

# Guardianship in South Carolina

## Frequently Asked Questions from a Ward

**WARNING:** You are strongly encouraged to seek the advice of an attorney in any legal matter. If you move forward without an attorney, it may negatively affect your legal rights. If you have questions about your legal rights or the law that affects your case, please talk with an attorney.

**DISCLAIMER:** The general information provided in these Frequently Asked Questions (FAQs) is not legal advice, cannot be cited as legal authority, and cannot replace the advice of an attorney licensed in South Carolina. The information in these FAQs is accurate as of the date of publication. If you decide to bring a lawsuit in a South Carolina court without an attorney, you are responsible for researching the law on your own. Please note that the presiding judge in each case decides what law applies in that case.

**Guiding Principles:** When a person needs help making decisions about his or her care and well-being, guardianship is one important option to consider. There are other options called [least restrictive alternatives](#). Least restrictive alternatives encourage independence and allow a person to be involved in decisions about his or her care and well-being, while still providing protection for the person.

In some situations, guardianship may be the best choice to protect a person and that person's rights. This may be a full guardianship or a limited guardianship. Because guardianship can be very restrictive for an individual, it is important to explore other alternatives first.

## Questions that a ward/vulnerable adult would ask:

### What is an incapacitated person?

In South Carolina, an incapacitated person is someone who is impaired due to mental illness, developmental disability, physical illness or disability, advanced age, chronic use of drugs or alcohol, or other causes. Just because an individual makes bad decisions or has a disability does not necessarily mean that he or she is an incapacitated person. See S.C. Code Ann. § 62-5-101 at <http://scstatehouse.gov/code/t62c005.php>.

## **What is a visitor?**

A visitor is a person who is appointed by the Probate Court to meet with the individual alleged to be incapacitated to make sure that the environment is safe and to find out more information about the individual. See S.C. Code Ann. §§ 62-5-303 and 62-5-308 at <http://www.scstatehouse.gov/code/t62c005.php>.

## **Who can be a visitor?**

In South Carolina, a visitor must:

- Have training in law, nursing, or social work;
- Be appointed by the Probate Court; and
- Have no personal interest in the court proceeding.

See S.C. Code Ann. § 62-5-308,  
<http://www.scstatehouse.gov/code/t62c005.php>.

## **What is a guardian ad litem in Probate Court?**

A guardian ad litem (GAL) and a guardian are not the same thing.

A GAL is:

- An independent third-party attorney appointed by the Probate Court;
- Authorized to investigate the case for the Probate Court; and
- Required to report to the Probate Court.

## **What If I do not want a guardian?**

Talk to the visitor, the guardian ad litem, and your attorney, if you have one. If you do not have an attorney, ask the Probate Court to appoint an attorney who is not your guardian ad litem.

Ask the Probate Court to appoint a third examiner, perhaps your personal physician who has knowledge of your needs, in addition to the two examiners required by law.

Speak up at the guardianship hearing.

**Note:** The costs of the visitor, the guardian ad litem, and the attorney may be charged to you, the potential ward.

## **What are least restrictive alternatives for decision making?**

Least restrictive alternatives are options that encourage independence and allow you to make decisions about your care and well-being while still providing protection for you. People who can protect themselves should retain their rights. If least restrictive alternatives can sufficiently protect you, they may be used instead of guardianship.

## **What is the process for appointing a guardian?**

Only the Probate Court can appoint a guardian for an adult. The Probate Court will not appoint a guardian unless it receives clear and convincing evidence, in a court hearing, that an individual is incapacitated, and that the person applying to be guardian is the appropriate person to serve as a guardian.

Some of the basic requirements are:

- The person filing the guardianship petition must complete a summons (<http://www.sccourts.org/forms/pdf/SCCA401PC.pdf>) and petition (<http://www.sccourts.org/forms/pdf/530GC.pdf>) and serve both the summons and petition. To learn how to serve these documents, see <http://www.sccourts.org/selfHelp/FAQCircuit.pdf#page=2>.
- \$150 filing fee must be paid to the Probate Court.
- Two examiners, including one physician, must be appointed by the Probate Court and must examine the individual and find that the individual is incapacitated. The Examiner's Report is found

online at <http://www.sccourts.org/forms/pdf/538PC.pdf>. The Doctor's Affidavit Regarding Capacity is found online at <http://www.sccourts.org/forms/pdf/541PC.pdf>.

