

Guardianship Handbook

A Guide for Court Appointed Guardians in North Dakota



Published by:

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GUARDIANSHIP

Guardianship is a very serious legal process and involves court action removing rights and responsibilities from an individual and assigning them to a guardian. Guardianship is a court-appointed relationship between a competent adult or entity (**guardian**) and an individual considered unable to handle his or her affairs (**ward**). When a guardian is appointed, the court gives the guardian authority to handle certain legal rights of the ward and removes those rights from the ward. **The guardian must ensure the ward's protection and well-being, and act in the ward's best interests.**

North Dakota Century Code chapter 30.1-28 recognizes that a ward may need the protection of a guardian - either "limited" or "full authority." Each guardianship is tailored to meet the needs of the ward.

Now that you have been appointed as a guardian by the court, you have certain responsibilities as a decision maker for elderly people and people with disabilities.

Types of Guardians

A **general guardian** is responsible for decisions in ALL aspects of the ward's life. The guardian assures that the ward has a place to live, food to eat, proper clothing, and other necessities, as well as medical treatment, schooling, vocational opportunities, and other needed services. The guardian may oversee social security and medical benefits, but is not required to have the ward live with him or her, or assume personal financial responsibility.

A **limited guardian** has the authority to make decisions ONLY in specific areas of the ward's life, such as financial or residential. The court's *Findings of Fact and Orders* and/or *Letters of Appointment* will identify these areas.

An **emergency or temporary guardian** may be appointed in situations where immediate action is required to prevent harm to the ward. *An emergency guardianship CANNOT be in effect longer than 90 days and has ONLY the authority identified by the court at the time of the appointment.* The court may grant an extension beyond the 90-day limit if necessary.

A **testamentary guardian** is established when a guardian spouse or guardian parent of a person determined to be incapacitated appoints, by will, a successor guardian for that person.

A **conservator** may be appointed to manage the estate and finances of a ward. This is usually done when a ward has significant assets to manage. The appointment is a separate legal process and does not involve making decisions regarding the ward's personal life. A guardian may not be needed if a conservator has been appointed, and the court may request a conservator or guardian be bonded.

Establishing guardianship is a court procedure that alters the legal status of the ward, removing certain rights to control his or her own life. It is a procedure that should not

be approached lightly. It is intended to be used only as needed to promote and protect the well-being of the individual. The legal concept of a guardian exists for one purpose: enhancing the life experience of the ward to the fullest extent possible.

A guardian is required to act in and represent the best interests of a ward, and to protect the ward and his or her rights. A guardian must ensure that services are provided in the least restrictive way possible and are tailored to the needs of the ward.

Rights of the Ward

North Dakota state law requires a guardian to involve the ward in all decisions to the fullest extent possible. The court will clearly define the limits of the guardian's authority. However, unless first approved by order of the court, the guardian MAY NOT approve or authorize the sterilization of a ward; approve or authorize psycho-surgery or experimental treatment; admit a ward to a mental health facility or a state institution for longer than 45 days; or authorize or approve an abortion.

Unless specifically limited by order of the court, a ward retains: the right to vote; the right to seek to change marital status; the right to obtain or retain a motor vehicle license; and the right to testify in any judicial or administrative proceedings.

Alternatives to Guardianships

- **North Dakota Informed Healthcare Consent Law** – (Persons Authorized to Provide Informed Consent for Health Care if an Individual is Unable to Consent.) A hospital or doctor is required to provide treatment in life and death situations even if informed consent cannot be obtained from an individual. North Dakota state law has a section that outlines the process for obtaining informed consent for health care for a person who is unable to provide informed consent or if informed consent is unable to be obtained from a person authorized to provide consent for the patient. The section of the law lists in order of priority who may provide consent in such situations. (Please refer to N.D.C.C. § 23-12-13 for specific information.)
- **Health Care Directives** – Every competent adult has the right and responsibility to make decisions relating to his or her own health care, including the decision to have health care provided, withheld, or withdrawn. The individual retains control over his or her own health care during periods of incapacity through the implementation of the health care directives and the designation of an individual (health care agent) to make health care decisions on his or her behalf. It is essential that the individual completely trust the health care agent and communicate his or her wishes clearly to the agent. (Please refer to Advance Health Care Planning Resource Guide for N.D.)
- **Mental Health Advance Directive or Psychiatric Advance Directive** – Through this directive, an individual may appoint an alternate decision-maker, or agent, to make treatment decisions for the individual if he or she becomes unable to express choices on his or her own behalf. (Please refer to N.D. Mental Health Advance Directive.)

