

## Chapter 4

# The People Defined: Juvenile, Parent, Guardian, Custodian, and Caretaker

### Which Children Are Covered?

The reporting law applies to all juveniles. For purposes of the reporting law, a “juvenile” is a minor—anyone under the age of eighteen—who is not married, has not been emancipated, and is not in the armed forces.<sup>1</sup> (In this book, the term “child” is used interchangeably with “juvenile.”) Legislatures in some states—but not in North Carolina—have explicitly made their child protection laws applicable to unborn children.<sup>2</sup> North Carolina’s Juvenile Code (the Code) has not been interpreted as applying to children before birth.<sup>3</sup>

The only minors to whom the reporting law does not apply are those who are emancipated or in the armed services. An “emancipated minor” is someone under the age of eighteen who has been released legally from parental control and who has many of the same rights as an adult. In North Carolina a minor may become emancipated in only two ways. First, a minor is emancipated automatically if he or she marries. A minor may marry in this state, however, only if

- he or she is at least sixteen years old and has the written consent of (1) a parent who has full or joint legal custody of the minor or (2) a person, agency, or institution that has legal custody of the minor or is serving as the minor’s guardian; or
- the minor is fourteen or fifteen years old, the minor and the person he or she plans to marry are the parents of a child (whether born or

unborn), and the minor has filed a civil court action and obtained a court order authorizing the marriage.<sup>4</sup>

If a minor were to marry in another state, the validity of the marriage would depend primarily on whether the marriage conformed with the law of the other state.<sup>5</sup> For purposes of emancipation, it does not matter where the marriage occurred, if it is a valid marriage.

The second way a minor may become emancipated in North Carolina is by bringing an action in juvenile (district) court for a decree of emancipation.<sup>6</sup> Only sixteen- and seventeen-year-olds may seek court-ordered emancipation. A judge may grant an emancipation petition only after (1) the minor's parents are given notice, (2) a court hearing is held at which the judge makes extensive inquiries about the minor's circumstances, and (3) the judge concludes that emancipation is in the minor's best interest. This procedure and marriage are the exclusive means of emancipation in North Carolina.

The reporting law, therefore, covers all unmarried children under the age of eighteen except those in the armed services or with a legal court decree of emancipation. Minors may be abused, neglected, or dependent, and the subjects of mandatory reports, even if they

- have given birth or fathered children,
- live independently away from home,
- are treated by their parents as if they were emancipated, or
- declare themselves emancipated and are self-supporting.

### **Whose Conduct Is Covered?**

The Juvenile Code defines “abused,” “neglected,” and “dependent juveniles” in terms of the effect or potential effect on children of the conduct or care-taking abilities of parents, guardians, custodians, or caretakers. A child who suffers an injury as a result of inappropriate discipline by a parent, guardian, custodian, or caretaker is an abused or neglected juvenile. A child who suffers an identical injury as a result of identical conduct by a schoolteacher, an older child, or a stranger is not an abused or neglected juvenile for purposes of the Juvenile Code and the reporting law.

A *parent*, although the Code does not define the term, may be a child's biological or adoptive parent, a person who is legally presumed to be a child's

parent, or a person who has been determined by a court to be a child's parent.

A child's parent is considered the child's "natural guardian."<sup>7</sup> Otherwise, a guardian is someone appointed by a court to have the care, custody, and control of a child or to arrange an appropriate placement for the child.<sup>8</sup> A guardian also has the authority to consent on the child's behalf to medical care and other matters for which a parent's consent ordinarily would be required. The precise scope of a guardian's authority is determined by the statute under which the guardian is appointed and specific provisions in the court order appointing the guardian.<sup>9</sup> In North Carolina a guardian for a minor can be appointed in two ways:

1. The clerk of superior court, in a special proceeding, may appoint a "guardian of the person" or "general guardian" for a child, but only if the child either (1) has no natural guardian, that is, no parent; or (2) is adjudicated incompetent within the six months before the juvenile's eighteenth birthday.<sup>10</sup> Children ordinarily cannot be adjudicated incompetent. However, when it is clear that a minor will need a guardian when he or she becomes an adult, an adjudication is permitted during this six-month period so that a guardian will be in place when the minor reaches age eighteen.
2. In a juvenile court proceeding in which a juvenile is alleged or has been found to be abused, neglected, dependent, undisciplined, or delinquent, the district court may appoint a guardian of the person for the juvenile if (1) no parent appears at the hearing with the juvenile, or (2) the court finds the appointment would be in the juvenile's best interest.<sup>11</sup>

A "custodian" is a person or agency that has legal custody of a child—that is, custody pursuant to a court order.<sup>12</sup> Before October 1, 2013, a custodian also could be a person who has assumed the status and obligations of a parent but has not been awarded legal custody by a court.<sup>13</sup> A person in that role sometimes is called a *person in loco parentis*, a term the Juvenile Code does not use although it is still used in many other contexts to refer to someone who has assumed the role of a parent.<sup>14</sup> For purposes of the Juvenile Code, a person who assumes the role of a parent but does not have legal custody is a "caretaker," as discussed below.

