

CHAPTER 1:

Overview of Adult Guardianship

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1.1

Scope of this Manual

This manual is written for attorneys who are appointed to represent allegedly incapacitated adults in proceedings to appoint general guardians, guardians of the person, or guardians of the estate for those adults under Articles 1, 2, 4, and 5 of G.S. Chapter 35A.

This manual focuses primarily on the law and procedure governing proceedings to determine whether a person is an incapacitated adult, to appoint a guardian for an incapacitated adult, and to “restore” the competency of an incapacitated adult. It does not discuss in detail many other aspects of guardianship law, such as the powers and duties of guardians, guardianship bonds, accountings, and removal of guardians because those matters generally do not fall within the scope of representation by attorneys who are appointed in guardianship proceedings under G.S. 35A-1107.

Similarly, because attorneys are not appointed to represent minors who are the subjects of guardianship proceedings under Article 6 of G.S. Chapter 35A, this manual does not address in detail the law governing the appointment of guardians for minors (other than those who are at least 17 ½ years old and are alleged to be incapacitated for reasons other than their minority).

1.2

Scope of this Chapter

This chapter introduces readers to the terminology of guardianship and provides a general overview of the law of adult guardianship generally and legal proceedings to appoint guardians for incapacitated adults. Detailed information regarding legal proceedings to appoint guardians for incapacitated adults is provided in the remaining chapters of this manual.

Readers are encouraged to familiarize themselves with the guardianship terminology in the following section of this chapter before reading the rest of this chapter and the remaining chapters of the manual.

1.3

Adult Guardianship Terminology

Accounting. The process by which the guardian files with the Clerk of Superior Court for the Clerk's review and approval financial reports and information concerning the ward's property, estate, and financial affairs, including the receipt and expenditure of the ward's money and transactions involving the ward's property. *See* G.S. Ch. 35A, Art. 10.

Adult. A person who is at least 18 years of age or who is under the age of 18 and has been legally emancipated. A minor who is at least 17 ½ years old is treated like an adult for purposes of a guardianship proceeding if the minor is incapacitated due to reasons other than his or her minority. *See* G.S. 35A-1101(8).

Adult guardianship. Procedures involving the appointment of a guardian for an incapacitated adult (as opposed to proceedings involving the appointment of a guardian for a minor).

Ancillary guardian. A guardian of the estate who is appointed pursuant to G.S. 35A-1280 on behalf of a nonresident ward when a general guardian, guardian of the estate, or similar fiduciary has been appointed for the ward under the laws of another state and the ward has an ownership or other interest in real or personal property in North Carolina.

Applicant. Any person, including any state or local human services agency, who files an application seeking the appointment of a guardian for an incapacitated adult. *See* G.S. 35A-1210. In most adult guardianship proceedings, the petitioner is also the only applicant. However, a person other than the petitioner may be the only or an additional applicant in some adult guardianship proceedings.

Clerk. The Clerk of Superior Court. The Clerk has original jurisdiction over guardianship proceedings and exclusive, original jurisdiction except in cases in which the Clerk has a direct or indirect interest. The Clerk's judicial authority may be exercised by an Assistant Clerk of Superior Court.

Corporate guardian. A for-profit or nonprofit corporation whose corporate charter expressly authorizes it to serve as a guardian or in a similar fiduciary capacity. *See* G.S. 35A-1213(c).

Court. The Clerk of Superior Court or a Superior Court Judge. The Clerk has original jurisdiction over guardianship proceedings and exclusive, original jurisdiction except in cases in which the Clerk has a direct or indirect interest. Except as noted above, judges of the Superior Court exercise appellate, rather than original, jurisdiction over guardianship proceedings.

Designated human services agency. A state or local human services agency (including a state, county, city, area, or regional social services agency, public health agency, mental health agency, mental retardation or developmental disability agency, substance abuse agency, vocational rehabilitation agency, aging agency, or diagnostic evaluation agency or center) that is designated by the court to submit a multidisciplinary evaluation in an adult guardianship proceeding or to review status reports regarding an incapacitated ward. *See* G.S. 35A-1101(4); G.S. 35A-1101(14); G.S. 35A-1111; G.S. 35A-1202(3); G.S. 35A-1212(b); G.S. 35A-1242.

Disinterested public agent guardian. The director or assistant director of a local human services (social services, public health, mental health, aging, etc.) agency or an officer, agent, or employee of a state human services agency who is appointed by the Clerk of Court to serve as the guardian of an incapacitated ward. *See* G.S. 35A-1202(4); G.S. 35A-1213(d); G.S. 35A-1213(e).

