

Guardianship and Alternatives to Guardianship

NORTH DAKOTA PROTECTION & ADVOCACY

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What is Guardianship?

A guardianship is a court process in which a judge determines that a person is incapacitated and unable to care for himself or herself.

If the court determines that a guardianship is necessary following a court hearing, a guardian is appointed.

Depending on the court order, the guardian may have the authority to make medical, legal, residential, educational, vocational, and financial decisions for the individual under guardianship.

Before ordering a guardianship, less restrictive options must be considered. Guardianship should be a last resort.

For more information about guardianship in North Dakota see: <https://www.ndcourts.gov/legal-self-help/adult-guardianship>

Guardianship Statute

The guardianship statute, N.D.C.C. ch. 30.1 -28, requires alternatives to be considered. It also requires that the guardianship be as unrestrictive as possible.

“Least Restrictive form of Intervention” – 3 mentions

“Alternative Resource Plan” – 3 mentions

“Personal autonomy/freedom” – 2 mentions

“Maximum self-reliance and independence” – 1 mention

NDCC 30.1-28-12(5)

When exercising the authority granted by the court, the guardian shall safeguard the civil rights and personal autonomy of the ward to the fullest extent possible by:

- a. Meeting with the ward following the hearing, unless the ward is represented by an attorney, and explaining to the fullest extent possible the contents of the court's order and the extent of the guardian's authority;
- b. Involving the ward as fully as is practicable in making decisions with respect to the ward's living arrangements, health care, and other aspects of the ward's care; and
- c. Ensuring the ward's maximum personal freedom by using the least restrictive forms of intervention and only as necessary for the safety of the ward or others.

Types of Guardianships

Emergency guardianship: lasts up to 90 days. May be ordered if there is an emergency situation in which an incapacitated person needs legal decisions made but is unable to do so.

Examples where an emergency guardianship may be ordered could include:

- Emergency medical care
- A dangerous situation the individual is unable to handle alone
- Ongoing exploitation

Full guardianship: Gives guardian full authority to make decisions in the areas of medical, legal, residential, educational, vocational, and financial.

Limited guardianship: Gives guardian authority to make decisions in certain areas, as determined by the court.

A person under guardianship retains fundamental rights such as the right to vote or the right to marry, unless limited by the court.

Process for Obtaining a Guardianship

1. Petitioner files a petition for guardianship.
2. A guardian ad litem is appointed by the court to act in the best interest of the individual. The guardian ad litem writes a report recommending whether the individual should have a guardian and who the guardian should or should not be.
3. A court visitor visits the individual, proposed guardian and other relevant individuals and writes a report with a recommendation of whether the individual should have a guardian and who the guardian should or should not be.
4. An expert examiner, usually a physician, writes a report describing the need for a guardian. The report will typically describe the individual's medical conditions and how they limit the individual's ability to care for himself or herself.
5. The proposed ward can be appointed an attorney to represent his or her interests if requested.
5. After the reports are filed, a hearing takes place. The proposed guardian and other individuals may testify. Following the hearing, the judge may order a guardianship for a specified period of up to 5 years.
6. A guardian is required to submit annual reports to the court about the guardianship and the individual's finances. When the guardianship lapses, the guardian may be reappointed if the guardianship is still needed.

Power of Attorney

DEFINITIONS:

- Principal: An adult who grants Power of Attorney to an Attorney in Fact.
- Attorney in Fact: Person who is given the power of attorney to make decisions on the Principal's behalf. Attorney in fact does not have to be an attorney, but can be any responsible adult.
- Power of Attorney: The document authorizing the Attorney in Fact to act on the Principal's behalf.

N.D.C.C. § 30.1-30-01

Durable Power of Attorney

- A Durable Power of Attorney is appropriate for making end-of-life decisions, because it remains in effect if the Principal becomes incapacitated or can no longer make decisions for himself or herself.
- A Durable Power of Attorney remains in effect unless properly revoked.
- Revocation may happen if the Principal does so at a time when he or she has capacity.
- Covers financial and other decisions, but not health care decisions.

