear and consistent choice

Ability to constantly verbalize wishes and choices? Also, can the individual direct the decision to the appropriate parties and accept help.



Guardian of the Person

Guardian of the Estate

General Guardian

Limited Guardian

Interim Guardian

What are the
Types of
Guardianship
in NC?

A guardian is a legally appointed surrogate decision maker and advocate who helps the ward:

- Ensure that the guardianship is tailored to meet the *actual* needs of the individual ward.
- Make decisions that ensure the health and well being of the ward, **based on what the ward would decide if capable** of making the decision.
- Seek information about the ward's value system, wishes, and needs from the ward, the ward's family, friends, or legal documents such as a Living Will.
- Involve the ward in all decisions to the extent possible.
- Allow the ward the opportunity to exercise rights that are within his/her comprehension and judgment, allowing the ward the same possibility for error as a person who is not incompetent.
- Support the ward in developing the necessary skills to assume responsibility for his/her own decision-making.
- Ensure the guardianship is periodically reviewed and consider alternatives to guardianship, including restoration to competency or a limited guardianship.

**What is the role
of the Guardian?**

MISCONCEPTION



A guardian can force someone to take their medication

Every person with dementia needs a guardian

A guardian can control an individual's behavior and actions

A guardian can keep an individual in the hospital

A guardian can speed up access to services or benefits

The petitioner has to become the guardian



What Rights Can a Person Under Guardianship Lose?

- The guardian may decide where and with whom the ward lives
- The guardian may decide which medical care the ward receives
- The guardian may have control over finances, assets & property
- The guardian may be able to enter into contracts on the ward's behalf
- The ward may lose his ability to drive (exceptions possible)
- The ward cannot serve on a jury
- The ward cannot purchase or possess firearms
- The ward cannot execute a HCPOA or POA



What Rights Does a Person Under Guardianship Keep?

- A person under guardianship has the right to participate in their decisions to the extent they are able to
 - Incompetent adults retain the right to vote
 - Incompetent adults retain the right to marry
 - The individual under guardianship may be able to make a will (testamentary capacity)
- Persons under guardianship retain the right to refuse medication and certain invasive procedures
- A ward may file a motion to appeal or modify their guardianship



Guardianship Process



Who can file a petition to have someone found incompetent?

Any person, including a relative, friend, medical provider, or any State or local human services agency, through an authorized representative, can file a petition for adjudication of incompetence with the court.

While it is advisable to consult and utilize an elder law attorney, it is not required.

Filing a Petition for Adjudication of Incompetence

What to Expect



A filing fee will be due, as well as a fee to cover the sheriff (unless the respondent is indigent)

The sheriff has to serve the respondent personally

Interested parties have to be notified of the hearing

A Guardian ad Litem will be assigned to represent the person

The hearing is usually scheduled 10-30 days after service

The Hearing:

- The petitioner and respondent are allowed to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses.
- Medical testing or other evidence, showing a cognitive diagnosis is helpful.
- Documentation of financial mismanagement or exploitation should be presented, if applicable.
- A MDE (Multi-Disciplinary Evaluation) may be ordered.
- The GAL will make a recommendation whether clear and cogent evidence shows that a guardianship is necessary.



To Be Considered as Guardian:

- Participate in the proceedings
- 18 years of older
- No felony charges
- Act in the best interest of the ward

Family and other natural supports will be considered before a third-party guardian

Reporting and oversight



A guardian of the estate or general guardian must file an inventory of the ward's assets within 3 months after qualification and must file an annual account each year regarding the status of the ward's property and money received and paid.



A guardian of the estate or general guardian must file a verified petition with the court for approval to sell real property. This is a complicated process that requires court approval. An attorney can assist with this process.



Public/third-party Guardians of the Person must submit an initial 6-month status report and an annual status report thereafter. This does not apply to private individuals service as guardian of person.

Alternatives to Guardianship



Alternatives to Guardianship

Supported
Decision-
Making

Representative
Payee

Power
of
Attorney

Trusts
and
Savings
Accounts

Person
Centered
Planning

Other Resources



- Understanding Guardianship: Video
- <https://www.nccourts.gov/about/nc-administrative-office-of-the-courts/training/understanding-guardianship>
- Alzheimer's Association Legal Guide:
- https://www.alz.org/national/documents/brochure_legalplans.pdf
- Listing of Elder Law Attorneys (National Association):
- <https://www.naela.org/>
- NC Capacity Questionnaire:
<https://www.nccourts.gov/assets/documents/forms/sp208-en.pdf?RrwgXJAFgdwA6QjGkHl6Ubr2G3q8dYis>

Thank You

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Thank you for joining us today!

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