Durable power of attorney. A valid power of attorney executed pursuant to G.S. Ch. 32A, Art. 2, or a similar statute of another state, under which the attorney-in-fact's authority is not affected by the principal's subsequent mental incapacity. *See* G.S. 32A-8; G.S. 32A-10.

Estate. Any interest, including any interest in joint accounts or jointly-held property, of the ward in real property, choses in action, intangible personal property, and tangible personal property. G.S. 35A-1202(5).

General guardian. A guardian who has the authority of a guardian of the person and a guardian of the estate of an incapacitated ward. G.S. 35A-1202(7).

Guardian. A general guardian, guardian of the person, guardian of the estate, or interim guardian of an incapacitated adult.

Guardian ad litem. When used in the context of guardianship proceedings under G.S. Chapter 35A, guardian ad litem means an attorney who is appointed pursuant to G.S. 35A-1107 to represent or serve as the guardian ad litem for an allegedly incapacitated respondent or an incapacitated ward in a proceeding to determine the respondent's or ward's capacity or to appoint a guardian for the respondent. When used in other contexts, guardian ad litem refers to a person who is appointed pursuant to Rule 17 of the North Carolina Rules of Civil Procedure as the guardian ad litem for an incompetent person who is a party to a civil action or proceeding. *See* G.S. 35A-1101(6); G.S. 35A-1202(8).

Guardian of the estate. A guardian who is appointed solely for the purpose of managing the property, estate, and business affairs of an incapacitated ward. G.S. 35A-1202(9). *See also* G.S. 35A-1251; G.S. 35A-1253. In some states, a guardian of the estate is referred to as a "conservator."

Guardian of the person. A guardian who is appointed solely for the purpose of performing duties relating to the care, custody, and control of an incapacitated ward. G.S. 35A-1202(10). *See also* G.S. 35A-1241.

Guardianship. A legal relationship under which a person or agency (the guardian) is appointed by a court to make decisions and act on behalf of a minor or an incapacitated adult (the ward) with respect to the ward's personal affairs, financial affairs, or both.

Health care power of attorney. A valid health care power of attorney that is executed pursuant to G.S. Ch. 32A, Art. 3, or a similar law of another state, under which a health care agent is authorized to make health care decisions on behalf of the principal when the principal lacks capacity to make or communicate health care decisions. *See* G.S. 32A-19; G.S. 32A-20; G.S. 32A-22.

Incapacitated (or incompetent). Lacking sufficient mental capacity to manage one's own personal affairs, financial affairs, or property or lacking sufficient mental or physical capacity

to make or communicate important decisions concerning one's own person, family, or property due to mental illness, mental retardation or developmental disability, inebriety, disease, injury, or similar cause or condition. G.S. 35A-1101(1); G.S. 35A-1101(2); G.S. 35A-1101(5); G.S. 35A-1101(7); G.S. 35A-1101(10); G.S. 35A-1101(12); G.S. 35A-1101(13).

Note: Although North Carolina's guardianship statutes use the term "incompetent," this manual will use the term "incapacitated" instead of "incompetent."

Incapacitated (or incompetent) adult. An incapacitated person who is at least 18 years old or who is a minor who is at least 17½ years old and, apart from his or her status as a minor, is incapacitated. G.S. 35A-1101(7); G.S. 35A-1101(8).

Interim guardian. A temporary guardian who is appointed pursuant to G.S. 35A-1114 for a respondent who is alleged to be incapacitated in order to protect the respondent's well-being or estate from imminent harm. G.S. 35A-1101(11).

Letters of appointment. The document issued by the Clerk of Superior Court to a general guardian, guardian of the person, or guardian of the estate, following the guardian's appointment and qualification, authorizing the guardian to act as the ward's guardian. *See* G.S. 35A-1206.

Limited guardianship. A guardianship in which the guardianship order expressly limits the guardian's powers or permits an incapacitated ward to retain certain legal rights or privileges that are within the ward's comprehension and judgment. *See* G.S. 35A-1215(b).

Minor. A person who is under the age of 18 years and is not emancipated.

Multidisciplinary evaluation (MDE). An evaluation that is prepared by a designated human services agency at the direction of the Clerk of Superior Court regarding the nature and extent of a respondent's or ward's incapacity in order to assist the Clerk in determining whether or to what extent the respondent is incapacitated, whether a limited guardianship is appropriate, or other issues regarding guardianship. An MDE must include current (within the past year) medical, psychological, and social work evaluations as directed by the Clerk and may include evaluations by other professionals regarding the respondent's or ward's needs with respect to education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech therapy, etc. G.S. 35A-1101(14); G.S. 35A-1111; G.S. 35A-1202(13); G.S. 35A-1212(b).

Natural guardian. The parent of a minor child.

