

# Guardianship in South Carolina

## Frequently Asked Questions from a Caregiver or Potential Guardian

**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 laws concerning 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 a licensed South Carolina attorney. 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 decides what law applies in each 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 if the person is incapacitated. 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.

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

An incapacitated person 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 Probate Court relies on the opinions of medical examiners.

## **What is a ward?**

A ward is a person to be protected by a guardian. A guardian is only appointed when a Probate Judge determines a person is an incapacitated adult who does not have the mental or physical capacity to effectively manage or make necessary daily living and health care decisions.

## **What is a guardian?**

In South Carolina, a guardian is a person, institution, or agency appointed by the Probate Court to handle personal matters for a ward.

The primary responsibilities of a guardian are to decide where the ward will live and make provisions for the ward's care, comfort, and maintenance, including medical and health care decisions. Among other responsibilities, a court-appointed guardian must file a written report with the Probate Court at least once a year.

## **What is a guardian ad litem?**

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 is the difference between a guardian and a GAL?**

A guardian is a person, institution, or agency appointed by the Probate Court to handle personal matters for a ward. Usually the guardian serves until the ward dies or the Probate Court decides that the ward no longer needs a guardian.

The GAL is also appointed by the Probate Court, but only until the case is resolved.

## **What is a guardianship proceeding?**

In South Carolina, a guardianship proceeding is the process in Probate Court (<http://www.sccourts.org/probateCourt/>) that appoints a guardian to make decisions for an incapacitated person, such as medical decisions, decisions about where to live, and other decisions for the person. The person who has been appointed by the Probate Court to make decisions for an incapacitated person is called a guardian. An adult who has been found incapacitated by the Probate Court is known as a ward.

Once appointed by the Probate Court, the guardian is authorized to make certain important decisions for the ward.

In South Carolina, a guardianship involves personal decisions and not decisions about money, real estate, or valuable property. The Probate Court may appoint a conservator to protect money and property. These FAQs do not cover conservatorships.

## **Does the Probate Court handle guardianships for minors?**

No, only the Family Court can appoint a guardian for a minor. A minor is an individual under the age of 18. Only the Probate Court can appoint a guardian for an adult.

## What are the requirements 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 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. See <http://www.sccourts.org/forms/pdf/541PC.pdf> and <http://www.sccourts.org/forms/pdf/538PC.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 duties of a guardian ad litem (GAL);
- A person alleged to be incapacitated has a right to be represented by an attorney. The attorney does not have to 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 about further requirements and fees.

## **What is a visitor?**

A visitor is a person who is appointed by the Probate Court to give a written opinion about whether the visitor believes the alleged ward/vulnerable adult needs a guardian. See S.C. Code Ann. §§ 62-5-307 and 62-5-308 at <http://www.scstatehouse.gov/code/t62c005.php>.

## **Who may need a guardian?**

- An adult who is unable to make reasoned health care decisions or take or direct proper care of himself or herself.
- An adult who does not have a health care power of attorney (HCPOA) and needs someone to make health care decisions.
- An adult who is dying and does not have a living will or a HCPOA, and whose family cannot agree as to appropriate end of life decisions.

- An adult who has a living will or HCPOA, but the person named in the document is unable or unwilling to make decisions or has a conflict.
- An adult who has a living will or HCPOA, but the documents are not sufficient to meet his or her needs or the adult will not let the agent designated in the living will or HCPOA help.
- An adult whose health care providers (nursing homes, doctors, hospitals) are not honoring a valid Durable Power of Attorney (DPOA) or HCPOA.
- An adult who needs services in the home and is unable to arrange for them on his or her own.
- An adult who is in a facility and needs an advocate to make sure his or her needs are met.

## **Who does not need a guardianship in Probate Court?**

- A person who is a minor (under 18 years of age). The Family Court has jurisdiction over minors.
- An adult who is not incapacitated. Making poor decisions does not necessarily mean a person needs a guardian. See S.C. Code Ann. § 62-5-101(1) at <http://scstatehouse.gov/code/t62c005.php>.
- An adult who has a valid living will, healthcare power of attorney, or durable power of attorney that is sufficient to meet his or her needs.
- An adult whose needs are met by the Adult Health Care Consent Act. See S.C. Code Ann. §§ 44-66-10 et seq. at <http://www.scstatehouse.gov/code/t44c066.php>.
- A ward who already has a guardian in another jurisdiction. There may be a need to transfer the Guardianship to South Carolina if the ward is residing in South Carolina.

- An adult who can manage personal care decisions, but not financial decisions. That person may need a protective order or conservator to manage money or property.

## **Are there any alternatives to guardianship?**

Yes. There are several options that are less restrictive than full guardianship. These options are outlined in [Alternatives to Guardianship in South Carolina - Frequently Asked Questions](#).

