



NC
Nothing Compares
NORTH CAROLINA

**Guardianship
Decision-Making
Overview**

Sponsored by:
NC Division of Aging
and Adult Services
Department of Health
& Human Services



Evelyn Pitchford
Guardianship Consultant

Adult Services Section
Division of Aging and Adult Services

Email Address:
Evelyn.Pitchford@dhhs.nc.gov


Direct Line:
919-855-3469



Objectives

By the end of this training, participants will be knowledgeable about:

- ✓ Basic Guardianship Terminology.
- ✓ DSS becoming the only Disinterested Public Agent Guardian in NC.
- ✓ The purpose of guardianship, who needs a guardian?
- ✓ The types of guardianship, Roles and Responsibility of a guardian and Priority of appointments.
- ✓ The Ethical concept of the guardian-ward relationship and decision-making.
- ✓ What steps to take when a resident needs a guardian.



Session One

- Guardianship Terminology
- Guardianship Transition
- Purpose and Scope
- Alternatives to Guardianship



It's the Law?

**North Carolina
General Statute 35A**



Guardianship

Legal relationship between an individual (*the guardian*) who has been given the authority by the court to make decisions on behalf of another individual (*the ward*) who is no longer able to make and communicate responsible decisions on his or her own behalf.



Legal Definitions
G.S. 35A 1101 & G.S. 35A 1202

Guardian – One who is legally responsible for the care and management of the person and/or property of an incompetent adult or a minor.

Incompetent Adult - an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's 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.

Respondent-A person who is alleged to be incompetent in an adjudication of incompetence proceeding.

Ward - a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction.



Legal Definitions
(Continued)
G.S. 35A 1101 & G.S. 35A 1202

Clerk - means the Clerk of Superior Court.

Jurisdiction – The Clerk of Superior Court has original authority over adjudication of incompetence hearings and the appointment of a guardian.

Venue for the adjudication of incompetence-The hearing is held where the respondent resides, is domicile or is an inpatient in a treatment facility.

Venue for the appointment of a guardian-Venue for this proceeding is in the county where the respondent was adjudicated incompetent unless the clerk in that county transfers the case to another county.

Disinterested Public Agent Guardian (DPAG)-The director or assistant directors of a county department of social services.

Corporation - A company or group of people authorized by law to act as a single entity or legal personality, and having its own powers, duties, and liabilities.



Guardianship Transition Year

- DSS became the only Disinterested Public Agent Guardian in NC in 2012
- The move to a managed care system of providing mental health services in NC has effectively terminated the ability of a director or assistant director of an LME to serve as a client's guardian as a Disinterested public agent" because of the 1915(b/c) Medicaid waiver for MH/DD/SAS prohibits a managed care organization(MCO) from serving as the guardian of an individual who is managed by that MCO.
- Centers for Medicare and Medicaid (CMS) considered it a potential conflict of interest for Local Management Entities to serve as public guardians and provide managed care to the same group of people. This prompted NC Session law 2012-151.
- N.C. Session Law 2012-151 amended the definition of "disinterested public agent" in G.S. 35A-1202(4) so that only a director or assistant director of a county department of social services can serve as a guardian as a "disinterested public agent guardian"
- The guardianship transition began FY 2012-2013. Wards previously receiving service from the LME/MCOs (directly or contractual) were transferred to DSS or a corporation.





Who Needs a Guardian?




WHO NEEDS A GUARDIAN?
G. S. 35A-1201 (2)

NC GENERAL ASSEMBLY RECOGNIZES THAT:

Incompetent persons who are not able to act effectively on their own behalf have a right to a qualified, responsible guardian.



Purpose and Scope



Purpose and Scope

The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.

[N.C. General Statute 35A-1201 (3)]



Purpose and Scope

Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.

[N.C. General Statute 35A-1201(4)]



Purpose and Scope

Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent.

[N.C. General Statute 35A-1201(5)]



Purpose and Scope

To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.

[N.C. General Statute 35A-1201(5)]



Alternatives to Guardianship

- **Family, friends**

Individuals may have family or friends willing and capable of providing for their needs.

- **Advanced Directives**

Competent individuals may give another person(s) the legal authority to act on their behalf when they become unable to handle personal and financial affairs.



Alternatives to Guardianship

Advanced Directives may include one or more of the following:

- **Powers of Attorney (Durable, Health Care or Advance Instruction for Mental Health Treatment)**
- **Living Will**
- **Trust**
- **Will**



Alternatives to Guardianship

For a complete description of alternatives to Guardianship, go to the General Assembly website:

www.ncleg.net

- Click on **Shortcuts:** *General Statutes*
- Browse:** *NC G.S. Table of Content*
- Chapter 32A-** *Powers of Attorney*



Session Two

- Types of Guardianship
- Roles and Responsibility
- Priority of Appointment



Types of Guardianship

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

(Interim, Limited, or Full)



Roles and Responsibilities

•The Secretary of DHHS (Rule-Making Authority)

The Secretary of the Department of Health and Human Services shall adopt rules concerning the guardianship responsibilities of disinterested public agents. The rules shall provide, among other things, that disinterested public agents shall undertake or have received training concerning the powers and responsibilities of guardians.