Practice Note: An incapacitated adult does not have a natural guardian.

Nominated guardian. A person who has been nominated by a competent adult, pursuant to a duly executed durable power of attorney, health care power of attorney, or other writing, to serve as the adult's guardian in the event that the adult is determined to be incapacitated and in need of a guardian.

Nonresident guardian. A guardian who is not a resident of North Carolina. *See* G.S. 35A-1213(b).

Petitioner. Any person, including any state or local human services agency, who files a petition alleging that a respondent is incapacitated and needs a guardian. *See* G.S. 35A-1105. In most adult guardianship proceedings, the petitioner is also the applicant who seeks the appointment of a guardian for an incapacitated adult. *See* G.S. 35A-1210.

Plenary guardianship. An adult guardianship in which the guardianship order does not limit the guardian's statutory powers or permit the ward to retain specified legal rights or privileges.

Public guardian. A person appointed by the Clerk of Superior Court pursuant to G.S. Ch. 35A, Art. 11, to serve as the guardian of an incapacitated adult when (a) the incapacitated adult does not have a guardian and six months have elapsed since the discovery of property belonging to the incapacitated adult, or (b) any person who is entitled to letters of guardianship with respect to an incapacitated adult requests the Clerk to issue letters of appointment to the public guardian.

Representative payee. A person or agency who has been designated by the Social Security Administration or another federal or state agency to receive and use public benefits, such as Social Security, Supplemental Security Income, or veterans' benefits, on behalf of and for the benefit of a beneficiary who has been determined to be unable to manage the benefits or assistance to which he or she is entitled.

Respondent. The person who is alleged to be incapacitated in an adult guardianship proceeding under G.S. Ch. 35A. G.S. 35A-1101(15). If a respondent is adjudicated incapacitated and a guardian is appointed for the respondent, the respondent generally is referred to thereafter as the ward. *See* G.S. 35A-1101(17); G.S. 35A-1202(15).

Standby guardian. A person who has been designated or appointed pursuant to G.S. Ch. 35A, Art. 21, to become the guardian of a minor child upon the death or incapacity of the child's parent.

Practice Note: North Carolina law currently does not provide for the designation or appointment of a standby guardian for an incapacitated adult.

Status report. A report filed pursuant to G.S. 35A-1242 by a general guardian or guardian of the person regarding an incapacitated ward's condition, needs, and development and the guardian's performance of his or her duties.

Substituted judgment. A decision-making standard under which a guardian considers the ward's known preferences, attitudes, beliefs, wishes, etc., in an attempt to make the same decision for a ward that the ward would have made if the ward had the capacity to make the decision.

Successor guardian. A guardian who is appointed following the death, resignation, or removal of a guardian.

Testamentary guardian. A person who is nominated by the last will and testament of the parent of a minor child pursuant to G.S. 35A-1225 to become the minor child's guardian upon the parent's death.

Practice Note: The provisions of G.S. 35A-1225 do not apply to incapacitated adults.

Ward. An incapacitated adult for whom a guardian has been appointed in an adult guardianship proceeding. G.S. 35A-1101(17); 35A-1202(15).

1.4

Nature and Purpose of Adult Guardianship

A. Definition of Guardianship

Guardianship is a legal relationship under which a person or agency (the guardian) is appointed by a court to make decisions and act on behalf of a minor or an incapacitated adult (the ward) with respect to the ward's personal affairs, financial affairs, or both.

B. Purpose of Guardianship

The essential purpose of guardianship for an incapacitated adult is to replace, in whole or in part, the ward's authority to make personal decisions with the guardian's authority to make decisions regarding the ward's personal affairs, financial affairs, or both when the ward lacks sufficient mental capacity to make those decisions. *See* G.S. 35A-1201(a)(3). Guardianship, however, should seek to preserve for an incapacitated ward the opportunity to make those decisions and exercise those rights that are within the ward's comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to competent adults. G.S. 35A-1201(a)(5). And even when a guardian has been appointed for an incapacitated ward, the ward should be allowed to participate, to the maximum extent of his or her capabilities, in all decisions that will affect him or her. G.S. 35A-1201(a)(5).

C. Personal Autonomy

The concepts of personal autonomy and self-determination hold that all "competent" adults have, or should have, the right to make their own decisions regarding their personal affairs. These concepts, in turn, rest on at least two assumptions:

- absent a contrary and legitimate social or governmental interest, "competent" adults should be free to make their own decisions regarding their personal affairs;
- absent proof that an adult lacks sufficient mental capacity to make personal decisions, an adult has the capacity to make his or her own decisions.

Both of these assumptions are recognized, explicitly or implicitly, by the common law, case law, statutory law, and constitutional law.