A “caretaker” is someone (other than a parent, guardian, or custodian) who is responsible for a child’s health and welfare in a residential setting.<sup>15</sup> A caretaker might be a stepparent, a foster parent, an adult member of the child’s household, or an adult relative who has been entrusted with or voluntarily assumed responsibility for the child’s care. People such as house parents or cottage parents who supervise children in residential child care facilities and residential schools also are caretakers. The Juvenile Code’s definition of the term specifically includes any employee or volunteer of a division, institution, or school operated by the state Department of Health and Human Services.<sup>16</sup>

Because the definition of caretaker refers to someone responsible for a child’s care “in a residential setting,” the term does not encompass schoolteachers, coaches, club leaders, and others with similar temporary responsibility for children. (An exception relating to care providers in child care facilities is described below.) A babysitter or a girlfriend or boyfriend who does not live in the child’s home generally would not be considered a caretaker.<sup>17</sup> If someone suspects that one of these non-caretakers has harmed or neglected a child or placed a child at risk, the law does not require that person to make a report to the department of social services. Still, most people who are aware of such an instance would take steps to ensure that the child receives proper attention and that the individual does not pose a threat to other children.<sup>18</sup> Appropriate responses might include one or more of the following:

- notifying the child’s parents, guardian, or custodian, who presumably would respond to the child’s medical needs and need for future care and protection;
- contacting law enforcement authorities;
- informing the individual’s employer or supervisor or, if in a position to do so, taking appropriate personnel action.

Organizations and institutions that involve non-caretakers in regular contact with children often have their own internal policies or administrative requirements for reporting any individual who harms a child, places a child at risk, or acts inappropriately in relation to a child. Generally these reports would be made within the organization or to law enforcement or both.

If a person does make a report to a county department of social services about a non-caretaker, the department is not authorized to conduct an assessment, and it will not do so. However, if the report describes criminal

conduct that results in physical harm to a child, the law requires the social services department to relay the information to the district attorney's office and to law enforcement officials.<sup>19</sup>

In an exception to the general requirement that a caretaker must be someone responsible for a child's care in a residential setting, the legislature has included within the meaning of caretaker people who are responsible for a child's care in a child care facility.<sup>20</sup> Except for child care arrangements that are specifically excluded by statute, "child care facility" is a child care center or home "where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption."<sup>21</sup>

The legal definition of "child care" exists primarily for licensing and regulatory purposes.<sup>22</sup> Someone caring for a child in a child care center or home ordinarily will be considered a caretaker. People who provide care for children but are not caretakers for purposes of the reporting law, because the places in which they care for children are excluded from the definition of child care, include those in

- public schools;
- recreation programs that operate for fewer than four consecutive months;
- organized clubs such as Boy Scouts, Girl Scouts, 4-H groups, and Boys and Girls Clubs; and
- drop-in or short-term care provided in health spas, resort hotels, bowling alleys, shopping malls, or churches.<sup>23</sup>

Someone who has primary responsibility for a child's care in a child care facility is a caretaker, and so is anyone who has that person's approval to assume responsibility for children who are in the primary provider's care. This might be an employee or a relative the provider asks to supervise or otherwise provide care for the children.

Observing or suspecting that a child has been injured or mistreated does not necessarily trigger a duty to make a report to the county department of social services. In order for a report to be required, and in order for the social services department to have the authority and responsibility to conduct an assessment, there must be cause to suspect that the child's condition can be attributed to the child's parent, guardian, custodian, or caretaker. If abuse or

neglect occurs when a child is in the care of more than one parent, guardian, custodian, or caretaker, it is not necessary to know, or even to have cause to suspect, which of those persons is responsible for the child's abuse or neglect before making a report.

A child who is assaulted by an older juvenile, sexually molested by a stranger, or disciplined in a cruel manner by a schoolteacher would not come within the reporting requirement—unless, of course, there was also some indication that the child's parent (or guardian, custodian, or caretaker) allowed, contributed to, or responded inappropriately to the injury, harm, or risk to the child.

This is not to say that a concerned person has no recourse in these situations. Cases involving people who are not parents, guardians, custodians, or caretakers may be the subject of criminal investigations and prosecutions. They should be reported to law enforcement officials or to other appropriate authorities. These cases, however, do not come within the Juvenile Code provisions aimed at protecting children in family, family-like, and child care settings.

## Notes

1. North Carolina General Statutes (hereinafter G.S.) § 7B-101(14). The North Carolina General Statutes can be viewed online at [www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl](http://www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl).

2. See, e.g., WIS. STAT. §§ 48.02(1)(am) (defining “abuse” to include, when “referring to an unborn child, serious physical harm inflicted on the unborn child, and the risk of serious physical harm to the child when born, caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree”) and 48.133 (giving the court jurisdiction over certain unborn children and their expectant mothers). See also U.S. Department of Health & Human Services, Administration for Children & Families, Child Welfare Information Gateway, “Parental Drug Use as Child Abuse: Summary of State Laws,” July 2012, [www.childwelfare.gov/systemwide/laws\\_policies/statutes/drugexposed.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/drugexposed.pdf).