- The Probate Court must appoint a visitor. A visitor meets with the individual alleged to be incapacitated to make sure the environment is safe and to find out more information about him or her.
- The Probate Court must appoint an attorney with the powers and duties of a guardian ad litem (GAL).
- A person alleged to be incapacitated has a right to be represented by an attorney, but the attorney may not be the same person as the GAL.
- Notice must be provided to the alleged incapacitated person, his or her spouse, parents, and adult children. If a person alleged to be incapacitated already has a guardian or has a power of attorney, the guardian or person named in the power of attorney must be notified. If none of these persons can be found, at least one of the alleged incapacitated person's nearest relatives must be notified. See S.C. Code Ann. § 62-1-201(20) at <http://scstatehouse.gov/code/t62c001.php>.
- The Probate Court must hold a hearing. See S.C. Code Ann. § 62-5-303 at <http://www.scstatehouse.gov/code/t62c005.php>.
- At the hearing, the alleged incapacitated person has the right to speak to the Probate Court Judge and to be represented by an attorney.

Check with the Probate Court in the county in which the action will be filed to obtain information about additional requirements and fees.

## **What is the difference between incapacity and poor judgment?**

A person with incapacity is unable to make responsible decisions about his or her well-being. A person with poor judgment has the ability to make responsible decisions, but chooses not to do so. Sometimes it may be difficult to understand the reasons for the poor decisions, which is why the court relies on the opinions of medical examiners.

## **How long will I have a guardian?**

You will have a guardian until the Probate Court decides you no longer need a guardian. Check with the Probate Court about requirements.

## **What if I believe I no longer need a guardian? What if I want a different guardian?**

You or any interested person may request that the Probate Court issue an order stating that you are no longer incapacitated and ending the guardianship. See S.C. Code Ann. § 62-5-307 at <http://www.scstatehouse.gov/code/t62c005.php>.

Any interested person may make a request to the Probate Court by informal letter. The Probate Court must appoint a visitor to meet with the guardian and the ward. The visitor must send the Probate Court a report before the Court can act on any such request. The Probate Court will need updated medical information in order to decide whether you still meet the definition of incapacity. Many Probate Courts require a hearing as well. For more information, contact the Probate Court. See S.C. Code Ann. § 62-5-307 at <http://www.scstatehouse.gov/code/t62c005.php>

## **Do I have to do what my guardian says?**

Yes, usually, you have to do as your guardian says. Your guardian has a duty to make decisions for you that are in your best interest.

After the guardianship hearing, the Probate Court will issue an order, sometimes also known as guardianship papers.

The guardianship papers describe the type of guardianship that is in place. In some instances, this may be a limited guardianship which will allow you, the ward, to make some decisions.

## **What is a limited guardianship?**

A limited guardianship allows you to keep certain rights and independence. The Court must consider less restrictive alternatives and appoint a guardian only where necessary to protect you. The guardianship papers will tell you whether it is a limited guardianship.

## **Can my guardian spend my money?**

Generally no.

If there is no conservator, no Veterans Administration fiduciary, and no Social Security representative payee appointed for the ward, then the guardian may be able to spend the ward's money. These are special cases, and the Probate Court should be able to guide your guardian through these situations.

A guardian makes decisions about where the ward will live and makes provisions for the ward's care, comfort, and maintenance, including health care and mental health care decisions. The guardian may need to spend money to pay for living arrangements or services for the ward. The Probate Court will supervise the way any of your money is spent.

## **Does my guardian control my property and money?**

Generally no, but there are some exceptions. If you have a conservator, the conservator is responsible for controlling property and money. For more information, contact your attorney or the Probate Court.

## **What happens to my Social Security? What happens to my retirement?**

It depends on many things, but your Social Security and your retirement should always be used for your benefit. These questions can be discussed during the guardianship hearing.

## **Do I have to eat what my guardian tells me to eat?**

Your guardian is responsible for making decisions that are in your best interest, including your health care. Sometimes health care includes your diet, what you eat, and what your doctor recommends.

## **Can I choose who I want to be my guardian?**

Sometimes. The Probate Court appoints the guardian after holding a hearing. Before the hearing, you can let the visitor and your guardian ad litem know who you want to be your guardian. You need to let the Probate Court Judge know your preference at the guardianship hearing as well. The Probate Court is not required to appoint the person you prefer. Also, you may want to hire an attorney or ask the Probate Court to appoint one for you.