The United States Supreme Court has held that a competent adult has a constitutionally-protected, but not absolute, interest in making certain types of important, intimate, or personal decisions, including decisions regarding the refusal of medical treatment. *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 278 (1990); *cf. Washington v. Glucksberg*, 521 U.S. 702 (1997). *See also Hagins v. Greensboro Redevelopment Comm'n*, 275 N.C. 90, 106 (1969) (holding that the government may not interfere with a competent adult's authority to make decisions regarding his or her person or property absent actual and positive necessity therefor).

D. Presumption of Capacity

The law also presumes that, in the absence of proof to the contrary, all adults have sufficient mental capacity to make their own decisions regarding their personal affairs. *See State v. Thompson*, 328 N.C. 477 (1991); *Ridings v. Ridings*, 55 N.C. App. 630 (1982); *In re Womack*, 53 N.C. App. 221 (1981); *State v. Jones*, 293 N.C. 413 (1977); *Hagins v. Greensboro Redevelopment Comm'n*, 275 N.C. 90 (1969) (presumption implicit in holding); *Jones v. Winstead*, 186 N.C. 536 (1923); *Hudson v. Hudson*, 144 N.C. 449 (1907).

This presumption, however, may be rebutted by sufficient, competent evidence of mental incapacity in a legal proceeding, including a guardianship proceeding pursuant to G.S. Ch. 35A, in which an adult's mental capacity is at issue.

E. Balancing Personal Autonomy vs. Protection of Incapacitated Persons

Guardianship necessarily limits the personal autonomy and legal rights of an incapacitated ward. Guardianship, however, also may protect an incapacitated person or his or her property. The law of guardianship, therefore, reflects an attempt to strike a balance between preserving and protecting the legal rights, freedom, and personal autonomy of adults and the duty of the State (acting as *parens patriae*) to protect individuals who lack sufficient mental capacity to make decisions regarding themselves or their property, to act in their own best interests, or to protect themselves or their property from harm, injury, or exploitation.

One of the ways that the law attempts to balance the competing interests of personal autonomy and protection of incapacitated persons is by defining the conditions that will warrant the State's limiting an adult's legal rights through the appointment of a guardian to make decisions and act for that adult. Legal definitions of "incapacity" or "incompetence," along with legal concepts regarding "limited guardianship," "least restrictive" alternative, "last resort," or "necessity," constitute the legal "triggers" that justify limiting an adult's legal rights through the appointment of a guardian.

Unlike the Uniform Guardianship and Protective Proceedings Act, North Carolina's guardianship statutes do not expressly provide that a guardian may be appointed for an incapacitated adult only if there are no "less restrictive" alternatives that will meet the adult's needs. North Carolina law, however, does provide that limiting the rights of an incapacitated adult through the appointment of a guardian should not be undertaken unless it is clear that guardianship will give the ward a fuller capacity for exercising his or her rights. G.S. 35A-1201(a)(4).

North Carolina's guardianship statutes also implicitly encourage the use of "limited guardianships" and expressly allow the entry of "limited guardianship" orders under which the ward retains specified legal rights. G.S. 35A-1215(b).

A second way in which the law attempts to balance the competing interests of autonomy and protection is by establishing the legal procedures that govern the determination of incapacity and the appointment of a guardian for an incapacitated adult. At a minimum, these procedures must provide an allegedly incapacitated adult with adequate notice and a fair opportunity to be heard before he or she is determined to be mentally incapacitated and

a guardian is appointed for him or her. *See Hagins v. Greensboro Redevelopment Comm'n*, 275 N.C. 90 (1969).

F. The Guardian-Ward Relationship

Guardianship involves a fiduciary relationship between the guardian and the ward. The general guardian or guardian of the estate of an incapacitated ward has a fiduciary obligation to manage the ward's estate reasonably, prudently, and in the ward's best interest. *See* G.S. 35A-1253; *In re Armfield*, 113 N.C. App. 467 (1994); *Cline v. Teich*, 92 N.C. App. 257 (1988); *Kuykendall v. Proctor*, 270 N.C. 510 (1967); *State ex rel. Armfield v. Brown*, 73 N.C. 81 (1875). Similarly, a general guardian or guardian of the person of an incapacitated ward is required to act in good faith and in the ward's best interest. *See* G.S. 35A-1241.

1.5 Guardianship Law in North Carolina

Most of North Carolina's statutory law regarding incapacity and guardianship is codified in G.S. Ch. 35A. There is only a limited amount of North Carolina case law regarding guardianship, and most of that case law predates the 1977 and 1987 guardianship legislation described below.