## **What are Least Restrictive Alternatives for decision making?**

Least restrictive alternatives are options that encourage independence and allow a person to make decisions about his or her care and well-being while still providing protection for the person. People who can protect themselves should retain their rights to the extent possible.

## **Who has priority to be a 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 nominated to serve as guardian by the alleged incapacitated person;
- A person appointed in a power of attorney by the alleged incapacitated person pursuant to Section 62-5-501;
- The spouse of the alleged incapacitated person;
- An adult child of the alleged incapacitated person;

- A parent of the alleged incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- Another relative of the alleged incapacitated person;
- Someone nominated by the person who is caring for the incapacitated person or the person/entity paying benefits to the incapacitated person.

### **Even if you have priority, do you qualify to be a guardian?**

Not always. In certain circumstances, the law allows the Probate Court to make a decision that is outside the order of priority for the best interest of the ward. A guardian must be qualified and suitable as determined by the Probate Court.

### **Maybe you should not be a guardian if:**

- You do not have the time.
- You do not live in South Carolina.
- You do not have the resources to commit to serving.
- You are not emotionally ready.
- You are too close to the situation.
- Someone else may be more appropriate.
- You have been convicted of a felony.
- You are under 18 years of age.
- You are on the adult abuse registry.
- You are on a sexual offender or sexual predator registry in any state.

- You have a mental or physical health care concern of your own that would prevent you from serving.
- You are uncomfortable making decisions that may conflict with other family members' choices.
- You do not like confrontation.
- You may not be able to honor the ward's wishes.
- You are only doing it because you feel guilty.
- You do not have a strong connection to or care for the person.
- You have a conflict of interest; what you want may be different than the best interest of the individual. (Example: You have a personal or financial interest that may complicate the decision.)

## **Who is the ideal choice for a guardian?**

The ideal choice for a guardian is going to depend greatly upon the specific circumstances of the individual who needs a guardian. The ideal candidate must be willing to do the work and report back to the Probate Court. The person appointed as guardian must be willing to follow the rules of court and the law.

Qualities may include being:

- loving
- respectful
- responsible
- diligent
- easily accessible and responsive
- available
- open-minded
- organized

- good at record-keeping
- willing to speak up
- assertive
- dutiful
- honest
- sensitive
- discerning
- tactful
- patient
- kind
- compassionate.

### **Do I have to be the guardian for my family member or friend?**

No. Serving as a guardian is voluntary.

### **If I do not want to be a guardian, are there any other options?**

Yes. Other family members, friends, professional guardians, agencies, or others may be willing to serve as a guardian. See S.C. Code Ann. § 62-5-311 at

<http://www.scstatehouse.gov/code/t62c005.php>.

### **Does South Carolina have a public guardian program?**

No.

### **If no one in my family can serve as guardian, are there professional guardians?**

There are individuals and organizations that serve as professional guardians, but these services are usually not free. You may want to compare the services and prices.

- Contact the Probate Court in the county where the allegedly incapacitated person resides.

- Check with doctors, counselors, therapists, or any agency which provides services to your loved one.
- Check with an agency, including the:
  - South Carolina Lieutenant Governor's Office on Aging
  - South Carolina Department of Social Services
  - Veterans Administration
  - South Carolina Department of Mental Health
  - South Carolina Department of Disabilities and Special Needs
  - South Carolina Department of Health and Human Services

### **Can two people be guardians for the same person?**

Yes, but usually only one person is appointed to serve as a guardian.

Two people can be guardians in special situations. In order for the situation to work best for the ward, the two guardians must get along and they must be willing to work together on all decisions.

Co-guardians are most often appointed when they are the parents of an incapacitated adult, or in cases where there are adult children of an incapacitated parent and one may live close to the parent and the other may live out of town or out of state.

### **What do I have to do if I am a guardian?**

- Act in the ward's best interest;
- Report to the Probate Court as instructed;
- Stay informed of the ward's conditions (appointments, services, etc.);

- Visit the ward regularly based upon the needs of the ward or upon order of the Probate Court;
- Make sure the ward has appropriate food, shelter, clothing, and health care; and
- Consider the needs and wants of the ward in making decisions that are in his or her best interest.

## **What are the powers and duties of the guardian?**

Generally a guardian has the same powers, rights, and duties over the ward that a parent has over a child. See S.C. Code Ann. § 62-5-312 at <http://www.scstatehouse.gov/code/t62c005.php>.

A guardian must:

- File an annual report with the Probate Court;
- Inform the Probate Court of the physical location of the ward; and
- Keep the guardian's contact information current with the Probate Court.

When the Probate Court appoints a guardian for a ward, the guardian may have some or all of the following responsibilities:

- Advocate in the ward's best interest.
- Determine and monitor the ward's residence.
- Monitor whether the ward's needs are being met.
- Monitor health care and non-medical services, such as education and counseling.
- Consent to or refuse to consent to health care.