## **Who has priority to be my guardian?**

In South Carolina, the Probate Court makes the final decision as to who will be the guardian based on the facts of each case. There is a priority for appointment by law, which is followed unless there is a good reason to appoint someone else. See S.C. Code Ann. § 62-5-311 at <http://www.scstatehouse.gov/code/t62c005.php>. Form 530GC, Petition for Guardian, is found online at <http://www.sccourts.org/forms/pdf/530GC.pdf>.

The priority is:

- A person you nominated to serve as guardian;
- A person you appointed in a power of attorney pursuant to Section 62-5-501;
- Your spouse;

- Your adult child;
- Your parent, including a person nominated by will or other writing signed by your deceased parent;
- Another relative;
- A person nominated by your caregiver or a person/entity paying benefits to you.

### **How will a guardianship affect my will?**

A guardianship does not affect an existing will.

### **Can my guardian change my estate plan?**

No.

### **What Probate Court do I go to with questions about my guardianship?**

Start with the Probate Court in the county where the guardianship began. If you have moved to a different county or state, the guardianship may have been transferred to the new place.

### **What happens if my guardian dies?**

The Probate Court needs to be told that the guardian has died. Then the Probate Court will decide whether you need a new guardian.

### **Will I still be able to vote?**

Yes, unless the guardianship papers ("the order") state that you cannot.

### **Will I be able to decide where I live?**

Your guardian should consider where you want to live. Your guardian will make the final decision about where you will live. Look at your guardianship papers to see if there are specific details that may limit the guardian's decisions. Talk to your guardian about available choices. Your guardian may consider finances, location, your needs, access to medical providers, and other factors to decide where you live.

### **Can I stay at home?**

That depends. Your guardian must act in your best interest and review your situation and resources to decide whether you can stay at home.

### **Will the Probate Court appoint an attorney if I can't afford one?**

Maybe. If you think you want an attorney, call South Carolina Legal Services at 1-888-346-5592 (toll free). If you need help finding an attorney, talk to your guardian ad litem or call the Probate Court.

### **Can I choose my own doctor?**

If you have a guardian, tell your guardian who you want to have as your doctor. The guardian has the responsibility to act in your best interest, which includes choosing your doctor.

### **Can I spend my own money?**

It depends. You and your guardian should work together based on how much money you have.

**Note:** If you have a conservator, Veterans Administration fiduciary, or Social Security representative payee, then that person, not your guardian, will decide how your money is spent.

### **Can I visit my children or spouse?**

It depends. You and your guardian will decide based on the situation. If you have a close and healthy relationship with someone, your guardian will usually assist with visits. In most cases, visits among family members are not a problem.

## **What happens if I disagree with my guardian?**

If you are concerned about the actions or decisions of your guardian, first talk with your guardian directly about your concerns and try to work toward a resolution. You may want to speak with other people you trust to help you with the communication. Most issues are resolved through respectful communication.

## **What if we cannot come to an agreement?**

Contact the county Probate Court with your concerns. The Probate Court may provide you with contact information for legal assistance. The Probate Court may re-involve the original court-appointed attorney, send out a visitor to further investigate, forward the concern to South Carolina Department of Social Services Adult Protective Services, simply file the complaint and address it later if more issues arise, or take other appropriate action.

## **What rights do I have?**

You will always have a right to be treated with respect and to receive appropriate care. Other rights may be determined by the Probate Court and the type of guardianship you have. If you have a limited guardianship, the guardianship papers may describe some of those rights. You may have other protections under the law that are not affected by the guardianship.

## Resources

- If you do not understand the information in these FAQs, you may want to contact an attorney.
- To find an attorney who practices law in this area, please contact the South Carolina Bar's Lawyer Referral Service (LRS) at 1-800-868-2284 (toll free) or 803-799-7100 (Columbia area). LRS offers a referral by the location and by type of law. The lawyers who sign up with LRS are in good standing with the South Carolina Bar and must maintain malpractice insurance coverage. The lawyers also agree to a 30-minute consultation for no more than \$50. After the 30-minute consultation, the fees will be the lawyers' normal fees. Once you receive a referral, you will be expected to contact the lawyer by telephone to make an appointment.
- If you cannot afford an attorney, you may contact the South Carolina Legal Aid Telephone Intake Service (LATIS) at 1-888-346-5592 (toll free) or 803-744-9430 (Columbia area). Eligibility for assistance will depend on your income and assets and the type of problem you have. The income limit to be eligible for LATIS is 125% of the Federal poverty level, which changes every year in April. There is also an asset (money in bank accounts, property, etc.) limit. Additionally, the problem you have must be within the list of problems with which LATIS can help.

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