A. Guardianship Law Before 1977

American guardianship statutes find their origin in a 1324 English statute under which the Lord Chancellor, acting on behalf of the King, was authorized to appoint a committee for the person and property of "idiots" and "lunatics."

North Carolina's first statute regarding guardianship was enacted in 1784, authorizing the county courts to appoint guardians for "idiots and lunatics." In 1868, jurisdiction with respect to guardianship proceedings was transferred to the Clerk of Superior Court.

Before 1977, North Carolina's guardianship law contained few provisions protecting the due process rights of allegedly incapacitated respondents and focused primarily on the investment, management, use, and sale of the property of minor and incapacitated wards.

B. The 1977 Amendments to G.S. Chapter 35

In 1977, the General Assembly enacted legislation

- replacing pejorative language ("idiot," "lunatic," "feeble-minded," "insane," etc.) in North Carolina's guardianship statutes with the term "incompetent adult,"
- providing due process protections for allegedly incompetent respondents,
- introducing the concept of "limited guardianship,"
- allowing the court to order a "multidisciplinary evaluation" of an allegedly incompetent respondent,
- allowing the appointment of interim guardians in cases of emergency,

- allowing the appointment of state and local human services directors and employees as “disinterested public agent” guardians,
- defining the powers and duties of guardians of the person, and
- requiring certain guardians to file “status reports” regarding their wards with the court.

The 1977 legislation, however, applied primarily with respect to persons who were incompetent or allegedly incompetent due to mental retardation, epilepsy, cerebral palsy, or autism and did not significantly affect respondents and wards whose incapacity or alleged incapacity was due to mental illness, “senility,” inebriety, or other causes.

C. The 1987 Enactment of G.S. Chapter 35A

In 1987, the General Assembly enacted G.S. Ch. 35A, consolidated and clarified North Carolina’s statutory law governing guardianship of minors and incapacitated adults, and extended the provisions of the 1977 legislation to all allegedly incompetent respondents and incompetent wards.

D. The Uniform Guardianship and Protective Proceedings Act

North Carolina has not enacted the Uniform Guardianship and Protective Proceedings Act (UGPPA).

1.6 Overview of Adult Guardianship Proceedings

This section provides a brief overview of adult guardianship proceedings. Detailed information regarding adult guardianship proceedings is included in the remaining chapters of this manual.

A. Jurisdiction

The Clerk of Superior Court has original jurisdiction over guardianship proceedings involving allegedly incapacitated adults and incapacitated wards. G.S. 35A-1103; G.S. 35A-1203. (The Clerk of Superior Court also has original and exclusive jurisdiction with respect to guardianship proceedings involving minors, other than juveniles who are subject to the jurisdiction of the district court in juvenile proceedings under G.S. Ch. 7B.) The Clerk’s jurisdiction over proceedings to appoint a guardian for an incapacitated adult is exclusive, except in cases in which the Clerk has a direct or indirect interest in the proceeding, in which case jurisdiction is vested in any superior court judge residing or presiding in the district in which the proceeding is brought. G.S. 35A-1103(d).

B. Procedure

Proceedings to appoint a guardian for an incapacitated adult are commenced by filing a verified petition with the Clerk of Superior Court. G.S. 35A-1105. Upon the filing of a petition, an attorney must be appointed to represent the respondent. G.S. 35A-1107. Counsel

appointed for the respondent may be discharged if the respondent retains counsel. G.S. 35A-1107. Copies of the petition and notice of hearing must be served personally on the respondent. G.S. 35A-1109.

The Clerk may appoint an interim guardian for the respondent before the hearing to determine the respondent's incapacity if the petitioner files a motion seeking the appointment of an interim guardian and the Clerk finds that there is reasonable cause to believe that the respondent is incapacitated and that there is an imminent or foreseeable risk of harm to the respondent's physical well-being that requires immediate intervention or that there is an imminent or foreseeable risk of harm to the respondent's estate that requires immediate intervention in order to protect the respondent's interest. G.S. 35A-1114.

C. Determining Incapacity and Appointing a Guardian

In order to appoint a guardian for an adult respondent, the court (or jury) must find, after hearing and by clear, cogent, and convincing evidence, that the respondent 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, due to mental illness, mental retardation, inebriety, disease, injury, or similar cause or condition. G.S. 35A-1101(7); G.S. 35A-1112(d).

The respondent or respondent's attorney may request that the issue of incapacity be determined by a jury. G.S. 35A-1110. If a jury trial is not requested by the respondent or ordered by the court, the issue of incapacity is determined by the court.

If a respondent is adjudicated incapacitated, the Clerk must, after hearing evidence regarding the nature and extent of the needed guardianship, the assets, liabilities, and needs of the ward, and the suitability of prospective guardians, appoint a general guardian, a guardian of the person, or a guardian of the estate for the incapacitated ward. G.S. 35A-1120; G.S. 35A-1212.

