

## Guardianship

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Individuals who do not have the capacity to make and communicate important decisions about their personal and financial affairs may require the assistance of a legally appointed surrogate decision maker (guardian) to help them exercise their rights. The guardian serves as surrogate decision maker and advocate for the individual (the ward) who has been determined incompetent. The guardian must, however, allow the ward the opportunity to participate as fully as possible in all decisions affecting him or her. The guardian is also required to preserve for the ward the opportunity to exercise those rights that are within his or her comprehension and judgment allowing for the same possibility of error as is allowed to persons who are not competent.

The guardian must advocate for and protect the ward's right to make his or her own choices. Wards should be given every opportunity to take as much control over their lives as possible. This means that the guardians must support wards in developing the necessary skills needed to assume responsibility for their own decision making.

In instances where the ward is not capable of making certain decisions for himself or herself, the guardian as the surrogate decision maker should make decisions based on the expressed wishes of the ward or what the ward would decide if the ward were capable of making the decisions. In order to make decisions based on what the ward would decide, the guardian should seek prior information about the ward's value system, wishes, and needs. The guardian may get this information from the ward, or the ward's family, friends, or a type of legal document such as Living Will or Health Care Power of Attorney, indicating what the ward would want. In instances where the ward is not or never was capable of participating in the decision making process or expressing wishes and values, the guardian makes decisions based on what is in the ward's best interest.

The guardian must be sensitive to the ward's needs, values, and wishes. Through this sensitivity the guardian can ensure that the decisions he or she makes with the ward are individualized, consistent with the ward's value system, and are in the ward's best interest.

The guardian may not consent to the sterilization of the ward without a court order.

### **Principles of Guardianship**

1. Guardianship should be used as the alternative of last resort and only when less intrusive alternatives are not appropriate.
2. Guardianship should be sought only when it is clear that it will give the individual a fuller capacity for exercising his or her rights.

3. Guardianship should seek to preserve for the individual the opportunity to exercise those rights that are consistent with his or her abilities.
4. Guardianship should be tailored to meet the “actual” needs of each individual.
5. Guardianship should periodically be reviewed. Alternatives, including limited guardianship and restoration to competency, should be considered.

### **Principles for the Guardian**

1. The guardian owes a loyalty and duty to the “actual” needs of the individual and must act solely for the individual’s benefit.
2. The guardian must support the individual’s right to participate in all decision making consistent with the individual’s ability.
3. The guardian should preserve for the individual the opportunity to exercise those rights that are within his or her comprehension.
4. The guardian must ensure that the individual under the guardianship resides in the least restrictive living arrangement.
5. The guardian should maximize the individual’s self-reliance and independence.
6. The guardian should periodically review the guardianship to determine whether it continues to be appropriate.
7. The guardian should consider alternatives to guardianship, including limited guardianship and restoration competency.
8. The guardian’s interests should never be in conflict with the interests of the ward.

### **Principles for the Ward**

1. The ward should be involved in all decision making consistent with his or her capabilities.
2. The ward has the right to petition the court for periodic reviews of the guardianship.
3. The ward has the right to petition the court for restoration competency.
4. The ward should be able to exercise those rights consistent with his or her capabilities.
5. The ward is entitled to be represented by an attorney or guardian ad litem who represents the expressed interest of the ward in guardianship proceedings.

### **Restoration to Competency**

A person who has been declared incompetent can have his or her guardianship reversed and be restored to competency. The person who has a guardian, the guardian, or any other interested person can ask the clerk of Superior Court to re-open the case. This is done by filing a written motion or petition with the clerk in the county where the guardianship is being administered.

When a person who has been declared incompetent seeks restoration to competency, he or she is entitled to a court hearing before the clerk, and if desired, a jury. The person is also

entitled to be represented by privately retained counsel or, if indigent, the person shall be appointed a guardian ad litem by the clerk to represent him or her at the hearing. In order to be restored to competency, the person must prove that he or she is able to manage his or her own affairs and make and communicate important decisions concerning his or her self, family, and property. When someone is restored to competency, the guardian is dismissed and the person is authorized to manage his or her own affairs and exercise rights as if he or she has never been declared incompetent. Partial restoration of some rights is also an alternative.

*Information Developed by Guardianship Workgroup consisting of public and private human services agencies, N.C. courts and advocates. Funded by Governor's Advocacy Council for Persons with Disabilities (GACPD).*