

Quick Reference: Alternatives to Guardianship

Every older adult who lacks capacity does not need a guardian. Guardianship removes fundamental rights, inhibits autonomy, and is indefinite and difficult to terminate, particularly for older adults with a condition like dementia that will continue to decline over time. There are legal and practical alternatives to guardianship of the person and of the estate that empower surrogate decision makers to act on an older adult's behalf (guardianship is discussed in detail in Chapter 4 of the *Legal Framework for North Carolina's Elder Protection System* (the *Legal Framework*)). The most effective of these alternatives may be powers of attorney, which require advance planning and are discussed in detail in Chapter 5 of the *Legal Framework*. But, even without advance planning, there are supports that may be put in place for an older adult after a cognitive decline occurs that may prevent or, at the very least, delay the need for a guardian.

I. HEALTH AND PERSONAL CARE DECISION-MAKING ALTERNATIVES TO A GUARDIANSHIP OF THE PERSON (GOP)

A. HEALTH CARE POWER OF ATTORNEY (HEALTH CARE POA)

A health care POA is a written instrument, signed in the presence of two qualified witnesses and acknowledged before a notary public, pursuant to which an attorney-in-fact or agent is appointed to act for an older adult in matters relating to health care.¹ This may include the power to authorize withholding or discontinuing life-prolonging measures and to authorize providing or withholding mental health treatment.² Any person who is 18 years of age or older and has an understanding and capacity to make and communicate health care decisions may make a health care POA.³ If a court appoints a guardian of the person or general guardian for an older adult, the agent's authority under a health care POA continues until suspended by court order for good cause.⁴ The order suspending the health care POA should direct whether the guardian must act consistently with the health care POA and whether and to what extent the guardian may deviate from it.⁵ A form health care POA is set forth in G.S. 32A-25.1.

1. Chapter 32A, Section 16(3), of the North Carolina General Statutes (hereinafter G.S.).

2. G.S. 32A-19(a).

3. G.S. 32A-17.

4. G.S. 32A-22(a).

5. *Id.*

B. LIVING WILL

A living will is a type of health care advanced directive that allows an individual to give future instructions to health care providers to withhold or withdraw life-prolonging measures, such as a feeding tube, in certain situations.⁶ A living will states the choices an individual would make if the individual were able to communicate. It must be signed in the presence of two qualified witnesses and acknowledged before a clerk, assistant clerk, or notary public.⁷ A form living will is set forth in G.S. 90-321.

C. ADVANCE INSTRUCTION FOR MENTAL HEALTH TREATMENT

An advance instruction for mental health treatment is a written instruction signed in the presence of two qualified witnesses and acknowledged before a notary public.⁸ In an advance instruction, a principal makes a declaration of instructions, information, and preferences regarding mental health treatment to be followed when the principal is incapable of giving or refusing consent.⁹ It may include the authority to administer medications, to deliver shock treatment, and to admit the individual to a facility for care.¹⁰ A form advance instruction is set forth in G.S. 122C-77.

D. INFORMED CONSENT STATUTE

A health care provider may not treat a patient without consent in most non-emergency situations.¹¹ Consent must be voluntarily given by a person with the legal authority and the decisional capacity to make health care decisions.¹² In addition, consent must be informed.¹³ When a person lacks capacity to make or communicate health care decisions, North Carolina law sets out a list of persons who may consent to medical treatment on the person's behalf.¹⁴ Priority is first given to a guardian of the person or a general guardian, then to a health care agent under a health care POA, and then an agent with powers to make health care decisions for the patient.¹⁵ If there is no guardian or agent authorized to make decisions, the patient's spouse is first in line.¹⁶ The list continues with other relatives and involved individuals.¹⁷

6. G.S. 90-321.

7. G.S. 90-321(c)(3), (4).

8. G.S. 122C-72(1).

9. *Id.*

10. G.S. 122C-72(5).

11. See G.S. 90-21.13 (describing the standards a health care provider must meet in obtaining informed consent).

12. *Id.*

13. *Id.*

14. G.S. 90-21.13(c).

15. *Id.* Note that if a patient has a health care POA and a general guardian or guardian of the person, the health care agent under a valid health care POA has the right to exercise the authority in the health care POA unless the clerk suspends the authority of the health care agent. *Id.* § 90-21.13(c)(1).

16. *Id.*

17. *Id.*

E. ADULT PROTECTIVE SERVICES (APS)

An APS unit exists in every county in North Carolina and serves to protect disabled adults, including older adults who lack capacity, who are abused, neglected, or exploited.¹⁸ APS may help an older adult resolve a crisis situation and avoid the need for a more permanent guardianship by connecting the older adult to essential services in the community or initiating court action to protect the adult under G.S. Chapter 108A. A more in-depth discussion of APS is presented in Chapter 2.

F. SUPPORTS AND SERVICES

There may be a number of public and private supports and services that can be put in place to help older adults who lack capacity navigate their day-to-day needs. This includes meal delivery programs, such as Meals on Wheels; transportation services;¹⁹ in-home aides and home health managers; housing locators;²⁰ and placement services²¹ and technologies that are geared toward older adults, such as medical alert systems, smart pillboxes, and remote patient monitoring devices.