The Clerk of Superior Court may order that issues related to the guardianship of an incapacitated adult be referred for mediation. G.S. 7A-38.3B.

D. Qualification, Powers, and Duties of Guardians

To qualify as a guardian, a person or corporation must meet the statutory qualifications for appointment as a guardian and, except in the case of specified guardians of the person who are not disinterested public agent guardians or public guardians, post a bond with the Clerk of Superior Court. After qualifying, general guardians and guardians of the estate are required to file inventories and accountings with the Clerk of Superior Court. Some general guardians and guardians of the person are required to file status reports with the Clerk or a designated human services agency.

Unless otherwise provided by the Clerk, the powers and duties of guardians are those set forth in G.S. Ch. 35A and other applicable statutory or case law. The Clerk may enter a "limited guardianship" order under which the guardian's statutory powers are limited and the ward retains certain rights and privileges. G.S. 35A-1212(a); G.S. 35A-1215(b).

E. Appeal

Appeal from the Clerk's order adjudicating incapacity or appointing a guardian for an incapacitated ward is to the Superior Court. G.S. 35A-1115; G.S. 1-301.2; G.S. 1-301.3. Notice of appeal must be filed within 10 days of the date the Clerk's order is entered. On appeal, the Superior Court hears the case *de novo* with respect to the issue of incapacity but may reverse and remand the Clerk's order regarding appointment of a guardian only if the judge finds that the Clerk's findings were not supported by the evidence in the record before the Clerk, that the Clerk's conclusions of law are not supported by the Clerk's findings, or that the Clerk's order is inconsistent with the Clerk's conclusions of law or with applicable law.

F. Modification and Termination of Guardianship

An incapacitated ward, the ward's guardian, or any interested person may file a motion with the Clerk requesting that the ward's capacity be "restored." G.S. 35A-1130.

The Clerk of Superior Court has jurisdiction to hear motions requesting modification of guardianship orders or any other matter pertaining to a pending guardianship, to remove guardians, and to appoint successor guardians. G.S. 35A-1207; G.S. 35A-1290; G.S. 35A-1293.

The guardianship of an incapacitated ward terminates when the ward dies, when the ward's capacity is restored, or when the Clerk enters an order terminating the guardianship. *See* G.S. 35A-1295.

1.7

Legal Consequences of Guardianship

A. Presumption of Incapacity

The fact that a person has been determined to be incapacitated under G.S. Ch. 35A creates a presumption that he or she lacks mental capacity from the date on which he or she was adjudicated "incompetent," and this presumption is binding against the ward and parties in privity with the ward in other civil actions absent an order "restoring" the ward's capacity or evidence that is sufficient to rebut the presumption by showing that the ward has or had sufficient mental capacity with respect to the matter at issue. *See Sutton v. Sutton*, 222 N.C. 274 (1942); *In re Maynard*, 64 N.C. App. 211 (1983); *Geitner v. Townsend*, 67 N.C. App. 159 (1984).

B. General Legal Status and Rights of Wards Under Plenary Guardianship

Unless otherwise provided by the Clerk's order, an order appointing a guardian for an incapacitated ward generally deprives the ward of his or her right to make his or her own decisions regarding many, if not most, issues related to his or her person, family, and property.

Even when the Clerk enters a “plenary guardianship” order, a ward should be allowed to participate, to the maximum extent of his or her capabilities, in all decisions that will affect him or her. G.S. 35A-1201(a)(5).

An incapacitated ward has the right, without the consent of his or her guardian, to file a motion seeking restoration of his or her capacity pursuant to G.S. 35A-1130.

C. Specific Legal Rights That Are or May Be Retained by Incapacitated Wards

Right to vote. An incapacitated ward has the right to register to vote and to vote in elections if he or she is otherwise qualified. 41 N.C. Atty. Gen. Op. 85 (1973).

Competency to testify as witness. An incapacitated ward is competent to testify as a witness in a civil or criminal proceeding if he or she understands the nature of one’s oath to tell the truth, had sufficient capacity to observe or understand the matters about which he or she will testify, and has sufficient capacity to remember and relate those facts. *See State v. Benton*, 276 N.C. 641 (1970).

Capacity to marry, execute a will, or enter into a contract. An incapacitated ward *may* have the legal capacity to marry, to execute a will, or to enter into a contract. In each instance, the issue is whether, despite the fact that the ward has been determined to lack capacity to manage his or her own affairs or to make important decisions regarding his or her person, family, or property, the ward has the *specific* mental capacity to marry, to execute a will, or to enter into a contract. *See Medical College of Virginia v. Maynard*, 236 N.C. 506 (1953); *In re Maynard*, 64 N.C. App. 211 (1983); *Geitner v. Townsend*, 67 N.C. App. 159 (1984).

