

North Carolina Guardianship Manual

2008

John L. Saxon

North Carolina Indigent Defense Manual Series
John Rubin, Editor



Production of this series is made possible by funding
from the North Carolina Office of Indigent Defense Services.

The School of Government at the University of North Carolina at Chapel Hill works to improve the lives of North Carolinians by engaging in practical scholarship that helps public officials and citizens understand and strengthen state and local government. Established in 1931 as the Institute of Government, the School provides educational, advisory, and research services for state and local governments. The School of Government is also home to a nationally ranked graduate program in public administration and specialized centers focused on information technology, environmental finance, and civic education for youth.

As the largest university-based local government training, advisory, and research organization in the United States, the School of Government offers up to 200 classes, seminars, schools, and specialized conferences for more than 12,000 public officials each year. In addition, faculty members annually publish approximately fifty books, periodicals, and other reference works related to state and local government. Each day that the General Assembly is in session, the School produces the Daily Bulletin, which reports on the day's activities for members of the legislature and others who need to follow the course of legislation.

The Master of Public Administration Program is a full-time, two-year program that serves up to sixty students annually. It consistently ranks among the best public administration graduate programs in the country, particularly in city management. With courses ranging from public policy analysis to ethics and management, the program educates leaders for local, state, and federal governments and nonprofit organizations.

Operating support for the School of Government's programs and activities comes from many sources, including state appropriations, local government membership dues, private contributions, publication sales, course fees, and service contracts. Visit www.sog.unc.edu or call 919.966.5381 for more information on the School's courses, publications, programs, and services.

Michael R. Smith, DEAN

Thomas H. Thornburg, SENIOR ASSOCIATE DEAN

Frayda S. Bluestein, ASSOCIATE DEAN FOR PROGRAMS

Todd A. Nicolet, ASSOCIATE DEAN FOR INFORMATION TECHNOLOGY

Ann Cary Simpson, ASSOCIATE DEAN FOR DEVELOPMENT AND COMMUNICATIONS

Bradley G. Volk, ASSOCIATE DEAN FOR ADMINISTRATION

FACULTY

Gregory S. Allison	Cheryl Daniels Howell	Dale J. Roenigk
Stephen Allred (on leave)	Joseph E. Hunt	John Rubin
David N. Ammons	Willow S. Jacobson	John L. Saxon
A. Fleming Bell, II	Robert P. Joyce	Shannon H. Schelin
Maureen M. Berner	Diane M. Juffras	Jessica Smith
Mark F. Botts	David M. Lawrence	Karl W. Smith
Joan G. Brannon	Dona G. Lewandowski	Carl W. Stenberg III
Molly C. Broad	James M. Markham	John B. Stephens
Michael Crowell	Janet Mason	Charles Szypszak
Shea Riggsbee Denning	Laurie L. Mesibov	Vaughn Upshaw
James C. Drennan	Kara A. Millonzi	A. John Vogt
Richard D. Ducker	Jill D. Moore	Aimee N. Wall
Robert L. Farb	Jonathan Q. Morgan	Richard B. Whisnant
Joseph S. Ferrell	Ricardo S. Morse	Gordon P. Whitaker
Milton S. Heath Jr.	David W. Owens	Eileen Youens
Norma Houston (on leave)	William C. Rivenbark	

© 2008

School of Government

The University of North Carolina at Chapel Hill

Use of this publication for commercial purposes or without acknowledgment of its source is prohibited.

Reproducing, distributing, or otherwise making available to a non-purchaser the entire publication, or a substantial portion of it, without express permission, is prohibited.

Printed in the United States of America

ISBN 978-1-56011-580-9

♻️ This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

♻️ Printed on recycled paper

Table of Contents

Preface ix

Chapter 1: Overview of Adult Guardianship 1

- 1.1 Scope of this Manual
- 1.2 Scope of this Chapter
- 1.3 Adult Guardianship Terminology
- 1.4 Nature and Purpose of Adult Guardianship
- 1.5 Guardianship Law in North Carolina
- 1.6 Overview of Adult Guardianship Proceedings
- 1.7 Legal Consequences of Guardianship
- 1.8 Relationship of G.S. Ch. 35A to Other Laws
- Appendix 1-1 Additional Resources