- **Representative Payee** – This is a person or agency that is given the responsibility of managing Supplemental Security Income, Social Security Disability Income, veterans benefits, or other entitlements for an individual who is not able to adequately handle these funds. The *payee* takes charge of the funds and is responsible to see that they are spent on the care, treatment, and needs of the ward. A *payee* must keep records of transactions and expenditures, and file regular reports to the Social Security Administration. The appointment process involves some specific steps that are outlined by the respective funding source.
- **Power of Attorney** – This gives designated party(ies) the authority to act on behalf of an individual if the need arises. This is not a court process, and a power of attorney can be established easily and inexpensively. It can be revoked by the individual at any time. The assignment of the *power of attorney* assumes the person to be competent, but has few safeguards and lacks accountability because there are no reporting requirements or no court oversight.
- **Co-Signers on Bank Accounts** – This is an alternative to power of attorney or representative and protective payees. There are no safeguards or protection for the vulnerable person.
- **Alternative Resource Plan** – This means a plan that provides an alternative to guardianship, using available support services and arrangements, which are acceptable to the alleged incapacitated person. The plan may include the use of service providers such as visiting nurses, homemakers, home health aides, personal care attendants, adult day care, and multi-purpose senior citizen centers; home and community-based care, county social services, and developmental disability services; powers of attorney, representative and protective payees; and licensed congregate care facilities. Questions of informed consent and vulnerability must be considered and addressed, which may involve capacity issues.

Questions Frequently Asked About Guardianship

How do I go about establishing a guardianship?

There is a legal procedure that must be followed to establish a guardianship. If it has been determined that guardianship is the most appropriate solution, the first step is to contact an attorney. An attorney will help you file a petition for guardianship, and a court hearing will be set. Notices of the petition for guardianship and date of the hearing will be given to all interested parties, including the proposed ward. At the hearing, the court decides if the proposed ward needs a guardian, the level of guardianship (limited or general), and who will be the guardian.

What happens before the court hearing?

The attorney representing the person seeking the guardianship (the petitioner) will continue to gather information and evidence that supports the need for establishing guardianship. The court will appoint a **guardian ad litem**, a **visitor**, and a **physician or psychologist** to

evaluate the need for and appropriateness of establishing a guardianship for the proposed ward.

- The **guardian ad litem** is an attorney who represents the best interests of the proposed ward. He or she visits with the proposed ward and evaluates all of the available information on the case. He or she then files a report and recommendations with the court. The guardian ad litem makes recommendations based on what he or she feels is in the best interests of the proposed ward. The proposed ward has the legal right to retain an attorney to represent his or her wishes and desires.
- The **visitor** is usually a licensed social worker or registered nurse professional who visits with the proposed ward, his or her current (future, if applicable) residence, and the proposed guardian. The visitor may meet with others who are involved in the case and examine information related to the case. The visitor then files a report and recommendations with the court.
- The **physician or psychologist** examines or evaluates the proposed ward. His or her recommendations and report are then filed with the court.

What happens at the hearing?

All interested parties could and should attend the hearing. The proposed ward must attend unless very good and clear reasons for his or her absence are provided to the court prior to the hearing. (The court may hold the hearing at an alternative location such as a nursing home or hospital to ensure the proposed ward's attendance.)

- The **attorney** representing the petitioner presents evidence to establish that the proposed ward is not capable of taking care of himself or herself in all or certain areas of his or her life.
- The court accepts and carefully considers the reports and recommendations filed by the **visitor, guardian ad litem, and physician or psychologist.**
- Anyone involved in the case may be called to testify to prove or disprove the need to establish guardianship.
- Once the evidence has been presented and testimony has been given, the court decides if there is clear and convincing evidence that the proposed ward is incapacitated. If so, the court appoints a guardian to fulfill the assigned duties properly.

How do I know what authority I'll have as a guardian?

The court will issue "Findings of Fact and Orders Appointing and Letters of Appointment" that specify the areas where the guardian does and does not have authority and responsibility. After the guardianship orders and letters have been signed and filed with the court, the guardianship becomes official.

Guardianship Decision Making Guidelines

- When possible and appropriate, the guardian **should attempt to involve the ward** (to the extent possible), service providers and other appropriate individuals to evaluate the options, the possible implications and effects (positive and negative) and alternatives. Ultimately, the authority and responsibility for a decision rests with the guardian.
- If the ward is capable of expressing his or her opinions or desires and that opinion or desire is within the limits of his or her safety and welfare, the guardian **should give weight and consideration to these wishes**. When possible and appropriate, the guardian will make the decision in accordance with the stated desires or opinions of the ward.

