

North Carolina Guardianship Manual

2008

John L. Saxon

North Carolina Indigent Defense Manual Series
John Rubin, Editor



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ABOUT THE NORTH CAROLINA INDIGENT DEFENSE MANUAL SERIES

The North Carolina Indigent Defense Manual Series is a collection of reference manuals addressing law and practice in areas in which indigent defendants and respondents are entitled to the representation of counsel at state expense. The series was created to address the need for comprehensive, up-to-date reference materials for public defenders and appointed counsel, who devote their time, skill, and effort to representing poor people. In addition to assisting indigent defenders with their responsibilities, the manuals also may be useful to others who work in the court system and who need a reference source on the law. In keeping with the School of Government's commitment to practical scholarship, the manuals are written by authors with subject-matter expertise in their respective fields, experience in developing effective educational materials, and knowledge of how things actually work in practice. The editor of the series is John Rubin, a member of the School of Government faculty who specializes in indigent defense education. For a current listing of manuals in the series, see www.indigentdefense.unc.edu. Production of the series is made possible by funding from the North Carolina Office of Indigent Defense Services, which is responsible for overseeing and enhancing the provision of indigent defense representation in North Carolina.

ABOUT THE AUTHOR OF THE NORTH CAROLINA GUARDIANSHIP MANUAL

John L. Saxon is a Professor of Public Law and Government at the School of Government. He joined the faculty in 1992, and his areas of interest include social services law, child support, elder law, and family policy. Prior to this appointment, he worked for 15 years as an attorney for the U.S. Senate and the U.S. Department of the Interior, and as a legal services lawyer in South Carolina, Virginia, and North Carolina. He is the editor of *North Carolina Legislation 1997* and *North Carolina Legislation 1998*, is co-author of *The Law and the Elderly in North Carolina*, and has written numerous articles and bulletins on welfare reform, social services, child support, and elder law.

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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.

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