- Consent to or refuse to consent to non-medical services such as education and counseling.
- Consent to or refuse to consent to the release of confidential information.
- Make end-of-life decisions.
- Encourage independence and advocate for the ward to live in the least restrictive setting appropriate to his or her needs.
- Report to the Probate Court about the guardianship status at least annually.

## **What happens if I later decide I no longer want to be a guardian?**

It is important for you to know that you must remain a guardian until the Probate Court relieves you. You will still be responsible for acting in the best interest of the ward and reporting to the Probate Court until the Probate Court relieves you. You must file a request with the Probate Court to relinquish your responsibilities as the guardian. See South Carolina Code Ann. § 62-5-307 at <http://www.scstatehouse.gov/code/t62c005.php>.

## **What are my options if I am not the guardian?**

Any interested person can file an action to remove an existing guardian and petition the Probate Court to review his or her administration. SCCA Form 571PC is found online at <http://www.sccourts.org/forms/pdf/571PC.pdf>.

## **What if someone is abusing my ward?**

- Call local law enforcement (911) in emergency situations.
- Have your Probate Court appointment papers available to show you have authority to act for your ward.

- Get copies of any relevant reports, medical information, photographs, or other documents.
- Keep a record of the date and time and details of any incidents.
- Determine whether you need to contact Adult Protective Services (DSS), the Long Term Care Ombudsman, SLED, or law enforcement. For more information, see <http://pandasc.org/wp-content/uploads/2011/12/SpotAbuse.pdf>.

## **When is an emergency guardianship necessary?**

An emergency guardianship is necessary if immediate action needs to be taken to protect the health, safety, or welfare of a person. See S.C. Code Ann. § 62-5-310 at <http://www.scstatehouse.gov/code/t62c005.php>.

## **How do I know if someone has a guardian?**

An adult does not have a guardian unless there is an official document signed by the Probate Court Judge that appoints a guardian. Check with the Probate Court in the county where the person lives or formerly lived.

## **Once I am appointed as guardian, where should I send copies of my certificate of appointment?**

Although not required, it is a good idea to send copies of the certificate of appointment to:

- The ward's primary care physician and any of the ward's other physicians.
- The ward's other medical service providers (for example: Medicaid, any care providers, nursing homes, facility directors).
- Credit bureaus such as [Equifax](http://www.equifax.com/), [Experian](http://www.experian.com/), or [TransUnion](http://www.transunion.com/). (<http://www.equifax.com/>, <http://www.experian.com/>, <http://www.transunion.com/>)

- The ward's banks.

## **Can I ask that the guardianship action be kept private or sealed?**

Yes. You can make a formal request to the Probate Court.

## **Does a guardian need to be bonded?**

In Probate Court, a bond is a type of insurance to protect assets of the ward. Bonds are usually not required in guardianships, but they are required in Conservatorships.

## **What does it cost to be appointed as a guardian?**

Costs can vary. The court's filing fee is \$150. There are other expenses, which may include the cost of the visitor, the guardian ad litem (GAL), the examiners' reports, attorney's fees, and service of process. There may be other costs as well. See S.C. Code Ann. § 62-5-414 and § 62-5-711 at <http://www.scstatehouse.gov/code/t62c005.php>

## **Do I get paid as a guardian?**

It depends. Ask the Probate Court. You may request a fee, but the Probate Court will make the decision about any fee or reimbursements.

## **Does the guardian have to pay for the ward's food, housing, and other incidentals?**

The guardian must always act in the ward's best interest. Acting in the ward's best interest may mean that the guardian must use the ward's income to purchase food, housing, or other items for the ward.

In some cases, the guardian may need to use his or her own funds for the ward if there is an emergency need or necessities are required

to protect the ward. If the guardian does use his or her own funds, he or she can ask the court for reimbursement.

A guardian may never spend the ward's money for the guardian's personal use.

## **Can the guardian be reimbursed for expenses?**

Often the guardian can be reimbursed for legitimate expenses if the ward has sufficient funds. Check with the Probate Court about its reimbursement process.

## **Who has to pay for the cost of securing guardianship?**

If a guardian is appointed, the costs may be paid from the ward's funds or estate if there are any assets available. See S.C. Code Ann. § 62-5-312(b) at <http://www.scstatehouse.gov/code/t62c005.php>.

The Probate Court decides whether the person who brings the guardianship petition is reimbursed for the attorney's fees and expenses.

It is possible that the Probate Court will not find a guardian necessary, and the person bringing the action may be responsible for all of the expenses.

## **Do I need to be trained to be a guardian?**

Some probate courts require training. Check with the Probate Court in the county where the potential ward lives. See <http://www.sccourts.org/probateCourt/probateMap.cfm>.