Questions a guardian should ask to help clarify issues when confronting a decision for a ward:

1. Is this decision within the limits of the guardian's authority?
2. What, if any, are the alternatives?
3. What is the risk to the ward if the action is taken?
4. What is the risk to the ward if no action is taken?
5. Is it in the best interests of the ward?
6. Is it the least restrictive or intrusive action or treatment available?
7. What are the ward's feelings about it, and what are his or her preferences?
8. Is the action or treatment congruent with the values and beliefs of the ward?
9. What are the possible outcomes or consequences of each of the proposed actions or treatment options?

Two Models of Surrogate Decision Making:

1. **Substituted Judgment:** What would the ward do if he or she was able to make this decision and the decision would not cause substantial harm? There are two components involved to utilize this model: must know the ward; and must involve the ward.
2. **Best Interest:** This model is used when:
 - The guardian cannot ascertain what the ward would do.
 - The ward never had capacity or capability of being involved in the process.

- The model requires the guardian to consider the least restrictive and most normalizing course of action possible to provide for the needs of the ward.
- The ward's current and previously expressed wishes are taken into consideration.

Are there any resources available to explain the responsibilities and expectations of being a guardian?

The Aging Services Division of the North Dakota Department of Human Services developed the "North Dakota Guardianship Standards of Practice for Adults." The standards of practice address issues such as the guardian's relationship with the ward, informed consent, decision-making, least restrictive alternative, self-determination, confidentiality, duties of the guardian, initial and ongoing responsibilities, decision-making about medical treatment, financial and estate responsibilities, and more. The standards of practice can be found on the following website: www.gand.org.

Does it cost anything to set up a guardianship?

In order to protect the freedoms and rights of a proposed ward, the procedure to establish a guardianship is detailed, specific, and requires the services of a number of professionals. The cost of setting up a guardianship includes attorney's fees, court costs, and fees for the guardian ad litem, visitor, and the physician or psychologist.

The costs in establishing a guardianship vary, depending on the attorney fees associated with the complexity of the case or from family conflicts. Fees typically run from \$1,500 on up, and include attorney fees, guardian ad litem fees, court visitor fees, physician fees, and court fees. The costs are the responsibility of the petitioner. Often however, the petitioning attorney asks the court to order the fees associated with the proceedings to be paid from the ward's estate. In some cases, certain fees can be paid by an outside agency or may even be waived.

As a guardian, will I be financially responsible for my ward?

You may have the authority to oversee and handle your ward's funds. You **MUST** make sure that your ward's money is spent to cover his or her needs such as rent, clothing, and other bills. Unless you agree to take on more financial responsibility for your ward or are clearly negligent in handling your ward's funds, you have no personal financial responsibility. **YOU ABSOLUTELY MAY NOT COMMINGLE** your personal funds with the ward's funds.

Will my ward have to live with me?

You need to make arrangements for the care of your ward; you are not required to have your ward move into your home. You are responsible for seeing to the well-being and best interest of your ward. If your ward lives with you, charges for room and board must be approved by the court.

As a guardian, do I have to make reports to the court?

Guardians are required to file an annual report with the court, but the court has the discretion to request one more often. The reporting requirements are outlined in “The Findings of Fact and Order Appointing” court documents. The report forms are available from the clerk of district court or online at:

<http://www.ndcourts.gov/court/forms/guard/forms.htm>.

The report consists of information about the physical and emotional condition of your ward, the services that the ward receives, any problems that have occurred since the last report, and what the guardian has done for the ward. Financial accountings are required if you are handling the ward’s finances. The court may require the filing of a beginning inventory and may also request a bond. Bonding requirements vary depending on the size of the estate that is being managed by the Guardian and/or Conservator. As a guardian, your primary responsibility is to ensure that your ward is receiving necessary and quality services. There are agencies and organizations that can provide assistance in obtaining these services.

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| Protection & Advocacy Project www.ndpanda.org | Legal Services of North Dakota www.legalassist.org |
| North Dakota Dept. of Human Services Aging Services Division http://www.nd.gov/dhs/services/adultsaging/index.html | Mental Health America of North Dakota www.mhand.org |
| AARP www.aarp.org/nd | County Social Services www.nd.gov/dhs/locations/countysocialserv |
| State Long-Term Care Ombudsman Program www.nd.gov/dhs/services/adultsaging/ombudsman | The Guardianship Association www.gand.org |
| Guardian and Protective Services, Inc. www.gapsinc.org | Catholic Charities www.catholiccharitiesnd.org |

The **North Dakota Aging and Disability Resource LINK** can assist you in locating information and resources for your ward.

www.carechoice.nd.gov,

Toll Free: **1-800-451-8693**

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