

Less Restrictive Alternatives to Guardianship and other Considerations

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Threshold question for every case: Is the restriction of constitutionally-protected liberty *really* the last, best alternative?

--National and state trend is toward less-restrictive alternatives to guardianship

--what other, less restrictive or non-judicial options may there be?

--what community resource and partners are available to help provide supportive services and a supportive environment?

Different scenarios may present different non-guardianship opportunities. E.g. Cases involving neurocognitive decline may offer fewer non-guardianship solutions than an able-bodied young person with intellectual disabilities.

NCGS 35A SUBCHAPTER II. GUARDIAN AND WARD.

Article 4.

Purpose and Scope; Jurisdiction; Venue.

§ 35A-1201. Purpose.

(a) The General Assembly of North Carolina recognizes that:

(1) Some minors and incompetent persons, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.

(2) Incompetent persons who are not able to act effectively on their own behalf have a right to a qualified, responsible guardian.

(3) **The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.**

(4) Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.

(5) 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.

(6) Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.

Some Non-Guardianship Options:

1. **Bank Accounts:** Consider Joint accounts or signature rights, with or without survivorship option.

§ 54C-165. Joint accounts.

(a) Any two or more persons may open or hold a withdrawable account or accounts.

The withdrawable account and any balance of the account is held by them as joint tenants, with or without right of survivorship, as the contract shall provide.

§ 54C-167. Personal agency accounts.

(a) A person may open a personal agency account by written contract containing a

statement that it is executed under this section. A personal agency account may be a

checking account, savings account, time deposit, or any other type of withdrawable account

or certificate. The written contract shall name an agent who shall have authority to act on

behalf of the depositor in regard to the account as set out in this subsection. The agent shall

have the authority to:

(1) Make, sign, or execute checks drawn on the account or otherwise make withdrawals from the account;

(2) Endorse checks made payable to the principal for deposit only into the account;

and

(3) Deposit cash or negotiable instruments, including instruments endorsed by the principal, into the account.

2. Simple Estate Planning and Advance Directive Documents. Does the individual possess requisite capacity to execute surrogate decision-making documents in lieu of a court-appointed Guardian? These should be customized to meet the intellectual and cognitive capacity of the individual. ALWAYS check whether these documents exist before assuming the need for surrogate decision-makers. Check Register of Deeds office for recorded DPOAs, ask family and medical providers whether there already is a HCPOA or Living Will in effect. Be careful using form documents that may be too difficult to understand or that include actions beyond the scope of what is reasonably necessary or likely to be necessary.

a. **Durable Powers of Attorney (NCGS 32C);** see statutory short form.

DPOA may be an effective alternative to GOE. Agent can assist privately and effectively with financial needs of the Principal, potentially avoiding a costly and time-consuming GOE. Does the individual possess requisite capacity to execute a basic DPOA? DPOA should be customized or limited to comprehension level of the Principal. Per NCGS 32C-2-208(12) can include power to “Establish, modify, and terminate an ABLE account as defined under section 529A of the Internal Revenue Code with any State or financial institution selected by the agent and have the same authority over the ABLE account as the agent has with regard to any other account with a bank or other financial institution.”

b. **Health Care Power of Attorney (NCGS §32A, Article 3 et seq.).**

Consider whether this, in tandem with a HIPAA Release, may be a less restrictive alternative to a Guardian of the Person.

§ 32A-15. General purpose of this Article.

(a) The General Assembly recognizes as a matter of public policy the **fundamental right of an individual to control the decisions relating to his or her medical care**, and that this right may be exercised on behalf of the individual by an agent chosen by the individual.

(b) The purpose of this Article is to establish an additional, nonexclusive method for an individual to exercise his or her right to give, withhold, or withdraw consent to medical treatment, including mental health treatment, **when the individual lacks sufficient understanding or capacity to make or communicate health care decisions**. Because a HCPOA only is effective when an individual lacks capacity, a general HIPAA Release may be useful to allow an individual to give informed consent to another to speak to medical providers and to receive medical records.

c. Living Will (Right to a Natural Death). NCGS §90-32 et seq.

3. Consider Temporary Judicial Action: e.g. is an action under NCGS 108A-106 an option for disabled adults who are subject to abuse, neglect (including self-neglect) or exploitation. Once this action runs its course (up to 120 days), is it necessary to file a guardianship petition for that disabled adult? It should not be automatic. An action pursuant to NCGS 108A-106 may allow for placement in a suitable facility, re-direct certain monies to the facility, apply for important government benefits like Medicaid or in some cases, establish a person or agency to make end-of-life decision-making.

4. ABLE Accounts: Achieving a Better Life Experience. Can be used even for those receiving means-tested government benefits like SSI or Medicaid. Consider whether this product, in tandem with a co-signatory, can be used in lieu of a Guardianship of the Estate.

Achieving a Better Life Experience (ABLE) accounts are designed for those with the occurrence of disability before the age of 26*. The NC ABLE Program was launched in 2017 and allows eligible individuals the opportunity to save and fund a variety of to save and fund a variety of qualified disability expenses while maintaining Medicaid, SSI and other public supports.

NC ABLE accounts can be opened by an eligible individual, who is the account owner, or by the account owner's parent, guardian, or person acting under a power of attorney.

NC ABLE accounts are open to eligible individuals throughout the US. The account can be funded by the account owner, family, or friends, and in some cases, funds can also be transferred to an NC ABLE account from a 529 college savings account.

It is important to know that account owners can contribute up to \$17,000 per year to an NC ABLE account, and individuals that qualify for the NC ABLE Program have a greater annual allowance for contributions to their account with the ABLE-to-Work provision².

Overseen by the Department of State Treasurer and the Board of Trustees, NC ABLE currently has over 1,800 account holders with more than \$17.5 million in assets and an average account balance of over \$9,600.

Source attribution: <https://ncable.nc.gov/>

*Note that under the Secure Act 2.0, passed in December 2022, the age of disability onset was increased to age 46.

5. Consider the new(ish) Single Transaction Guardianship option: NCGS

§35A-1121. For an excellent explanation, review the article by Attorney Catherine Wilson, published in the NCGA Estate Planning and Fiduciary Law Section newsletter, form December 2021. See also, More on Single Protective Arrangements and Single Transactions under G.S. Chapter 35A by Meredith Smith and Timothy Heinle.

Before proceeding, consider whether your Clerk will require a bond, how you might avoid the need for a bond and be prepared to get creative and detailed about making these work effectively.

6. Rethinking Guardianship Work Group: Broad coalition of NC elder care and disability rights stakeholders, court personnel and attorneys who are working to promote less restrictive guardianship alternatives, including important changes to NCGS §35A. Stay tuned in 2023..... 😊