Chapter 2: Appointment of Attorney as *Guardian ad Litem* 19

- 2.1 Right to Counsel
- 2.2 Appointment and Discharge of Attorney as *Guardian ad Litem*
- 2.3 Statutory Powers and Duties of Appointed Attorney
- 2.4 Role of Appointed Attorney or *Guardian ad Litem*
- 2.5 Professional and Ethical Responsibilities of Appointed Attorney
- 2.6 Representing Persons with Diminished Capacity
- 2.7 Compensation of Appointed and Retained Attorneys for Respondents
- 2.8 Civil Liability of Appointed Attorneys
- Appendix 2-1 Additional Resources

Chapter 3: Jurisdiction and Venue 39

- 3.1 Subject Matter Jurisdiction
- 3.2 Personal Jurisdiction
- 3.3 Interstate Jurisdictional Issues
- 3.4 Venue
- 3.5 Change of Venue
- 3.6 Abatement
- Appendix 3-1 Additional Resources

Chapter 4: Parties, Pleadings, and Notice 45

- 4.1 Parties
- 4.2 Pleadings and Motions

- 4.3 Summons Not Required
- 4.4 Notice of Hearing
- 4.5 Service of Petition and Notice of Hearing
- 4.6 Service of Other Pleadings and Motions
- Appendix 4-1 Additional Resources

Chapter 5: Hearings, Practice, and Procedure 53

- 5.1 Scope of this Chapter
- 5.2 Nature of Adult Guardianship Proceedings
- 5.3 Rules of Procedure
- 5.4 Right to Jury Trial
- 5.5 Voluntary Dismissal, Default Judgment, and Summary Judgment
- 5.6 Discovery
- 5.7 Pre-Trial Conference
- 5.8 Appointment of Interim Guardian
- 5.9 Order for Multidisciplinary Evaluation
- 5.10 Calendaring and Continuance of Hearings
- 5.11 Hearing Procedure
- 5.12 Evidentiary Issues and Burden of Proof
- 5.13 Findings and Order
- 5.14 Costs and Fees
- Appendix 5-1 Additional Resources

Chapter 6: Incapacity 73

- 6.1 Incapacity and Adult Guardianship
- 6.2 Defining Incapacity
- 6.3 Statutory Definition of Incapacity
- 6.4 Analyzing and Interpreting the Statutory Definition of Incapacity
- 6.5 The Medical Component of Incapacity
- 6.6 The Functional and Cognitive Elements of Incapacity
- 6.7 Clinical Assessment of Cognitive and Functional Incapacity
- 6.8 Multidisciplinary Evaluations of Incapacity
- 6.9 Judicial Determination of Incapacity
- Appendix 6-1 Clinical Professionals
- Appendix 6-2 Medical Conditions Affecting Capacity
- Appendix 6-3 Dementia Overview
- Appendix 6-4 Temporary and Reversible Causes of Confusion
- Appendix 6-5 Medications That May Commonly Cause Confusion
- Appendix 6-6 Distinguishing Delirium from Dementia
- Appendix 6-7 Cognition and Cognitive Testing
- Appendix 6-8 Neuropsychological Assessment and Testing
- Appendix 6-9 Brief Guide to Psychological and Neuropsychological Instruments
- Appendix 6-10 Everyday Functioning and Functional Assessment
- Appendix 6-11 Means to Enhance Capacity
- Appendix 6-12 Additional Resources

Chapter 7: Appointment of Guardians 127

- 7.1 Scope of this Chapter
- 7.2 Types of Guardians That May Be Appointed
- 7.3 Legal Standards for Appointment of a Guardian
- 7.4 Procedure for Appointing a Guardian
- 7.5 Qualifications and Disqualifications for Appointment of Guardians
- 7.6 Statutory Priorities and Preferences Governing Appointment of Guardians
- 7.7 Appointment of Disinterested Public Agent Guardians
- 7.8 Appointment of Public Guardians
- 7.9 Order and Letters of Appointment

Chapter 8: Mediation of Adult Guardianship Cases 141

- 8.1 Statutory Authority and Rules
- 8.2 Ordering Mediation in Adult Guardianship Cases
- 8.3 Selecting the Mediator
- 8.4 Responsibilities of Respondent's Counsel or Guardian ad Litem
- 8.5 The Mediation Process
- 8.6 Consideration of Mediated Agreements by the Clerk
- 8.7 Cost of Mediation