Durable Power of Attorney Duties

Powers and duties usually include:

- Paying bills, including signing checks
- Buying, selling, and managing real estate
- Conducting business transactions
- Borrowing money
- Handling legal or insurance claims
- Filing tax returns
- Making donations or gifts

Why should someone have a power of attorney?

Attorney in fact assists a person who loses capacity or needs assistance making decisions or performing certain tasks.

Allows the attorney in fact to assist with financial decisions, such as paying bills and banking.

Specifies who should make legal and financial decisions for the principal.

A power of attorney must be signed while the principal has capacity. It is important to prepare for the future before the principal needs assistance from an attorney in fact.

A power of attorney is only in effect while a person is alive. It is not a substitute for a will.

How to get a durable power of attorney

An individual can complete the power of attorney document found here:

<https://www.ndcourts.gov/Media/Default/Legal%20Resources/Legal%20Self%20Help/Power%20of%20Attorney/Power%20of%20Attorney%20for%20Adult.pdf>

The power of attorney must be signed and notarized.

Legal Services of North Dakota may be able to assist individuals with powers of attorney. For more information about Legal services see: <https://lsnd.org/>

Representative Payee

A Representative Payee is an individual or organization that manages Social Security payments for Social Security beneficiaries who are unable to manage the payments.

Generally, Social Security looks to family or friends to serve as payees.

If a suitable individual is unavailable, a qualified organization may serve as an individual's representative payee.

For more information see: <https://www.ssa.gov/payee/>

Health Care Directives

A Health Care Directive:

1. Instructs how health information should be handled before death;
2. Designates who should make decisions if the Principal becomes unable to speak for himself or herself; and
3. Instructs what should be done with the body after death.

May include:

“[O]ne or more health care instructions to health care providers, others assisting with health care, family members, and a health care agent”

A power of attorney appointing an Agent to make health care decisions for the Principal

N.D.C.C. § 23-06.5-03(1)

The Agent has the authority to make health care decisions on the Principal's behalf...

- According to the Principal's personal values, religious or moral beliefs; or
- In accordance with the Agent's assessment of the Principal's best interests.

N.D.C.C. § 23-06.5-03(2)

What types of decisions might a health care directive cover?

Establishes who makes health care decisions if the principal is incapacitated.

The Agent can be any adult. It does not have to be a family member.

- Decisions that might come up:
 - Whether to perform CPR
 - Ventilator use
 - Artificial nutrition or hydration
 - Comfort Care

Health Care Directives

- Health Care Directives become effective when:
- The Principal lacks capacity to make health care decisions, “as certified in writing by the principal's attending physician and filed in the principal's medical record.”
- Authorized specifically in the Health Care Directive by the Principal even though the Principal retains capacity.

N.D.C.C. § 23-06.5-03(4)

The Principal must have capacity to sign a Health Care Directive. It must be done before the Principal loses capacity.

The Principal may revoke the Health Care Directive at anytime when he or she has capacity.

How to get a Health Care Directive

The form for the Health Care Directive can be found here:
<https://www.nd.gov/dhs/policymanuals/62410/Content/PI/PI-10-20%20Attachment%202%20HEALTH%20CARE%20DIRECTIVE%20Form.pdf>

Legal Services of North Dakota may be able to assist individuals in completing a Health Care Directive. For more information about Legal services see: <https://lsnd.org/>

Mental Health Advance Directives

A Mental Health Advance Directive is a legal document that states the wishes of an individual who has concerns about involuntary psychiatric commitment or treatment.

It allows the individual to make decisions about treatment before it is needed. It can improve communication with physicians and may prevent the need for a guardian or forced treatment.

The individual may appoint an agent to make decisions on his or her behalf regarding mental health treatment.

The individual may identify a person who may serve as a guardian, if necessary.