D. Specific Legal Rights That Are or Probably Are Lost by Incapacitated Wards

Driving privilege. A person who has been adjudicated incompetent under G.S. Ch. 35A is presumptively disqualified from obtaining a North Carolina driver’s license. *See* G.S. 20-9(d).

Qualification as juror. A person who has been adjudicated incompetent under G.S. Ch. 35A probably is not qualified to serve on a jury in state court. *See* G.S. 9-3.

Qualification as guardian. A person who has been adjudicated incompetent under G.S. Ch. 35A is not qualified to serve as a general guardian, guardian of the person, or guardian of the estate of a minor or incapacitated person. *See* G.S. 35A-1290(c)(1).

E. Legal Rights of Wards Under Limited Guardianship

A Clerk may enter a “limited guardianship” order that expressly allows the ward to retain certain legal rights and privileges. G.S. 35A-1215(b).

F. Statutory Powers of Guardians and Limitations on the Powers of Guardians

Unless expressly limited by the Clerk’s order, a guardian of the person of an incapacitated ward has all of the powers specified in G.S. 35A-1241 as well as those specified under other applicable statutes. Unless expressly limited by the Clerk’s order, a guardian of the estate

of an incapacitated ward has all of the powers specified in G.S. 35A-1251 as well as those specified under other applicable statutes.

A guardian's powers are subject to the limitations contained in G.S. 35A-1241, G.S. 35A-1251, other applicable statutes, and the Clerk's order. Some actions by guardians require prior court approval.

Legal proceedings involving the ward. A guardian of the person of an incapacitated ward generally does not have any authority to commence or defend on behalf of the ward a legal proceeding involving the ward or the ward's property unless the guardian is appointed as the ward's *guardian ad litem* pursuant to Rule 17 of the North Carolina Rules of Civil Procedure.

Divorce. A guardian does *not* have the authority to file an action for divorce on behalf of an incapacitated ward. *See Freeman v. Freeman*, 34 N.C. App. 301 (1977). A general guardian or guardian of the estate, however, may defend an incapacitated ward in a divorce proceeding instituted by the ward's spouse.

Sterilization. A general guardian or guardian of the person may *not* consent to the sterilization of an incapacitated ward unless the guardian obtains an order from the Clerk pursuant to G.S. 35A-1245.

Durable power of attorney. A guardian may revoke or amend a durable power of attorney executed by the ward. G.S. 32A-10.

Health care power of attorney. A general guardian or guardian of the person may not revoke a health care power of attorney executed by the ward. G.S. 32A-22. A general guardian or guardian of the person, however, may petition the court to revoke a health care power of attorney that was executed by the ward.

Advance declaration for natural death ("living will"). A general guardian or guardian of the person may not revoke a declaration of desire for natural death ("living will") executed by the ward. G.S. 35A-1208(b). In the absence of a declaration of desire for natural death executed by the ward, an incapacitated ward's guardian may authorize the withholding or withdrawal of life-prolonging measures under the circumstances specified in G.S. Ch. 90, Art. 23.

Gifts. A guardian's authority to make a gift from the ward's estate is limited. Certain types of gifts are authorized with the approval of a superior court judge. *See* G.S. Ch. 35A, Arts. 17, 18, 19.

1.8

Relationship of G.S. Ch. 35A to Other Laws

A. Incapacity Determinations in Other Civil and Criminal Proceedings

Although Article 1 of G.S. Ch. 35A establishes the exclusive procedure for adjudicating a person to be an “incompetent adult” or an “incompetent child,” the issue of a person’s mental “capacity” also may be determined in the context of any legal proceeding in which a person’s mental capacity or incapacity is relevant and material. *See Hagins v. Greensboro Redevelopment Comm’n*, 275 N.C. 90 (1969); *In re Maynard*, 64 N.C. App. 211 (1983); *Geitner v. Townsend*, 67 N.C. App. 159 (1984); *Leonard v. England*, 115 N.C. App. 103 (1994); *Dunkley v. Shoemate*, 121 N.C. App. 360 (1996); *Soderlund v. Kuch*, 143 N.C. App. 361 (2001); *State Farm Fire & Casualty Co. v. Darsie*, 161 N.C. App. 542 (2003).

Practice Note: It is not clear whether a determination regarding a respondent’s mental capacity made in the context of a civil or criminal proceeding not involving the appointment of a guardian may be asserted as collateral estoppel against the respondent in an adult guardianship proceeding under G.S. Chapter 35A.

