

GUARDIANSHIP & CONSERVATORSHIP

GUIDE

The following definitions vary from state to state. A lawyer (guardianship, elder law, family law) can help educate you on the rules and processes in your area.

Guardianship

typically involves the appointment of someone to manage the medical and physical care of a person with limited capacity (due to injury, illness, or disability). Can be a non-family member.

Conservatorship

typically involves appoint someone to oversee the financial affairs and/or personal affairs of a person who is incapacitated (due to injury, illness, or disability). Can be a non-family member.

Guardianships and Conservatorships are established by court order and involve someone making a legal decision on behalf of another person under an arrangement approved by a state court.

Petitioner

Individual petitioning the court for guardianship/conservatorship.

Respondent

The individual whom the guardianship/conservatorship is for.

Ward

An adult who has been deemed incompetent or whom a guardian has been appointed.

What is the difference between Guardianship/Conservatorship and a Power of Attorney/Healthcare Power of Attorney Document?

Guardianship/Conservatorship removes rights from an individual (such as determining residence, consent to medical treatment, end-of-life decisions, possessing a driver's license,

possessing a firearm or weapon), and the guardian is decided by the court.

Power of Attorney and Healthcare Power of Attorney documents are chosen by the individual. The documents are made prior to their inability to make decisions. They include naming their chosen representative to assist in managing affairs/healthcare decisions without a court proceeding being necessary.

THE PROCESS

Most states require an application or petition to the states' court to obtain the legal authority associated with guardianship and conservatorship.

Basic identifying information about the respondent is necessary and some additional information may include:

- Where the respondent has lived for the past 12 months
- Facts showing that the respondent is incompetent and reasons to show why the ruling is requested.
- Names and contact information for the respondent's next of kin and other persons known to have an interest in the proceeding.
- Information about assets, liabilities, and income.
- Information about the capability to manage various aspects of daily life.

What protections are in place for the respondent?

- Receive notice of the petition.
- **Be represented by an attorney (the court may appoint one for the individual if they do not have one to advocate on their behalf).**
- A hearing on the need for a guardianship.
- Being present at all court proceedings.
- The right to compel, confront, and cross-examine all witnesses.
- The right to present evidence.
- Guardianship must be proven by "clear and convincing evidence".
- Receive notice of all court orders.
- Can appeal the determination.

Are there fees?

Fees vary from state to state

As of 2023 in North Carolina, there is a \$120 filing fee and a \$30 fee for the sheriff to serve the respondent with the petition.

Reach out to your county Department of Social Services to learn about fees in your state.

Ask about your state's legal aid and financial support. There may be assistance with these costs and legal assistance.

HD Reach can help explore your local costs, resources, and supports.

Does the petitioner have to be represented by an attorney?

No, but it is advisable to speak with an attorney specializing in guardianship, elder law, or family law before starting a proceeding to familiarize yourself with your state's guardianship and/or conservatorship laws and court proceedings.

If the respondent does not have attorney representation, the court may appoint representation for the respondent to advocate on their behalf.

How long will a hearing take?

Typically held between 10-30 days after the respondent is personally served with the petition unless the clerk extends for good cause, preparation of a multidisciplinary evaluation, or the completion of a mediation.

This process does vary from state to state. HD Reach strongly encourages you to reach out to your HD healthcare team and/or HD Reach to help navigate your local resources if you are considering guardianship or conservatorship.

INVOLUNTARY COMMITMENT (IVC)

Involuntary Commitment (IVC)

when a person is put into a mental health facility against their will, or without their permission or the permission of their guardian. The individual must be a danger to themselves and/or others to be involuntarily committed.

No, but it is advisable to speak with an attorney specializing in guardianship, elder law, or family law before starting a proceeding to familiarize yourself with your state's guardianship and/or conservatorship laws and court proceedings.

An affidavit must be filed with the Clerk of Superior Court or Magistrate of District Court.

The Clerk or Magistrate may issue an order to a law enforcement officer to take the individual into custody for examination by a qualified professional or to the closest hospital.

If a qualified professional finds they are mentally ill and dangerous to self or others, they will be taken to a hospital, examined by the hospital physician, and if in agreement will admit for observation and treatment.

- If this physician does not believe they should be in the hospital, they will be released.
- A court hearing must be held no later than 10 days after they are taken into custody.
 - The hearing can be held either in the county where the commitment was started or at the hospital.
 - The judge will decide whether they should be treated in the hospital or in the community. The judge will also decide how many days they must be held in the hospital before another hearing must be held.
- If they leave the hospital without authorization, the physician may notify law enforcement agencies and request that they be returned.

Each situation is unique, and the process may vary slightly from state to state. Utilize your local HD care team or reach out to HD Reach to help you navigate the process.

ADDITIONAL RESOURCES & FORMS:

Guardianship and Conservatorship Links

American Bar Association
Guardianship & Conservatorship

https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/

US Department of Justice: Key
Concepts and Resources on
Guardianship

<https://www.justice.gov/elderjustice/guardianship-key-concepts-and-resources>

Guardianship Links for North Carolina

How to become a guardian and what
qualifications one must meet to
obtain guardianship.

<https://www.nccourts.gov/help-topics/guardianship/guardianship>

Petition For Adjudication Of
Incompetence And Application For
Appointment Of Guardian Or Limited
Guardian

<https://www.nccourts.gov/documents/forms/petition-for-adjudication-of-incompetence-and-application-for-appointment-of-guardian-or-limited-guardian>

NC Department of Health and
Human Services Aging and Adult
Services

<https://www.ncdhhs.gov/divisions/aging-and-adult-services>

IVC Resources for North Carolina

Resources on IVC

<https://www.ncdhhs.gov/divisions/mental-health-developmental-disabilities-and-substance-abuse/involuntary-commitments>

NC Facilities Designated for the Custody and Treatment of Individuals Under Petitions for Involuntary Commitment

<https://www.ncdhhs.gov/divisions/mental-health-developmental-disabilities-and-substance-abuse/involuntary-commitments/nc-facilities-designated-custody-and-treatment-individuals-under-petitions-involuntary-commitment>

NC IVC Flow Chart

<https://www.ncdhhs.gov/media/8756/download>



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