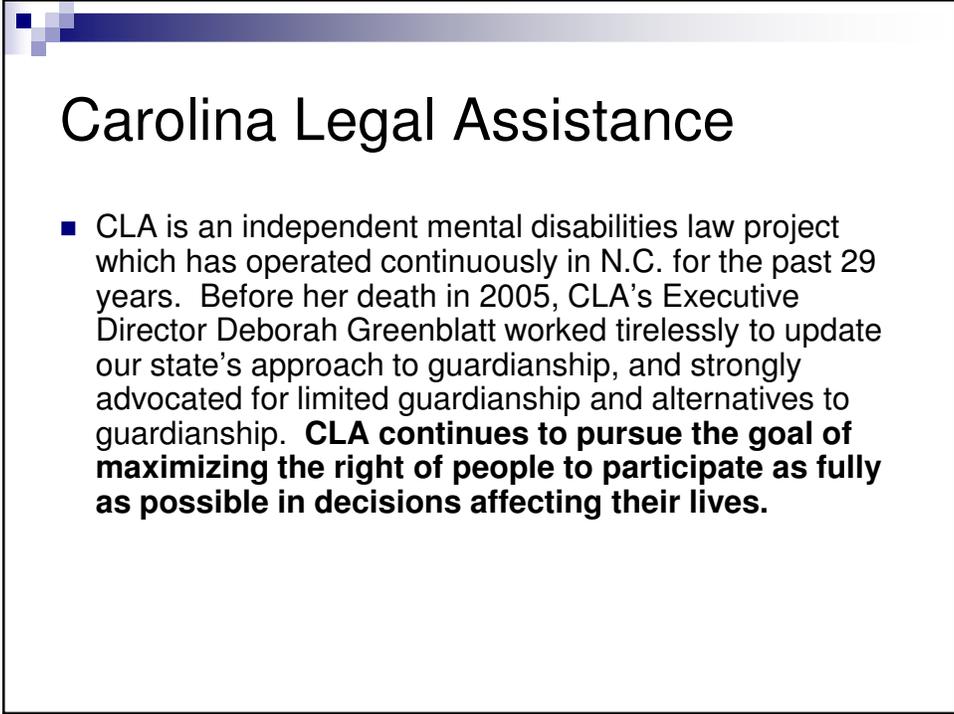


INCOMPETENCY AND THE LAW IN NORTH CAROLINA

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Carolina Legal Assistance

- CLA is an independent mental disabilities law project which has operated continuously in N.C. for the past 29 years. Before her death in 2005, CLA's Executive Director Deborah Greenblatt worked tirelessly to update our state's approach to guardianship, and strongly advocated for limited guardianship and alternatives to guardianship. **CLA continues to pursue the goal of maximizing the right of people to participate as fully as possible in decisions affecting their lives.**



Guardianship in N.C. in 2007

- Over the last several decades the treatment of people with disabilities has matured from a paternalistic one to one where self-determination is promoted.
- Legislative changes in 2003 make explicit the requirement to consider the functional capacity of potential wards, and to consider the appropriateness of limited guardianships.



Guardianship is an extreme deprivation of civil rights.

- A person is deprived of control of very personal matters – medical care, where and who they are to live with, how to spend their dollars, what becomes of their property, when they will travel and who they will see.

Our law favors moderation.

- Guardianship should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his or her rights. G.S. 35A-1201(4).
- The guardianship should be limited when possible, seeking to preserve the opportunity for the person to exercise all those rights that are within his or her comprehension and judgment. G.S. 35A-1201(5).
- The guardianship should allow for the possibility of error to the same degree as is allowed to competent persons; and permit the person to participate as fully as possible in all decision that affect him or her. G.S. 25A-1201(5).

Before a guardian is appointed, the person must be found to be “incompetent.”

- A functional approach is favored. A person is incompetent when they *lack sufficient capacity to manage his or her own affairs OR to make or communicate important decisions concerning their person, family, or property.* G.S. 35A-1101(7).

The law provides little guidance -

- Eccentricity, wastefulness, poor judgment, stubbornness, may coexist with the ability to manage one's property. *Hagins v. Redevelopment Comm'n.* 275 N.C. 90 (1969).
- When a person is "incapable of transacting the ordinary business involved in taking care of his property, if he is incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, his property and estate, he is incompetent to manage his affairs." *Id.*

Available Tools:

- You may determine that a **Multidisciplinary evaluation** is needed determine if guardianship if necessary. "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may include current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational

- The **Guardian ad litem's** responsibilities were increased in the 2003 amendment to the statute to require that they meet with the Respondent, evaluate whether a limited guardianship is appropriate. G.S. 35A-1107(b). A "good" Guardian ad litem will explore alternatives to full guardianship and report their findings to you.
- A helpful tool is the "Guardianship Capacity Assessment Chart."

