

The Importance of Limited Guardianship

In the context of guardianship, an important and delicate balance must be struck between protection and overprotection, which may unnecessarily take away a person's ability to make some decisions that affect her daily life.



When determining the appointment of a guardian, it is necessary to customize the guardianship to each person's needs and capabilities.

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. 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. Gen. Stat. § 35A-1201(5).

N.C. Gen. Stat. § 35A-1212(a) permits the Clerk of Court to order a limited guardianship when the "nature and extent of the ward's capacity justifies" this course.

The Advantages of Limited Guardianship

A limited guardianship or alternatives to guardianship should be considered when the needs of an individual can be met by a less restrictive alternative to the appointment of a general guardian.

A limited guardianship avoids a guardianship that is overly broad and restricts rights the individual is capable of exercising fully or to some degree.

Limited guardianships maximize an individual's independence and legal rights, protect health and welfare, and allow for an individual to make simple, human mistakes.



There should be a clear nexus between the capacity of an individual under guardianship and those rights transferred to a court-appointed decision-maker.

Example: An individual with a developmental or intellectual disability or mental illness does not require assistance with decisions such as choosing a caregiver or where she will live, but her disability makes managing complex affairs and making legal/financial decisions difficult.

In such an example, a Clerk of Court may order a limited guardianship that only gives authority for a guardian to make legal and financial decisions, such as giving consent to medical procedures and treatment or allocating property.

Why Seek Limited Guardianship?

While a limited guardianship can facilitate the exercise of some rights, it also promotes personal liberty. Limited guardianship allows the individual to continue to maintain other activities that she has successfully managed in the past, which could include pursuing employment or hobbies, choosing a new living arrangement, or assisting in the development of a personal plan of care. Such guardianships assure that the individual will retain the maximum autonomy.

Is it Difficult to Establish a Limited Guardianship?

Obtaining a limited guardianship does not require any more effort than a general guardianship, and many of the standard court forms will assist in this determination. The **Guardianship Capacity Questionnaire, Form SP-208**, expressly states:

The questionnaire is designed to help all parties in an incompetency proceeding gather information that will assist the Clerk of Court in determining what if any rights, powers and privileges the respondent can retain under guardianship or limited guardianship. The form may also assist the parties in determining whether alternatives to guardianship such as a representative payee for government benefits, a power of attorney, or a special needs trust might solve a problem thereby avoiding the need for incompetency hearing.

When is an Alternative to Guardianship Appropriate?

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 only be used as a last resort.

When a person does not meet the criteria for incompetency, but needs assistance with managing some aspects of living, less restrictive alternatives that can maintain the person safely in the community should be pursued.

Example: Consider an elderly family member who lives in her home but is unable to manage her monthly finances and needs some assistance with handling her medications. A family member or friend may be able to assist in organizing bills, and payment can be automatically drafted from a bank account. A home healthcare worker may assist with any daily medical or personal care needs.

In the above scenario, the individual can be sufficiently supported with in-home services and fiscal arrangements so that her rights are retained to the maximum extent possible. Where additional limitations necessitate greater interventions, a limited guardianship of the estate or the person can also be explored.

What Are Alternatives to Guardianship?

In-home supportive services and a variety of financial and legal instruments, such as a Representative Payee for public benefits, a joint bank account, powers of attorney, special needs trusts, or advance healthcare directives can be the solution for a person needing assistance who retains competency.

Guardians *ad Litem* may be required to first seek a limited guardianship.

"[I]n appropriate cases, the guardian *ad litem* shall consider the possibility of a limited guardianship and shall make recommendations to the clerk concerning the rights, powers, and privileges that the respondent should retain under a limited guardianship."
N.C. Gen. Stat. § 35A-1107 (emphasis added).



3724 National Drive, Suite 100
Raleigh, NC 27612
Phone: 919-856-2195
Toll-Free: 877-235-4210
TTY: 888-268-5535
www.disabilityrightsncc.org

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PROTECTING INDIVIDUAL RIGHTS: Limited Guardianship & Alternatives to Guardianship



Limited guardianships or alternative legal and financial protections can help ensure a full measure of dignity for individuals who need some assistance in managing their lives and affairs.