

Guardianship May or May Not Be an Answer

Written By **Jenna Fruechtenicht Butler** (jfb@wardandsmith.com)

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The COVID-19 situation has had many unwanted side effects.

Among them are increased occurrence of depression, substance abuse, and mental illness. Additionally, our older population has been particularly impacted by the need to protect them from infection, and the negative consequences isolation may have on their overall well-

being and their ability to seek and receive needed assistance from outside resources. With little social interaction becoming the new norm, progressive diseases such as dementia may not be as readily detected and help may be needed more quickly once a need becomes evident. At Ward and Smith, we are receiving an increased number of calls from family and friends seeking guidance on how to help someone that is in need. We are more than willing to help if we can, but the legal process may, or may not, be the best means for addressing the situation.

From the legal perspective, the primary means of assisting someone who is unable to attend to his or her own needs is Chapter 35A of the North Carolina General Statutes. Chapter 35A governs proceedings to establish judicial guardianships for individuals compromised as a result of mental illness, inebriety, senility, or other causes or conditions. A guardianship is appropriate when an individual lacks sufficient capacity to manage his or her own affairs or to make or communicate important decisions concerning his or her person, family or property. In such a case, a guardian of the person, a guardian of the estate, or a general guardian may be appointed to act on that individual's behalf. If a guardian is appointed, the guardian is then in a position to obtain needed help or assistance.

An adjudication of incompetence is sought by petition and heard by the office of the Clerk of Court. A person seeking to have an individual declared incompetent must serve the petition on the person whose competence is being questioned. The person whose competency is being questioned is afforded due process protections, including the appointment of a guardian ad litem to look after his or her interests. A determination of incompetence must be by clear, cogent, and convincing evidence, and usually requires an evaluation by a trained medical professional. A guardianship proceeding is a serious and detailed process, as it should be. While there are some mechanisms for interim relief, a judicial guardianship is not a quick or simple trip to the courthouse, particularly if incompetency is challenged. For these reasons, some situations may not be best suited for a guardianship proceeding or other avenues may be a better, and more effective, first step. This is particularly true when the situation is urgent or the need for medical help is dire.

In situations involving an immediate potential for harm to self or others as a result of mental illness or

substance abuse, special emergency procedures for a 24-hour involuntary commitment may be pursued. Local law enforcement officials can assist with these procedures which are initiated through a sworn petition before the Clerk of Court's office or a Magistrate. Involuntary commitment is a very strict process governed by Chapter 122C of the North Carolina General Statutes. Chapter 122C should be viewed as an emergency measure when the potential for immediate harm is high, but it is not generally a long-term solution.

If the situation is not one that warrants or would benefit from the involuntary commitment process but is nonetheless medically urgent, the best first step toward obtaining assistance is to contact a medical professional. Not only are medical professionals much better equipped than the judicial process to address medical needs, but they also are able to point you to other resources with which we as lawyers may not be as familiar. Trained medical professionals can usually be reached 24 hours a day, 7 days a week. In some counties, for example, Coastal Horizons offers a 24-hour crisis hotline, a quick response team for substance abuse issues, and special services for veterans. Other resources also can be found by searching the internet or calling the North Carolina Department of Health and Human Services for referrals to local providers.

Another resource people often are unaware of is the Adult Protective Services (APS) division of your county Department of Social Services. APS social workers will conduct well checks on adults for whom there is a concern and also can assist with obtaining various services for those in need. APS is an excellent resource, particularly if you do not have a direct means of checking on a person about whom you are concerned or if there is no family member available to serve as a guardian or otherwise provide the help that might be needed. If cost is a concern and the issue is more legal in nature, another resource to consider is the Legal Aid of North Carolina (LANC). LANC offers a Senior Legal Helpline for North Carolinians who are 60 years of age or older, and priority is given to those with the greatest need.

Our firm has assisted and continues to assist many families through difficult situations. COVID-19 has unfortunately exacerbated some previously manageable needs. The legal process may or may not be the answer you are seeking. If you or a loved one are in need of help, please know that various resources are available to you, including Ward and Smith, and please do not hesitate to reach out to someone for assistance.

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