Tips to Optimize Capacity

- Rebecca C. Morgan, in her article *Clients with Diminished Capacity*, 16 Journal of the American Academy of Matrimonial Lawyers 463 (2000), suggests ways a lawyer might optimize capacity and stresses that capacity deserves to be judged under the best circumstances possible. She suggests adjusting the interview environment to enhance communication. Speak slowly in a quiet well lit area. Be willing to spend extra time explaining the nature and consequences of options. Resist the temptation to equate the speed of the client's ability to process information with a level of capacity – the speed of cognitive processing may not be what you are accustomed to, but given more time, clients may be able to understand the nature and consequences of options. Meet a client more than once to acquire a truer sense of the client's decision making capacity. As a client's comfort level increases and there is greater confidence and trust in the attorney, the client's ability to function optimally is enhanced. Repeated meetings also allow the attorney to observe the client at different times when additional factors impacting capacity can be evaluated such as time of day, length of meeting, etc.

LIMITED GUARDIANSHIP

- In some cases, incapacity is not an all-or-nothing matter. An individual may have sufficient capacity to make certain types of decisions but lack the capacity to make other types of decision, or have the capacity to manage some of his or her affairs, but lack sufficient capacity to manage more complex matters.

- Our law encourages the Clerk to fashion a guardianship that is individualized to meet the functional needs of the Respondent.
 - G.S. 35A-1107 (b) (GAL must consider a limited guardianship)
 - G.S. 35A-1111 (MDE helps in developing the appropriate “guardianship plan”)
 - G.S. 35A-1112 (d) (clerk’s order may include nature and extent of ward’s incompetency)

- G.S. 35A-1201(5) (guardianship should seek to preserve the opportunity to exercise those rights that are within the ward's comprehension and judgment...a ward should be permitted to participate as fully as possible in all decisions that will affect him)
- G.S. 35A-1212 (a) ("If the clerk determines that the nature and extent of the ward's capacity justifies ordering a limited guardianship, the clerk may do so.")
- G.S. 35A-1215(b) (Clerk to include the rights the ward retains in a limited guardianship)

Benefits of a Limited Guardianship

- Less intrusive
- Promotes self-determination

RESTORATION OF COMPETENCY – G.S. 35A-1130

- Competency is a changing status. People can recover from mental illness or substance abuse, and skills can be acquired lessening the need for guardianship.
- Our statutes provide flexibility and allow a ward, guardian, or other interested person to motion for restoration of competency.

Notes about restoration procedure: Two Routes

- Motion in the Cause, OR
- Motion for Restoration of Competency
 - Guardian ad litem appointed
 - Notice and hearing with right to a 6 person jury trial
 - If the Clerk or jury finds by the preponderance of the evidence that the ward is competent, he or she shall be restored to competency
 - Right of appeal to Superior Court

Rights lost by an adjudication of incompetency:

- All rights of self-determination about where to live, medical treatment, what to purchase, etc.
- The right to serve on a jury
- The right to independently bring a lawsuit
- The right to get a driver's license
- The right to associate freely
- The right to avoid involuntary admission to a mental institution by the same standard as other people

Rights retained by a person adjudicated incompetent:

- Right to appeal an adjudication of incompetence decision.
- Right to file a legal action seeking restoration to competence.
- Right to make decisions within their comprehension and judgment.
- Right to participate in all decisions affecting them.

Right to Marry.

In *Geitner by and through First National Bank v. Townsend and Geitner*, 312 S.E.2d 236, review den. 315 S.E. 2d 702 (1984), the North Carolina Court of Appeals held that a prior adjudication of incompetency is not conclusive on the issue of later capacity to marry and does not bar a party from entering a contract to marry. The prior adjudication does not even shift the burden of proof in an annulment action. Id.

Right to Vote

- Notwithstanding the contrary implication of N.C. Gen. Stat. § 122C-58, an Attorney General's Opinion reasons that a person who has been adjudicated incompetent can register to vote pursuant to the state constitution's grant of universal suffrage. 43:1 N.C. Attorney General Reports 85, 85-87 (1973), citing N.C. Constitution Art. VI, Sections 1 and 2.

Right to be a Witness.

Although adjudicated incompetent, a person's right to be a witness in court still depends on whether the person understands the obligation of oath or affirmation and has sufficient capacity to understand and relate facts which will assist the jury in reaching its decision. A ruling on a person's competency to be a witness is within the trial court's discretion. *State v. McNeely*, 333 S.E.2d 738, 740, 314 N.C. 451 (1985); see also *State v. Benton*, 174 S.E.2d 793, 799, 276 N.C. 641, 644 (N.C. 1970) (person with delusions but who remembered some critical facts and indicated he knew meaning of oath permitted to testify).

Right to Make a Will.

In a will contest, the fact that the testator was under guardianship when the will was made raises a presumption that testamentary capacity was lacking. Yet, the presumption is rebuttable because testamentary capacity requires less than general capacity. A person has testamentary capacity when they understand the "natural objects of his or her bounty, understands the kind, nature and extent of his property; knows the manner in which he desires his act to take effect; and realizes the effect his act will have upon his estate." *Matter of Will of Maynard*, 64 N.C. App. 211, 307 S.E.2d 416, 426-430 (N.C. App. 1983), *rev. den.* 310 N.C. 477, 312 S.E.2d 885 (1983).