Chapter 9: Appeal of Guardianship Orders 149

- 9.1 Appeal of Final and Interlocutory Orders
- 9.2 Standing to Appeal
- 9.3 Notice of Appeal
- 9.4 Stay Pending Appeal
- 9.5 Appellate Jurisdiction of the Superior Court
- 9.6 Appellate Procedure in Superior Court
- 9.7 Appellate Review by the Court of Appeals and Supreme Court
- 9.8 Abatement of Appeal

Chapter 10: Modification and Termination of Guardianship Orders 155

- 10.1 Termination of Guardianship
- 10.2 Restoration of Competency
- 10.3 Modification of Guardianship Orders
- 10.4 Removal of Guardian
- 10.5 Resignation of Guardian
- 10.6 Appointment of Successor Guardian
- 10.7 Other Guardianship Proceedings

Preface

In 2007, the N.C. Office of Indigent Defense Services asked the UNC-Chapel Hill School of Government to develop a training program for attorneys who are appointed pursuant to G.S. 35A-1107 to represent allegedly incapacitated adults in guardianship proceedings.

Recognizing that there was no comprehensive treatise or practice manual on the subject of North Carolina guardianship law, I offered to write a *North Carolina Guardianship Manual* that would serve as a training and reference resource for attorneys who are appointed to represent incapacitated adults in guardianship proceedings. As such, it is part of a series of manuals produced by the School of Government on indigent defense practice areas, including the *North Carolina Defender Manual* and the *North Carolina Civil Commitment Manual* (2006).

It is important to note that this manual does not address all aspects of North Carolina’s guardianship law. It does not, for example, address most of the issues that arise in an adult guardianship proceeding following the appointment of a guardian for an incapacitated adult. Nor does it address in detail the powers and duties of guardians or the appointment of guardians for minors. Instead, it focuses almost exclusively on those aspects of adult guardianship matters in which attorneys who are appointed under G.S. 35A-1107 are involved—especially proceedings to determine whether an adult is incapacitated, proceedings to appoint a guardian for an incapacitated adult, and proceedings seeking the restoration of a ward’s incapacity.

Despite this, however, I hope that this manual will be of value to others who are involved in adult guardianship proceedings, including Clerks of Superior Court, superior court judges, lawyers who are retained to represent petitioners or respondents in adult guardianship proceedings, and public agencies (such as county social services departments) that may be involved in adult guardianship proceedings.

In writing this manual, I have made the conscious decision to use the terms “capacity,” “incapacity,” and “incapacitated,” rather than “competency,” “incompetency,” and “incompetent,” whenever possible and appropriate. It is true that North Carolina’s guardianship statute (Chapter 35A of the General Statutes) still uses “incompetent” and similar terms. I feel, however, that those terms are antiquated, pejorative, and inaccurate, and that the term “incapacitated” is preferable. It is important to note, though, that the use of “incapacitated” in this manual relates only to questions of capacity in connection with adult guardianship proceedings under G.S. Chapter 35A and does not apply to other legal proceedings, such as criminal proceedings or involuntary commitment proceedings, in which the issue of capacity may arise.

No book is ever solely the product of its author, and this manual is no exception. In writing this manual, I received much assistance and support from many people. My

colleagues on the faculty at the School of Government, John Rubin, Janet Mason, Joan Brannon, and Ann Anderson, reviewed the entire manuscript and offered many valuable suggestions and corrections, as did several other reviewers, including Dolly Whiteside (Special Counsel Supervising Attorney, N.C. Office of Indigent Defense Services), Pamela Weaver Best (Deputy Legal Counsel, N.C. Administrative Office of the Courts), Ben N. Turnage (Special Counsel, N.C. Office of Indigent Defense Services), and Patricia Kay Gibbons, Esq. (Raleigh, NC). I would also like to note my special appreciation to the American Psychological Association and the American Bar Association's Commission on Law and Aging for their permission to include the copyrighted materials that appear in the appendices to Chapter 6. I also want to thank Robby Poore, Kevin Justice, Sarah McConnaghy, Katrina Hunt, Chris Toenes, and Angela Williams of the Publications Division of the School of Government for their assistance in producing this manual.

Although I hope that the information included in this manual is entirely accurate, I realize that it may include some mistakes or errors (as well as perspectives and legal opinions with which some may disagree) and invite readers to contact me (saxon@sog.unc.edu or 919-966-4289) if they feel there is anything in the manual that is not correct or needs to be changed, added, or deleted in the next edition of this manual.

John L. Saxon
Professor of Public Law and Government
School of Government
The University of North Carolina at Chapel Hill
Chapel Hill, North Carolina

January 2008