

## **Alternatives to Guardianship**

Guardianship is an extreme form of intervention in another person's life because control over personal and/or financial decisions is transferred to someone else for an indefinite, often permanent, period of time. Once established, it can be difficult to revoke. Therefore, guardianship should be used only as a last resort. Less restrictive alternatives that can maintain the person safely in the community should be pursued.

The following are common alternatives to guardianship that should be explored before determining that a guardianship or even a limited guardianship is necessary.

### **Family and Community Supports**

Whether or not someone needs guardianship may depend on the supports the person has in the community and at home. All of us routinely rely on the expertise of others. For example, we rely on car mechanics as well as physicians to help us make and implement decisions. 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. For example, someone with a developmental disability who cannot do the math to balance their budget or bank account may not need a financial guardian if they know they need help in this area, and there is an available and appropriate person to whom the person is willing to turn for assistance.

Home health agencies exist to assist with activities of daily living (i.e. bathing, cooking, and cleaning) and can support someone in the community who retains their ability to make decisions about their care. Medicaid has services called skilled nursing care and home health services that may be available. The services can be purchased from a home health agency.

### **Social Security Representative Payee**

The Social Security Administration (SSA) administers two programs that provide benefits based on disability: Social Security Disability Insurance (SSDI), which is based on prior

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work under Social Security, and Supplemental Security Income (SSI). Under SSI, payments are made on the basis of financial need. SSA pays benefits directly to a beneficiary unless there is evidence that the beneficiary is not able to manage or direct the management of benefit payments in his or her best interest.

If a beneficiary is unable to manage his or her benefit payments, a Representative Payee may be appointed. A Representative Payee is a person or organization the SSA selects to receive and manage benefits on behalf of an incapable or legally incompetent beneficiary. Acceptable medical evidence of a person's inability to handle benefit payments include a signed statement from a physician, psychologist or other qualified medical practitioner who is in a position to provide a meaningful opinion of the person's ability to manage his/her funds. **An individual does not need to be declared incompetent for a Representative Payee to be appointed.** For more information, refer to the SSA website at <http://www.ssa.gov>.

### **Special Needs Trust**

Special Needs Trusts are set up to benefit an individual with a physical 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; however, the person with the disability has no power or authority to manage the trust assets.

The trustee is responsible for helping the beneficiary apply for and receive benefits from available public resources, such as Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), and the appropriate state or local services for the person with a disability. The trust can be drafted so that it lasts for the beneficiary's lifetime.

With a properly drafted Special Needs Trust, the person may receive government benefits and still enjoy the funds provided for in the trust. It is essential that the trust clearly states that it may be used only to provide benefits that are above and beyond the benefits the person receives from any government agency. 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.

## Power of Attorney

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.

In a Power of Attorney, one person gives another person (an attorney-in-fact) the legal authority to act on their behalf. The Power of Attorney either can become effective immediately or at a future time if the person becomes either temporarily or permanently unable to handle their affairs. The person decides how much or how little authority to give the attorney-in-fact. He or she may give the attorney-in-fact the authority to deal only with a specific piece of property or to do one specific act on the person's behalf. Or, the person may give the attorney-in-fact the authority to handle most of their personal and financial matters.

In a Power of Attorney document, a person may name a particular person for the Clerk to consider to be his or her guardian in case a guardianship is considered 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. N.C. Gen. Stat. § 32A-10(b).

***Powers of Attorney and Guardianships:*** If a guardian is appointed after the execution of a Power of Attorney, the attorney-in-fact is accountable to the guardian as well as to the person, and the guardian has the same power to revoke or amend the Power of Attorney that the person would have had if he or she were not mentally incompetent or incapacitated. N.C. Gen. Stat. § 32A-10(a).

There are special types of power of attorney that operate differently from a general power of attorney:

- In a Durable Power of Attorney, the Power of Attorney survives incapacity. This type of Power of Attorney becomes effective when the person becomes incapacitated or mentally incompetent. It can provide that the designated attorney-in-fact be able to sign documents and take actions on behalf of the individual with regards to almost everything: real property transactions; 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. N.C. Gen. Stat. § 32A-8.
- A Springing Power of Attorney empowers the designated person to use the Power of Attorney upon a specific event (usually the person's incapacity) and generally requires certification (e.g. a doctor's affidavit) that the event has taken place.

**TIP:** When a Petition for Incompetency is filed, the guardian *ad litem* and the Clerk of Court should inquire if there are Powers of Attorney already in place. If so, they should evaluate whether such measures are adequate protection for the person such that guardianship is not necessary. The guardian *ad litem* should investigate how these tools are being used on the person's behalf to ensure that the person's finances are being handled appropriately.

## **Advance Health Care Directives**

All individuals have the right to control decisions about their medical care. To make these decisions, a person must be competent and able to communicate. If a person is not competent or cannot communicate, someone else must make these decisions. Advance directives allow an individual to have some control over who is making decisions about their health care should they become incompetent.

North Carolina recognizes three forms of advance directives, which allow an individual to make certain medical decisions in advance. First, an individual may have a living will that allows him or her to authorize the withholding or withdrawal of extraordinary medical treatment and feeding tubes under specified conditions. N.C. Gen. Stat. § 90-321. Second, an individual may have a general health care power of attorney that allows them to appoint a health care agent to make health care decisions when they cannot make them for themselves. N.C. Gen. Stat. § 32A-16(3). Third, an individual may have an advance directive that covers mental health care. This is called an *Advance Instruction for Mental Health Treatment (AIMHT)*. N.C. Gen. Stat. §§ 32A-16(7), 122C-72(1).

- **Health Care Power of Attorney:** A valid Health Care Power of Attorney document must have the individual's notarized signature and two qualified witnesses. The health care agent may be given the same power and authority as the individual to make medical decisions on his or her 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. N.C. Gen. Stat. § 32A-19.

*Health Care Powers of Attorney and Guardianships:* Even if a guardian is appointed, the Health Care Power of Attorney still takes precedence in granting the authority to act as an individual's health care agent. Only an Order of the Clerk of Court can suspend the Health Care Power of Attorney in favor of the guardian. N.C. Gen. Stat. § 35A-1241(a)(3).

- **Advance Instruction for Mental Health Treatment:** An advance instruction for mental health treatment allows an individual to give instructions and preferences regarding mental health treatment. It allows an individual to appoint an agent to make these decisions for them when they are incapable of making the decision themselves. To be valid, this advance instruction must be signed by two qualified

witnesses, personally known to you, who are present when you sign or acknowledge your signature. It must also be acknowledged before a notary public. The form is provided in the North Carolina statutes. N.C. Gen. Stat. § 122C-77.

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Its team of attorneys, advocates, paralegals and support staff provide advocacy and legal services at no charge for people with disabilities across North Carolina to protect them from discrimination on the basis of their disability. All people with disabilities living in North Carolina are eligible to receive assistance from Disability Rights NC.

Contact us for assistance or to request this information in an alternate format.

**Disability Rights North Carolina**

3724 National Drive, Suite 100  
Raleigh, North Carolina 27612  
[www.disabilityrightsncc.org](http://www.disabilityrightsncc.org)

919-856-2195  
877-235-4210 (toll free)  
888-268-5535 (TTY)  
919-856-2244 (fax)