3. See N.C. Department of Health & Human Services, Division of Social Services, “The Impact of Drug and Alcohol Abuse,” in Section 1440.XI, Chapter VIII, of the Division of Social Services' online *Family Support and Child Welfare Manual* (hereinafter *State Manual*), [http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1440-10.htm#P213\\_31521](http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1440-10.htm#P213_31521) (stating that North Carolina child protective services laws do not address abuse or neglect of the unborn child).

Some North Carolina appellate court decisions refer to findings of fact by the trial court about a mother's drug use during pregnancy, but these findings have not been the subject of appellate court decisions. Typically these findings relate to the issue of whether there is a likelihood of future abuse or neglect. *See, e.g., In re K.P.M., \_\_\_ N.C. App. \_\_\_, 680 S.E.2d 901 (2009) (unpublished) (holding that the trial court's finding of a high likelihood that neglect would be repeated if the children were returned to the mother was supported by evidence showing, among other things, that the mother had used cocaine while pregnant with one child, after two other children had been removed from the home because of her substance abuse, and that all three children had tested positive for cocaine).*

4. G.S. 51-2(a1) and -2.1(a). *See* G.S. 7B-3509 (stating that marriage for a minor translates into emancipation). North Carolina's marriage laws are available for viewing at [www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl?Chapter=0051](http://www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl?Chapter=0051). *See also* Janet Mason, "Marriage in North Carolina," *Popular Government* 71 (Winter 2006): 26–36, [www.sogpubs.unc.edu/electronicversions/pg/pgwin06/article3.pdf](http://www.sogpubs.unc.edu/electronicversions/pg/pgwin06/article3.pdf).

5. *See* 1 SUZANNE REYNOLDS, *LEE'S NORTH CAROLINA FAMILY LAW* § 2.14 (5th ed. 1993 & Supp. 2010).

6. *See* Article 35 of G.S. Chapter 7B (G.S. 7B-3500 through -3509).

7. *See* G.S. 35A-1201(a)(6).

8. A court appoints a "guardian ad litem," on the other hand, only to represent a child's interest in a particular civil court action. *See, e.g.,* G.S. 7B-601 and 1A-1, Rule 17. "Guardian," except when referring to a parent's natural status, denotes a status created by and subject to change by a court order. In one context, however, a court held that a relative was a guardian even though no court action had occurred. *See* *State v. Jones*, 147 N.C. App. 527, 556 S.E.2d 644 (2001) (holding that the custodial interrogation of a juvenile did not violate the juvenile's *Miranda* rights because the juvenile's aunt was present and was the juvenile's guardian within the meaning and spirit of the juvenile interrogation statute, even though she had not been appointed by a court as the juvenile's guardian), *review denied*, 355 N.C. 351, 562 S.E.2d 427 (2002).

9. *See* G.S. 7B-600 and -2001 and G.S. 35A-1240 to -1245.

10. G.S. 35A-1203(a), -1105. The clerk may appoint a "guardian of the estate" for any minor who has assets or property. G.S. 35A-1203(a). A general guardian is one who serves as both guardian of the person and guardian of the estate.

11. G.S. 7B-600, -2001. Despite the breadth of the statute's wording, appointment of a guardian based solely on a "best interest" determination is unlikely. Parents have a constitutionally protected interest in the care and custody of their children, and before awarding custody to someone other than a parent or appointing a guardian of the person for a minor, a court must find that the parent is unfit, has neglected the child's welfare, or has acted inconsistently with the parent's constitutionally protected parental status. *See, e.g., In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (citations omitted) (stating that "to apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status").

12. G.S. 7B-101(8).

13. The definition of “custodian” in G.S. 7B-101(8) was rewritten by S.L. 2013-129, sec. 1, to delete this category of custodian effective October 1, 2013.

14. *See, e.g.*, G.S. 50-13.4(b) (specifying secondary liability for child support); G.S. 50B-2(c) (providing for ex parte orders in domestic violence actions); G.S. 115C-369(b) (addressing applications for school reassignment); and G.S. 122C-3(20) (defining “legally responsible person” for purposes of mental health, developmental disabilities, and substance abuse services statutes).

15. G.S. 7B-101(3).

16. *Id.*

17. “Structured Intake,” in Section 1407, Chapter VIII, *State Manual*, cited in full in note 3, 4–5, <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1407.pdf>.

18. Some professionals may be constrained by confidentiality requirements from reporting these cases if the law does not require them to make a report.

19. G.S. 7B-307(a). The social services director must make immediate oral reports and subsequent written reports to both the district attorney and the appropriate local law enforcement agency.

20. G.S. 7B-101(3).

21. G.S. 110-86(2) and (3).

22. G.S. 110-86(2).

23. *Id.*