B. Appointment of *Guardian ad Litem* under Rule 17

G.S. Ch. 35A does not limit the authority of a court to appoint a *guardian ad litem* pursuant to Rule 17 of the North Carolina Rules of Civil Procedure for an “incompetent” person who is a party to a civil action. G.S. 35A-1102 (superseding *Culton v. Culton*, 96 N.C. App. 620 (1989), *rev’d on other grounds* 327 N.C. 624 (1990); *Hagins v. Greensboro Redevelopment Comm’n*, 275 N.C. 90 (1969)). In doing so, however, a court must provide an allegedly incompetent party with notice and an opportunity to be heard and make findings, based on sufficient evidence, that the party is, in fact, “incompetent.” *Hagins v. Greensboro Redevelopment Comm’n*, 275 N.C. 90 (1969).

Practice Note: Attorneys who are appointed as *guardians ad litem* pursuant to Rule 17 of the North Carolina Rules of Civil Procedure in a civil action other than a guardianship proceeding are not paid by the N.C. Office of Indigent Defense Services.

C. Adult Protective Services

North Carolina’s adult protective services statute (G.S. Ch. 108A, Art. 6) authorizes the district court to order the provision of protective services to a disabled adult who needs protective services but lacks the capacity to consent to those services. *See* G.S. 108A-105. A determination that a disabled adult lacks the capacity to consent to protective services, however, does not affect proceedings to appoint a guardian for that person under G.S. Ch. 35A, and an adjudication that a person is incompetent under G.S. Ch. 35A does not affect proceedings under G.S. Ch. 108A, Art. 6. G.S. 108A-105(d).

D. Involuntary Civil Commitment

The standards and procedures for determining incapacity and appointing a guardian for an incapacitated ward are different from the procedures under G.S. Ch. 122C for the involuntary civil commitment of persons who are mentally ill or substance abusers and present a danger to themselves or others.

E. Capacity and Insanity in Criminal Proceedings

The standards and procedures for determining whether a criminal defendant lacks the capacity to stand trial or is not guilty of a crime due to insanity are different from the standard for determining whether a person is an “incompetent adult” under G.S. Ch. 35A.

F. Veterans’ Guardianship Act

The provisions of the Veterans’ Guardianship Act (G.S. Chapter 34), rather than those of G.S. Chapter 35A, apply with respect to the appointment of a guardian for an incompetent adult when the adult is entitled to the payment of benefits from the U.S. Department of Veterans’ Affairs (VA) and federal law or regulations require the appointment of a guardian for that adult before the payment of VA benefits.

Practice Note: Clerks generally limit the authority of a guardian appointed under G.S. Chapter 34 to management of the ward’s VA benefits.

G. Durable Power of Attorney

The appointment of a guardian for an incapacitated ward following the ward’s execution of a durable power of attorney does not automatically revoke the durable power of attorney or limit the attorney-in-fact’s authority thereunder unless the guardian revokes or amends the durable power of attorney. G.S. 32A-10(a).

H. Health Care Power of Attorney

The appointment of a guardian for an incapacitated ward following the ward’s execution of a health care power of attorney does not automatically revoke the health care power of attorney or limit the health care agent’s authority thereunder unless the guardian petitions a court to suspend the health care agent’s authority and the court enters an order suspending the health care agent’s authority. G.S. 32A-22(a).

I. Informed Consent for Medical Treatment

G.S. 90-21.13 generally authorizes a guardian, health care agent, or other authorized person to consent to medical treatment or make health care decisions on behalf of an adult who is comatose or otherwise lacks the capacity to consent to medical treatment.

J. Appointment of Representative Payee

The Social Security Act and other federal or state laws and regulations authorize the appointment of a “representative payee” to manage the federal or state public benefits or assistance payable to a person who lacks the capacity to properly manage his or her benefits or assistance. *See* 42 U.S.C. §405(j) (Social Security payments).

Appendix 1-1 Additional Resources

Outlines of the law governing incompetency and guardianship proceedings under G.S. Ch. 35A are included in volume 2 (chapters 85 and 86) of the *North Carolina Clerk of Court Procedures Manual* (Chapel Hill: School of Government, The University of North Carolina at Chapel Hill, 2003).

A pamphlet on the “Responsibilities of Guardians in North Carolina” has been published by the North Carolina Administrative Office of the Courts and is available on-line at www.nccourts.org/forms/Documents/845.pdf.

In 2004, the Governor’s Advocacy Council for Persons with Disabilities produced two videotapes: “The Guardianship Process,” and “Becoming a Guardian.” These videotapes may be available in the offices of the Clerk of Superior Court.