(Sometimes) the Privilege to Drive:

The Clerk sends a certified copy of the adjudication order to DMV where ward has the burden of rebutting a presumption to revoke. If DMV acts to revoke, the person may request a hearing in writing and shall retain their license until after the hearing. N.C.G.S. §20-17.1

Right to contract:

The fact that a person has been adjudicated incompetent raises a presumption that he or she lacks sufficient capacity to enter into a valid contract. This presumption, however, may be rebutted by evidence that the individual had sufficient capacity to understand the nature and consequences of his or her actions at the time he or she entered into a contract. *Medical College of Virginia v. Maynard*, 236 N.C. 506, 73 S.E.2d 315 (1952). Thus, contracts between an incompetent adult and another person are generally considered voidable, not void. An incompetent adult is responsible for the cost of necessary goods or services that are provided by others. *In re Dunn*, 239 N.C. 378, 79 S.E.2d 921 (1954).

ALTERNATIVES

- 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. There are times when a person might qualify for a guardian, but can be served safely in a less restrictive way.

Alternatives if the person is competent OR incompetent.

- Social Security Representative Payee: the Social Security Administration selects a person or organization to receive and manage benefits on behalf of an incapable beneficiary.
- Establishment of a special bank account. A variety of arrangements can be made. Examples include a joint bank accounts which require two signatures for all or some withdrawals and direct deposit options. Arrangements can also be made with most banks for a "permanent withdrawal order," which means a certain amount of money will be sent by the bank each month to a specified party -- for example, to the landlord, or to the mentally disabled person for pocket money.

- Special Needs Trust: a trust designed to hold supplemental funds for the benefit of a person with disabilities. There are stringent requirements and the trust must be drafted by an attorney. A trustee will handle the trust and care for the person's money.
- Home Health Care: Home health agencies can assist with activities of daily living such as bathing, dressing, cooking and cleaning and can support someone in the community if the person can make decisions about their care.

Supports

Whether or not someone needs guardianship may depend on the supports the person has in the community and at home. None of us is competent in all things and we routinely rely on the expertise of 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 client is willing to turn for assistance .

Mental Illness and Medication

Frequently, guardianship is sought for a person with mental illness over the issue of medication, and the person's failure to maintain or follow a prescribed medication course. If this is the case, explore the reasons for the medication failure which could include disagreeable side effects, etc. This is an area that also lends itself to limited guardianship and an inquiry into the question of truly informed consent by the person and adequate medical treatment.

Alternatives to use ONLY if the person is competent.

- "Competent means the person must understand the powers that they are granting to the Agent and the implications of having someone else make decisions for them.
- Sometimes a person's capacity fluctuates depending on time of day, medication, and surroundings. If the person has period of mental alertness and can understand what they are signing, a Durable Power of Attorney and Health Care Power of Attorney may eliminate the need for guardianship.

POWER OF ATTORNEY

- In a POA, the person grants authority to the attorney-in-fact to handle some or all of the person's affairs. The POA may grant authority regarding one transaction or the authority to handle most of the person's personal and financial matters.
- The POA can:
 - be effective immediately, or
 - at a point in the future, if a person becomes unable to handle their affairs, either temporarily or permanently, called a *Springing POA*, or
 - the POA may be made *Durable*, meaning it survives incapacity.

HEALTH CARE POWER OF ATTORNEY

- Health Care Power of Attorney: allows the person designated to make health care decision in the event of incapacity.
 - Must be signed before 2 witnesses and be notarized.
 - Includes the power to consent to the doctor giving or withholding medical treatment, including life-sustaining procedures.
 - The appointment of a guardian terminates a health care power of attorney executed by the ward.

ADVANCE INSTRUCTION FOR MENTAL HEALTH TREATMENT

- Advance Instruction for Mental Health Treatment – allows a person to give instructions and preferences regarding mental health treatment, and to appoint an agent to make these decisions if they become incompetent.
- Must be signed before two witnesses, but need not be notarized.

LIVING WILL

A living will is a declaration that you desire to die a natural death, that you do not want extraordinary medical treatment or artificial nutrition or hydration used to keep you alive if there is no reasonable hope of recovery. A living will gives your doctor permission to withhold or withdraw life support systems under certain conditions.

- You must be at least 18 years old and of sound mind when you sign it.

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- Your living will must contain specific statements as follows:
 - You must declare that you do not want your doctor to use extraordinary means or artificial nutrition or hydration to keep you alive if your condition is terminal and incurable or if you are in a persistent vegetative state (depending upon your instructions).
 - You must state that you know your living will allows your doctor to withhold or stop extraordinary medical treatment or artificial nutrition or hydration (depending upon your instructions)
 - You must sign your living will in the presence of two qualified witnesses and either a notary public or the Clerk of superior court.
 - You may revoke your living will by communicating this desire to your doctor.