The individual may authorize or not authorize the agent to commit the individual to a mental health facility if necessary.

The individual may identify preferred facilities for treatment, medical providers, and may identify preferences for emergency intervention, such as medication.

The individual may also list preferences for visitors while in a facility, preferences for the care of his or her children or pets, and provide other instructions.

The form for Mental Health Advance Directives can be found here:
<https://www.ndpanda.org/sites/www/files/documents/mhad-form0514.pdf>

Supported Decision Making

DEFINITIONS:

- Named Individual: The individual identified in a supported decision making agreement who is to receive decision making assistance
- Supporter: A person that has signed a supported decision making agreement, agreeing to provide assistance to the Named Individual
- Supported Decision Making Agreement: A written, signed, dated, and witnessed understanding between a Named Individual and a trusted adult who agrees to provide assistance for decision making to maximize the individual's ability to make informed, voluntary choices regarding health care, residence, finances, education, legal affairs, and vocation.

N.D.C.C. § 30.1-36-01.

What is Supported Decision Making?

A Named Individual authorizes another person to act as the Supporter.

The Supporter accepts the responsibility.

The Supporter assists and supports the Named Individual in making certain decisions, but does not substitute his or her decisions for those of the Named Individual.

Supporter should be a trusted, responsible adult. The Supporter does not have to be a family member.

What is Supported Decision Making?

- A Supported Decision Making Agreement establishes with what decisions the Named Individual desires assistance, and who is trusted to provide that assistance.
- Involves considering all areas in which the Named Individual may want decision-making assistance: Health care, residence, finances, education, legal affairs, and/or vocation.
- Allows the Named Individual to remain in the driver's seat and continue to make their own decisions.
- A Named Individual may enter into separate Supported Decision Making agreements, as well as sign separate authorizations to allow others to disclose confidential documents to the identified Supporter(s).

What can a Supporter do?

The Supporter may:

Identify, collect, and organize documents that apply to a decision the Named Individual is considering;

Identify, collect, and organize information that may be helpful to the Named Individual when making a decision;

Help the Named Individual understand documents;

Identify available choices;

Identify advantages and disadvantages of available choices;

Communicate any decision by the Named Individual to others at the request of the Named Individual;

Explain the decision-making process to the Court in a proceeding to create or modify a guardianship or conservatorship for the Named Individual.

N.D.C.C. § 30.1-36-01(3).

What can a Supporter not do?

A supporter may not:

Substitute their decisions for those of the Named Individual;

Sign documents on behalf of the Named Individual without express authority.

N.D.C.C. § 30.1-36-04(7).

Allow unauthorized access to, use of, or disclosure of any confidential documents, records, and other information about the Named Individual, unless otherwise directed.

N.D.C.C. § 30.1-36-06.

When do Supported Decision Making Agreements become effective?

Agreements become effective when the Named Individual authorizes the Supporter to assist with decision making.

It is presumed the Named Individual has capacity to enter a supported decision making agreement.

More than one supported decision making agreement may be in effect at one time.

N.D.C.C. § 30.1-36-04.

Resources about Supported Decision Making

More information can be found here:

<https://www.ndpanda.org/resources/supported-decision-making>

Worksheets can be found here:

<https://www.ndpanda.org/resources/supported-decision-making/supported-decision-making-worksheets>

What is the right choice for young adults?

Guardianship may be appropriate for young adults who do not have capacity to make decision of daily life, take care of themselves, or are at risk of danger or exploitation because of a lack of capacity.

Power of attorney may be appropriate for individuals who need help in certain areas, like finances, and have a trusted adult who can assist them.

A representative payee may be appropriate for individuals who need help with finances and managing money.

An advance healthcare directive or mental health directive may be appropriate for individuals who want to express their wishes and designate a trusted adult to assist them with medical decisions, particularly in situations where they are not able to make medical decisions.

A supported decision making agreement may be appropriate for those who want to make their own decisions, but may need assistance with some types of decisions or following the steps to make a decision.