[NC G. S. 35A-1216]



Guardian of the Person

A guardian appointed solely for the purpose of performing duties related to the care, comfort, and maintenance of the ward.



Responsibility

Guardian of the Person

- Take responsibility for the care, comfort and maintenance of the ward's person.
- Arrange for the ward's training, education, employment, rehabilitation or habilitation.
- Establish where the ward will live, either in, or outside of the state.
- Give any consent or approval for medical, legal, psychological or other professional care, counsel or treatment for the ward that is in the ward's best interest.




*Responsibility
Guardian of the Person (Continued)*

- Ensure the ward resides in the least restrictive environment.

- Allow the ward to exercise those rights that are within his or her comprehension.


- Support the ward's right to participate in all decisions effecting him or her.

- Petition for restoration of the ward's competence when the ward is no longer incompetent



Guardian of the Estate

A guardian appointed solely for the purpose of managing the ward's *property, estate and business affairs*




*Responsibility of
Guardian of the Estate*

- Give bond payable to the State before receiving the ward's estate.

- Take control of the ward's estate (real & personal property) *for the ward's use.*

- Administer the estate in a prudent manner *in the ward's best interest.*

- Pay the ward's debts, income taxes, property taxes and other taxes owed by the ward *from the ward's estate.*



*Responsibility of
Guardian of the Estate (Continued)*

- Obey all lawful orders of the court pertaining to the guardianship.
- Keep the ward's *finances separate* from the guardian's finances.
- Act in a reasonable and prudent manner in administering the ward's estate.
- Comply with the accounting requirements of the court



General Guardian

A guardian appointed to perform duties of both the person and the estate.

Responsibility

The General Guardian's responsibilities are the same as those of the guardian of the person and guardian of the estate.



Priority of Appointment

G.S. 35A-1212.1

- Individuals (family, friends)
- Corporation
- Disinterested public agent guardian(DPAG)



INDIVIDUALS as Guardians

- The Clerk may appoint an *individual* (family member, friend, or others who know the ward) to serve as guardian.
- An individual appointed to serve as guardian is *not personally responsible* for financial matters concerning the ward.



CORPORATIONS as Guardians

- The Clerk may appoint a *corporation* (private organization that is chartered to serve as guardian) such as:
- Arc of NC LIFEguardianship
- Carolina C & F
- CM Services
- Empowering Lives
- GGems, LLC
- Guardianship Services, Inc.
- Hope for the Future
- Monarch NC
- Phoenix Counseling Center

This list is not inclusive of all corporations. This list is all corporations who has a contract with DAAS



DPAG as Guardians

- Disinterested Public Agent Guardian

The Director or Assistant Directors of a county Department of Social Services.

No public agent shall be appointed guardian until diligent efforts have been made to find an appropriate individual or corporation to serve as guardian, but in every instance the clerk shall base the appointment of a guardian or guardians on the best interest of the ward. (1987, c. 550, s. 1; 2005-333, s. 2.)



SESSION Three

- Guardian-ward relationship
- Ethics in Decision-making
- When a resident needs a guardian



Guardian / Ward Relationship

To fulfill the primary responsibility of legally appointed surrogate decision maker, the guardian and/or guardian representative must establish a relationship with the ward.



Guardian / Ward Relationship

- Soon after the appointment visit with ward/family/caregivers.
- Explain the guardian's role, responsibilities and expectations.
- Determine expectations of the ward, ward's family, and caregivers and what they see as their role in the ward's life.
- Determine if ward can express certain choices/preferences, wishes and values.



Guardian / Ward Relationship

- Determine if ward has any advance directives that may be used as evidence of ward's wishes about medical treatment and end-of- life decisions.
- If ward resides in a facility, review records, treatment plans, etc.
- Give the ward and other appropriate individuals copies of letters of appointment and Order on appointment of the guardian.



Guardian / Ward Relationship

- Inform everyone of the guardian's need to be involved in all aspect's of the ward's care.
- Explain procedures family and caregivers should follow in case of emergencies(after-hours numbers, and agency contacts).
- Complete a functional assessment, service/treatment plan for the ward.



Ethical Principles for Decision Making

- Ensure that wards reside in least restrictive environments.
- Use informed consent when making decisions on behalf of wards.
- Limit the guardianship to enable the ward to retain as much control over his own decision making as is reasonable and appropriate.
- Support ward's right to participate in the decision making process.



