



**XVIII Airborne Corps and Fort Bragg
Office of the Staff Judge Advocate
Legal Assistance Office**



GUARDIANSHIP IN NORTH CAROLINA

1. WHAT IS GUARDIANSHIP?

Guardianship is the legal empowerment of one person (the guardian) to act on behalf of and make decisions for a minor child or an incompetent adult and handle property or benefits due. The guardian must perform all legal responsibilities and requirements of guardianship.

2. RESPONSIBILITIES OF GUARDIANS

- a. Ensure the loyalty and duty of the guardian is to the “actual” needs of the ward.
- b. Make decisions that ensure the health and well being of the ward.
- c. Involve the person in all decision-making to the extent possible, consistent with the ward’s ability.
- d. Ensure the need for guardianship is periodically reviewed and alternatives, including restoration to competency or limited guardianship, are considered.

3. TYPES OF GUARDIANS

- a. Guardian of the Estate: A guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward.
- b. Guardian of the Person: A guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward. The guardian of the person does not handle any of the ward’s money or property.
- c. General Guardian: A guardian of both the estate and the person making all decisions for the ward

4. HOW TO BECOME THE GUARDIAN OF A MINOR?

North Carolina laws give the court authority to decide who the best choice is for a minor guardian. In North Carolina, the court appoints a guardian after a guardianship petition is filed. The first step in gaining guardianship of a minor is contacting an attorney. An attorney will be extremely helpful in filing appropriate paperwork and assisting in the guardianship process.

Generally, biological parents are the natural guardians of a minor child. A court-appointed legal guardian for a minor child may be necessary where the minor will inherit property or receive a settlement arising from an accident; since minors cannot legally manage their own property. A Guardian of the Estate must be appointed to take charge of the property, protect it, and distribute it in the minor child’s best interest. Living parents must consent to the appointment of the Guardian of the Estate. If the parents’ consent cannot be obtained then a formal hearing must be held before the Clerk of Superior Court.

The Clerk of Superior Court only has jurisdiction to appoint a Guardian of the Person or General Guardian for a minor child that has no living parents or other guardian. The Clerk of Superior Court cannot appoint a Guardian of the Person or General Guardian for a minor child if that minor’s parents are still living, even with the parents’ consent. In the event of living parents, matters must be decided in the Civil District Court. Parents may nominate a legal guardian for their child by making the nomination in a properly drafted Will. While this nomination will be given significant weight by the Clerk, another guardian may be appointed for good cause.

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In situations where minor children are living with others, at the request of the parent(s), then a custody agreement may be needed. An attorney will need to be contacted to assist the parents and person caring for the children to prepare such an agreement.

5. WHAT IS INCOMPETENCY?

An incompetent adult is 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. An incompetent child is a minor who is at least 17 ½ years of age and who meets the criteria of an incompetent adult.

6. HOW TO DECLARE SOMEONE INCOMPETENT?

STEP 1: File Incompetency Petition

Incompetency Hearings are before the Clerk of Superior Court and petitions are filed in the Special Proceedings Division of the Clerk of Superior Court's Office. Any interested person or agency may file a petition to have another person declared incompetent so that a legal guardian may be appointed to make decisions concerning living arrangements, medical care, finances and property. Forms are available online for this purpose and include a Petition and Notice to interested parties. The names and addresses of next of kin and other interested persons will need to be determined prior to the filing of the petition since they must be served notice of the petition. The Petitioner may also move for the appointment of an Interim Guardian for immediate interventions due to an imminent and foreseeable risk to the respondent or the estate of the respondent.

STEP 2: Hearing before Clerk of Superior Court

After filing the petition, a Guardian *ad litem* will be appointed to represent the respondent's best interest in the incompetency proceeding. The petitioner must prepare and present the case for hearing before the Clerk of Superior Court. Subpoena or otherwise secure attendance of witnesses, be prepared to examine and cross-examine witnesses, doctors and medical professionals and present clear, cogent, and convincing evidence through admissible testimony and/or documentary evidence concerning the respondent's current capacity. Failure to properly prepare and process legal documents or meet legal requirements will result in dismissal.