## **Can I take a break from being a guardian?**

The Probate Court allows a guardian to delegate some or all of the guardian's powers to another person for up to thirty days. Ask the Probate Court for the specifics. See S.C. Code Ann. § 62-5-104 at <http://www.scstatehouse.gov/code/t62c005.php>.

## Is there a handbook where I can get more information?

While there is free information about guardianships online, it may not be specific to South Carolina. For general reference, visit these links:

- [http://www.guardianship.org/reports/Guardianship\\_Report.pdf](http://www.guardianship.org/reports/Guardianship_Report.pdf)
- There is a book on Elder Law, written by Franchelle Millender, a South Carolina attorney, for attorneys. You can buy the book from the South Carolina Bar at [http://miva.scbar.org/merchant5/merchant.mvc?Screen=CTGY&Store\\_Code=scbcle&Category\\_Code=ELDER](http://miva.scbar.org/merchant5/merchant.mvc?Screen=CTGY&Store_Code=scbcle&Category_Code=ELDER).

## What liability do I have as a guardian?

It depends. Usually a guardian is not responsible for the ward's acts. A guardian has a duty to act in the best interest of the ward at all times. See S.C. Code Ann. § 62-5-312 at <http://www.scstatehouse.gov/code/t62c005.php>.

If you have questions about your liability as a guardian, please contact an attorney.

## What does "best interest" mean?

"Best interest" means a decision that will have the best outcome for the ward.

This means that a guardian must evaluate all of the options available. A guardian must remember to take into consideration the ward's value system, religious beliefs, wants, needs, and desires when he or she makes decisions.

## How do I apply to become a guardian?

This is an involved process. The first thing to do is talk to the Probate Court. There are forms and fees that are required. See S.C. Code Ann. § 62-5-303 at <http://www.scstatehouse.gov/code/t62c005.php>.

If possible, talk to an attorney. An attorney can guide you through this process. If you cannot afford an attorney, below are some of the steps to become a guardian:

- Talk to the Probate Court Staff and tell them what you are trying to do.
- Get the appropriate forms – Summons and Petition. Go to <http://www.sccourts.org/forms/> for Probate Court Forms.
- Fill out the forms accurately.
- Take the forms to the Probate Court to file. Pay the required fees. Get a copy of the forms that you filed.
- Request that the Probate Court appoint a visitor.
- Request that the Probate Court appoint a guardian ad litem.
- Ask the Probate Court to appoint two examiners, one of whom must be a physician. Sometimes the Court will select the examiners. This varies by county. The examiners will fill out written reports. Make sure the reports are filed with the Probate Court.
- Serve all the appropriate people with copies of the documents that you filed with the Probate Court. See <http://www.sccourts.org/probateCourt/probateMap.cfm>. For more information about how to "serve" documents, see <http://www.sccourts.org/selfHelp/FAQCircuit.pdf#page=2>.

**Note:** If an interested person notifies the Probate Court that he or she objects, the procedure becomes more complicated. If an interested person objects, you are strongly encouraged to contact an attorney.

- File the proof of service form with the Probate Court. See <http://www.sccourts.org/probateCourt/probateMap.cfm>.
- Request a hearing date from the Probate Court.
- After you get a hearing date, provide notice of the hearing to all the parties, including the potential ward and the guardian ad litem.
- Before the hearing, make sure that all the appropriate forms have been filed, including the visitor's report and the two examiners' reports.
- Make sure the guardian ad litem is ready to report to the Probate Court.
- Some Probate Courts have additional requirements. Check with the Probate Court.
- At least one week prior to the hearing date, check with the Probate Court to ensure that everything is ready for the hearing.

**Note:** The potential ward is entitled to be present at the hearing and is entitled to an attorney. The guardian ad litem may be allowed to waive the potential ward's right to attend if appearing in court would not be in the potential ward's best interest. See S.C. Code Ann. § 62-5-309 at <http://www.scstatehouse.gov/code/t62c005.php>.

## **Do I need an attorney?**

An attorney is not required, but this is a complicated process, and you are encouraged to contact an attorney.

## **Can the guardian change the ward's will?**

No.

## **What does the guardian do if the ward is no longer incapacitated?**

The ward or any interested person may request that the Probate Court issue an order finding that the ward is no longer incapacitated and ending the guardianship. See S.C. Code Ann. §§ 62-5-306 and 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 the ward still meets 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>

## **What should I do if my Ward dies?**

Notify the Probate Court immediately. The guardian must file a Petition for Discharge (PC 571) and proof of death of the ward. The Probate Court will issue an Order of Discharge. <http://www.sccourts.org/forms/pdf/571PC.pdf>

If you have additional questions, ask the Probate Court.

## 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 South Carolina Legal Services can help.

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