Ethical Principles for Decision Making

- Allow a ward the opportunity to exercise independent decision making and assume as much responsibility and independence as is reasonable given the ward's abilities, limitations, functioning capability and scope of guardianship.
- Provide competent management of wards' estates.
- Petition the court for restoration of competency when ward appears no longer incompetent.



Guardian as an Advocate

The guardian's job is one of advocating and protecting a ward's right to make choices, even poor choices as long as these choices do not pose a risk of substantial harm to the ward.

- As a guardian one of the most difficult duties is to protect the ward's right to engage in behaviors that might be considered to be risky/controversial.
- Behaviors where there are laws or other restrictions, behaviors society consider to be dangerous or moral or ethically wrong.



Guardian as an Advocate

- Behaviors such as:
 - promiscuity or unprotected sex
 - excessive drinking
 - smoking
 - associating with persons of questionable characters
 - not following prescribed medical regimen.
 - unsupervised outings away from the facility with her boyfriend
 - to have beer on Friday night with some friends
 - more privacy in the facility



Guardian as an Advocate

- How does the guardian protect the ward's right to participate in these controversial behaviors?
- How does the guardian handle society's reactions when they challenge the guardian and/or the ward about the ward's participation in controversial behaviors?
- How does the guardian ensure that the ward will be safe while engaging in these controversial behaviors?



Risky Decisions/Choices/Behaviors

- Society usually applies a double standard to these behaviors when chosen by adults who have been adjudicated incompetent than competent adults.
- In the case of incompetent adults, these behaviors are considered to be poor and uninformed choices.
- In the case of competent adults these behaviors are considered poor, but informed choices.
- Determine why participation in the controversial/risky decisions, choices or behaviors is important to the ward.
- Determine whether the ward can appreciate the issues surrounding the controversial/risky decisions, choices or behaviors.
- Determine whether there are risks or harm involved or associated with the controversial/risky decisions, choices or behaviors.



Key Points

- The greatest responsibility the guardian may have is convincing others that a particular ward has the right to engage in behaviors that may pose a risk to her or him;
- The ward is not likely to be harmed; and
- The ward should be given every opportunity to take as much control over her or his own decision making even to the degree of making mistakes



Key Points

•Guardianship is not a mechanism to restrict wards' rights.

•When restrictions are necessary, they should be used only when acting otherwise would put wards' at risk.

•Guardianship should be used to enhance wards' rights and opportunities for growth.



Rights and Privileges

Wards automatically **lose** some rights and privileges when they are adjudicated incompetent

- Right to bring a civil lawsuit individually of the guardian
- Right to be sued in a civil lawsuit individually of the guardian
- Right to serve as guardian for another individual
- Right to Divorce



Rights and Privileges

Wards **may** retain certain rights and privileges even though they have been adjudicated incompetent

- Right to possess a valid NC Driver's license(Determined by DMV)
- Right to Vote
- Right to Marry (not the right to get a divorce)
- Right to file a legal action seeking restoration of incompetence
- Right to appeal the adjudication of incompetence decision
- Right to exercise those rights within their comprehension and judgment
- Right to participate in all decisions affecting them.



When a resident needs a guardian?

- Are there Advanced directives in place?
- Who is requiring that incompetence be pursued?
- Can this be met in some other way?



When a resident needs a guardian

•Legal Steps

In accordance with G.S. 35A
The Clerk of Court has legal authority to declare incompetence.

The Clerk declares incompetence by 3 components:

- ✓ Cognitive
- ✓ Functional-ADL's & IADL's
- ✓ Status-Mental and Physical Capacity

2 of the 3 components must be met for clerk to declare incompetence.



When a resident needs a Guardian

Anyone can file a petition for adjudication of Incompetence.

If a resident has no family or an individual to act on his/her behalf and is in need of a Guardian:

- The facility designated staff should refer the case to the local Department of Social Services or the county of residence.
- The Department of Social Services should assist in assessing the need for guardianship and if needed prepare the petition for adjudication.



When a resident needs a Guardian(continued)

- The DSS can work with facility staff or facility SW in preparing the petition for adjudication
- The facility can be the petitioner with DSS as the recommended guardian.
- The petitioner should be whomever has the most knowledge of the respondent medical, mental, social and psychological history



When a resident needs a Guardian

Legal Steps

Go to: www.nccourts.org

- Click forms
- Form# AOC-SP-200 Petition for Adjudication of Incompetence
- Complete form, have notarized and file
- Where to File the Petition:
in the county in which the respondent resides or is domiciled or is an inpatient in a treatment facility. If the county of residence or domicile cannot be determined, venue shall be in the county where the respondent is present.



Q&A



THE END

If you have any questions, please contact:

Evelyn Pitchford
Evelyn.Pitchford@dhhs.nc.gov
919-855-3469

© PLEASE HAVE A SAFE TRIP HOME!! ©