II. FINANCIAL DECISION-MAKING ALTERNATIVES TO A GUARDIAN OF THE ESTATE (GOE)

A. DURABLE POWER OF ATTORNEY (POA)

A POA is a common planning tool that is employed when an individual with capacity, the principal, wants to authorize another person, the agent, to act on his or her behalf.²² It is typically used with regard to property and property affairs. An individual may execute a POA for any reason, including for convenience or mental or physical incapacity. The POA may become effective immediately or upon the occurrence of a future event, such as the mental or physical incapacity of an individual.²³ A POA subject to G.S. Chapter 32C is durable by default, meaning that it survives the incapacity of the principal unless it expressly states otherwise.²⁴ The principal determines the nature and extent of the agent's authority under the POA.²⁵ The principal may give the agent the authority over just a certain tract of real property or over all of his

18. See G.S. Ch. 108A, Art. 6 (Protection of the Abused, Neglected, or Exploited Disabled Adult Act).

19. See N.C. Dep't of Health & Human Servs. (DHHS), *Transportation Services for Older Adults*, NCDHHS.gov, <https://www.ncdhhs.gov/assistance/adult-services/transportation-services-for-older-adults> (last visited Aug. 13, 2019).

20. DHHS, *Elder Housing Locator*, NCDHHS.gov, <https://www.ncdhhs.gov/assistance/adult-services/elder-housing-locator> (last visited Aug. 13, 2019).

21. DHHS, *Adult Placement Services*, NCDHHS.gov, <https://www.ncdhhs.gov/assistance/adult-services/adult-placement-services> (last visited Aug. 13, 2019).

22. G.S. 32C-1-102(9) (defining "power of attorney").

23. G.S. 32C-1-109.

24. G.S. 32C-1-104.

25. G.S. Chapter 32C, Article 2.

or her financial affairs. A POA is not typically subject to court oversight and is susceptible to abuse, particularly where the agent exceeds the scope of the agent's authority or conducts transactions under the POA for the agent's own benefit or otherwise not in the best interests of the principal. A form POA is set forth in G.S. 32C-3-301. POAs are discussed further in Chapter 5 of the *Legal Framework*.

B. TRUST

A trust is a fiduciary relationship in which one person (the trustee) holds a property interest subject to an obligation to keep or use that interest for the benefit of another (the beneficiary).²⁶ Typically, there is a trust instrument that sets out the terms of the trust.²⁷ A common type of trust used to avoid guardianship for an older adult is a revocable living trust, which may be modified or revoked by the older adult.²⁸ The older adult may create the trust naming himself or herself as the trustee but then name a successor trustee to take over the management of the trust in the event of the adult's incapacity.

C. REPRESENTATIVE PAYEE

A representative payee is a person or an organization appointed by a federal governmental agency to receive benefits for a person who is unable to manage or direct the management of his or her benefits.²⁹ A representative payee may be appointed after an individual loses capacity. The payee must use the benefits to pay for the current and future needs of the beneficiary and save any benefits not required to meet current needs. A payee must keep records of expenses and provide an accounting upon request by the agency. Federal agencies with representative payee programs include the Social Security Administration (for Social Security benefits such as Medicaid and Medicare and supplemental Social Security benefits (commonly referred to as disability benefits)), the Veteran's Administration, the Department of Defense, and the Office of Personnel Management.

D. CLERK ADMINISTRATION OF FUNDS

A clerk of superior court may receive \$5,000 or less from any person for an incapacitated adult who does not have a guardian and is domiciled in the clerk's county.³⁰ In addition, if an incapacitated adult is entitled to insurance proceeds that do not exceed \$5,000, the proceeds may be paid to the clerk in the county of the adult's domicile.³¹ The clerk may receive,

26. See G.S. 36C-4-402(a). The North Carolina Uniform Trust Code is contained in G.S. Chapter 36C and applies to any express trust no matter how created. *Id.* § 36C-1-102.

27. G.S. 36C-1-103(21).

28. See G.S. Ch. 36C, Art. 6 (Revocable Trusts).

29. See, e.g., Soc. Sec. Admin., *Frequently Asked Questions (FAQs) for Representative Payees*, SSA.gov, <https://www.ssa.gov/payee/faqrep.htm> (describing the role of a representative payee).

30. G.S. 7A-111(b).

31. *Id.*

administer, and, upon finding that it is in the best interest of the incapacitated adult, disburse the funds to a creditor, relative, or some “discreet and solvent neighbor” or friend for the purpose of handling the property and affairs of that adult.³² The clerk will require receipts or paid vouchers showing that the money disbursed was used for the exclusive benefit of the incapacitated adult.³³

E. JOINT PROPERTY

An older adult may own property, such as a house, car, or bank accounts, jointly with a spouse or other family member or friend. The joint ownership allows continued use of the assets for the older adult’s benefit after one joint owner’s incapacity. This type of ownership may prevent the need for a guardian, particularly in those situations involving one spouse with capacity who is a joint owner with a spouse who lacks capacity. If spouses hold property as tenants by the entirety and one or both of the spouses is/are mentally incompetent to execute a conveyance of the property when it is necessary or desirable that the property be mortgaged or sold, a special proceeding may be brought to authorize a sale or mortgage of the property.³⁴ This process is available when a spouse has not been adjudicated incompetent but is not competent to convey property.

F. SUPPORTS AND SERVICES

An older adult who lacks capacity may avoid the need for guardianship through supports and services, such as a daily money management (DMM) program. A DMM helps older adults with personal household finances, and services can range from comprehensive financial management to maintaining financial records to reminders to pay bills.³⁵ These types of services may be most helpful in situations where one spouse dies and the living spouse has not had a history of or experience with managing finances and needs some assistance and support.

32. *Id.*

33. *Id.*

34. G.S. 35A-1310.

35. Lynnette Khalfani-Cox, *Need Help Managing Day-to-Day Finances?*, AARP.ORG (July 1, 2016), <https://www.aarp.org/money/budgeting-saving/info-2016/money-management-on-a-budget.html/>.