A petitioner has the burden of proof in a court of law to show that the respondent is incompetent, and in need of a guardian. A guardian cannot be appointed until the respondent has been adjudicated by a court to be incompetent. If the petitioner is unable to do these acts according to the Rules of Evidence, an attorney may be needed.

7. HOW TO BECOME A GUARDIAN FOR AN INCOMPETENT?

STEP 1: After a person has been declared incompetent, the Clerk will move to a Guardianship Hearing to determine:

- a. The nature and extent of the needed guardianship
- b. The powers, duties and limitations of the guardianship
- c. The assets, liabilities and needs of the ward
- d. The rights and privileges retained by the ward
- e. Who can most suitably serve as the guardian or guardians of the ward's personal life [guardian of the person], finances [guardian of the estate] or both [general guardian]

STEP 2: Oath (Affirmation)

All guardians must take an oath (or affirmation) in which the guardian swears (or affirms) to faithfully and honestly discharge the duties of the guardian to the best of the guardian's ability and according to the law.

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STEP 3: Bond

When serving as a General Guardian or Guardian of the Estate, the guardian must post a bond, approved by the clerk, to secure the faithful performance of the guardian's duties. There are some limited circumstances in which a bond may not be required, which must be determined by the clerk. The Clerk of Superior Court also has the discretion to require a bond for non-resident guardian of the person.

STEP 4: Orders

The clerk may, with or without a hearing, authorize letters of guardianship to be issued to the named fiduciary (guardian).

STEP 5: Letters

The clerk will issue letters to the person who is appointed guardian. The letters are the guardian's proof of authority to act on behalf of the ward.

8. RESTORATION TO COMPETENCY

STEP 1: Petition

A guardian, ward, or other interested person may file a petition (as a motion in the cause) with the Clerk of Superior Court for partial or full restoration of the ward's competency. The petition must be served on the ward and guardian. There is no AOC form for this proceeding. No petition or proceeding is required for a minor reaching the age of 18.

STEP 2: Hearing

The clerk will schedule and hold a hearing to consider evidence of the ward's competency.

STEP 3: Guardian ad litem or attorney

The ward is entitled to be represented at the hearing by an attorney or the clerk will appoint a guardian ad litem attorney.

STEP 4: Order

a. Full restoration

If the clerk finds by a preponderance of the evidence that the ward is competent, the clerk will enter an order restoring the ward to competency. The ward may then handle his or her own affairs and enter into contracts as if he or she had never been adjudicated incompetent.

b. Alternative to full restoration

If the clerk finds that the ward is able to make some of his own decisions, the clerk may enter an order changing the guardianship to a limited guardianship. A limited guardianship permits the ward to have input into or to make certain decisions, such as housing and medical care, as designated by the clerk.

c. Against restoration

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If the clerk finds there is insufficient evidence to restore the ward's competency, the clerk will enter an order to that effect. The guardian of the ward will continue to serve.

9. TERMINATION OF GUARDIANSHIP

a. Resignation

A guardian who wishes to resign, must petition the Clerk of Superior Court for an order authorizing the resignation. The clerk may approve the resignation upon approval of a final account.

b. Death

Upon the death of a guardian, the clerk will appoint a successor guardian following the same procedure for the initial appointment

c. Mandatory Removal

The clerk must remove a guardian or take other action when the guardian has been adjudged incompetent, has been convicted of a felony, was initially unqualified, fails to renew a bond, fails to file accountings, fails to obey and citation, notice or process served on the guardian or the guardian's process agent, or the clerk finds the guardian to be unsuitable to continue serving.

d. Discretionary Removal

The clerk may remove a guardian or take other action when the clerk determines that the guardian has mismanaged or wasted the ward's money or estate, neglected to provide care for the ward, violated a fiduciary duty or has become insolvent.

e. Emergency Removal

A guardian may be removed without a hearing upon finding reasonable cause to believe an emergency exists that threatens the well being of the ward or the ward's estate.

f. Interim Orders

When a guardian is removed the clerk may make such interim orders as the clerk finds necessary for the protection of the ward or ward's estate.