

Civil Actions and Financial Exploitation of Older Adults: Who Brings the Action?

Financial exploitation of an older adult is a [type of elder abuse](#). It occurs in many forms. A door-to-door home repairman defrauds an older adult out of her life savings. A caregiver gets an older adult who lacks capacity to sign a deed conveying the older adult's property to the caregiver's son. An adult child steals the older adult's debit card and withdraws significant amounts of money for his own benefit. (Notably, a [recent study](#) suggests that relatives may perpetrate more financial elder abuse than strangers.)

Upon discovery of the exploitation, the older adult, a family member, friend, or other person concerned for the older adult may decide to file a civil action against the perpetrator of the exploitation to (i) recover specific property taken from the older adult, (ii) seek monetary damages for claims based on, for example, breach of fiduciary duty, constructive fraud, fraud, or negligent misrepresentation, or (iii) rescind documents such as a deed, will, or power of attorney that were executed when an older adult lacked capacity or as a result of undue influence, fraud, or duress. Unlike other states, North Carolina does not have a specific civil private right of action for elder abuse and exploitation. See, e.g., Utah Code Ann. § 62A-3-314; Ariz. Rev. Stat. Ann. § 46-455 and -456; Cal. Welf. & Inst. Code §§ 15657–15657.8 (“Civil Actions for Abuse of Elderly or Dependent Adults”); Conn. Gen. Stat. Ann. § 17b-462.

If the older adult has capacity, then the older adult files the action and prosecutes the claim(s) as the real party in interest. [G.S. 1-57; 1A-1, Rule 17\(a\)](#). A real party in interest is a party who has benefited or been injured by the judgment in a case and who by substantive law has the legal right to enforce the claim in question. *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18-19 (1977); *Energy Inv'rs Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337 (2000).

Filing the action becomes a bit more complicated if the exploited older adult is incompetent. The general rule is that claims may be (i) prosecuted in the name of the older adult as the real party in interest or (ii) if the older adult has a guardian, brought by the guardian in the guardian's own name without joining the older adult as a party subject to certain limitations discussed below. [G.S. 1A-1, Rule 17\(a\)](#).

1. Older Adult is the Real Party in Interest

If the claim is brought in the name of the incompetent older adult as the real party in interest, then under Rule 17(b) of the North Carolina Rules of Civil Procedure, the older adult must appear by either

- a general guardian (GG) appointed by the clerk pursuant to G.S. Chapter 35A or
- a guardian ad litem (Rule 17 GAL).

[G.S. 1A-1, Rule 17\(b\)\(1\).](#)

The appointment of a Rule 17 GAL must be made at any time prior to, or at the time of, the commencement of the action. [G.S. 1A-1, Rule 17\(c\)\(1\)](#). The appointment is made on the application of any relative or friend of the incompetent older adult or by the court on its own motion. *Id.* The written application is generally filed, and the appointment is typically made, by the clerk at the time the complaint initiating the action is presented for filing with the court. If the claim is brought in the name of the incompetent older adult as the real party in interest and the older adult has a GG, the court may still appoint a Rule 17 GAL if the court deems it expedient to have the older adult represented by a Rule 17 GAL. G.S. 1A-1, Rule 17(b)(3).

2. Guardian Sues in His or Her Own Name

Under Rule 17(a) of the North Carolina Rules of Civil Procedure, a claim may instead be brought by a guardian in the guardian's own name on behalf of the incompetent older adult without joining the older adult as a party. [G.S. 1A-1, Rule 17\(a\)](#). The clerk of superior court appoints a guardian in a separate proceeding under G.S. Chapter 35A after a judicial determination of incompetency. [G.S. 35A-1120](#); [-1203\(a\)](#); [-1210](#). The clerk may appoint

- a guardian of the person (GOP): a guardian with authority over the care, custody, and control of the incompetent older adult,
- a guardian of the estate (GOE): a guardian with authority over the property, estate, and business affairs of the incompetent older adult, or
- a GG: a guardian of the estate and the person.

[G.S. 35A-1202\(10\), \(9\), and \(7\).](#)

A GOP does not have authority to initiate an action on behalf of the older adult in the GOP's own name. See [G.S. 35A-1241](#) (listing the powers of the guardian of the person, which include the duty to give consent or approval to enable the incompetent adult to receive legal counsel but do not include the power to initiate legal action); [Clawser v. Campbell](#), 184 N.C. App. 526, 529 (2007) (holding the guardian of the person lacks the power to maintain an action); [Granville v. Yeddo](#), 199 N.C. App. 318 (2009) (unpublished) (stating that "[t]he power to initiate legal action lies with the general guardian, guardian of the estate, or guardian ad litem..." and not the guardian of the person).

A GOE and a GG have the authority to initiate actions in their own name without joining the older adult as a party related to the incompetent older adult's estate. [G.S. 35A-1251\(3\)](#) ("[A] general guardian or guardian of the estate has the power to perform...every act...incident to the collection, preservation, management, and use of the ward's estate...including but not limited to the...specific powers...[t]o maintain any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of

the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward"); [Stern v. Cinoman](#), 221 N.C. App. 231, 233-34 (2012) (stating that a guardian of the estate has the authority to bring a medical malpractice suit in his own name as guardian). A GOE may not initiate an action, such as domestic violence protective order (DVPO), in his or her own name that relates to the care, custody, or control of the older adult. [G.S. 35A-1251](#) (describing the authority of the guardian of the estate as limited to "the collection, preservation, management, and use of the ward's estate" and listing specific powers under that umbrella of authority as including the power to sue on or defend any claims in favor of or against the ward).

If there is any doubt as to whether the GOE or GG may commence the action in the guardian's own name without joining the incompetent older adult as a party, such as in the case of a DVPO or other action that does not involve the estate of the older incompetent adult, the action may be filed in the name of the older adult as the real party in interest, as discussed above, and a GG could appear on behalf of the incompetent older adult in the proceeding or a "relative or friend" could seek the appointment of a Rule 17 GAL to appear on his or her behalf. [G.S. 1A-1, Rule 17\(b\)](#). If the relief granted does not relate to the older adult's estate, such as the relief in a DVPO, significant confusion may arise in the enforcement of the order or judgment if the action is brought in the name of the guardian rather than the older adult. See Cheryl Howell, *Minor Parties in 50B Cases*, On the Civil Side: A UNC Sch. of Gov't Blog (Mar. 13, 2015), <https://civil.sog.unc.edu/minor-parties-in-50b-cases/> (explaining that, in cases involving minors, the child's name should be listed as plaintiff rather than the GAL's name).