

More on Protecting Against Elder Abuse

In my [previous post](#), I discussed elder abuse and the court's role in the protection of adults against such abuse through adult protective services (APS). An incompetency and guardianship proceeding filed before the clerk of superior court under [G.S. Chapter 35A](#) is another mechanism that can be used to protect an older adult from elder abuse when the adult is incompetent.

Guardianship* is markedly different from APS, including the role the adult's capacity plays in the proceeding, the permanency of the court order, the nature of the authority granted by the court, and who may file for court protection. These distinctions can have a significant impact on the adult and are important to consider when deciding whether or not to file a guardianship proceeding before the clerk of superior court.

Guardianship and Protection against Elder Abuse

While the primary goal of APS through DSS is to *mobilize essential services* for disabled adults to remedy abuse, neglect, and exploitation, guardianship is much more comprehensive in scope. [G.S. 108A-100](#). The purpose of guardianship is to replace an incompetent individual's authority to make decisions, in whole or in part, with the guardian's authority when the individual does not have adequate mental capacity to make such decisions. [G.S. 35A-1201\(a\)](#).

A legally appointed guardian may be responsible for all aspects of the welfare, safety, finances, and protection of the incompetent adult, part of which includes taking action to protect the adult from or ending any existing abuse, neglect, or exploitation. [G.S. 35A-1201\(b\)\(3\)](#). The guardian may have the authority, depending on the type of guardian appointed such as a guardian of the estate (authority over property), guardian of the person (care, custody, and control over the adult), or general guardian (both estate and person) and the type of guardianship (whether plenary or limited), to do the following to protect the adult from abuse, neglect, or exploitation through the guardianship:

- Revoke a durable power of attorney or petition the court for the authority to revoke a health care power of attorney. See [G.S. 32A-10](#) (standard for revocation of durable power of attorney); [G.S. 32A-30](#) (process for revocation of health care power of attorney).
- Access and review the adult's financial accounts and mail to determine if the adult has been the subject of a scam.
- Have the adult's bills sent directly to the guardian and pay them on time.
- Recover possession of any of the adult's property and any damages for injury done to the property, which may include filing a lawsuit on the adult's behalf.
- Make a financial plan, collect debts, employ advisors to assist in the performance of the guardian's financial duties, and invest carefully and with scrutiny.
- Take control over the adult's personal property and place valuable items in safe deposit box or in storage unit.

- Put the adult's number on the National Do Not Call Registry (donotcall.gov or call 1-888-382-1222).
- Change passwords to the adult's accounts.
- Place cash in separate bank accounts and review bank statements regularly and promptly.
- Report violations of laws or regulations by a long-term care or other facility.
- Review medical records and authorize medical treatment.
- Determine if living conditions are safe and install guard rails, smoke detectors, ramps, and other accommodations to help the adult stay in his or her home and consider alternative living arrangements to the extent that it is not feasible for the adult to stay at home.
- Remove the adult from a setting where abuse, neglect or exploitation may be taking place.

[G.S. 35A-1202](#) (definitions); [G.S. 35A-1241](#) (powers and duties of guardian of the person); [G.S. 35A-1251](#) and [G.S. 35A-1252](#) (powers and duties of guardian of the estate). See also [Managing Someone Else's Money, Help for court-appointed guardians of property and conservators](#), Consumer Financial Protection Bureau, pg. 10-12, 20; [APS Manual, pg. III-7](#).

APS and Guardianship: Not Equal Alternatives

While a guardianship appointment may empower a guardian to take action to stop or protect against abuse, neglect, or exploitation, it is a more permanent remedy and may not be necessary in every case. Both APS and guardianship are fundamentally about protection, but they are not equal alternatives and have very different consequences for the adult. Some key distinctions between the two proceedings include:

Role of Capacity. The role capacity of the adult plays in the two proceedings is very different. First, services may be provided through APS to a disabled adult with mental capacity to consent. [S. 108A-104](#). For example, the adult may be physically disabled and thus in need of protective services because she is unable to protect herself against physical abuse by a caretaker and has no one willing to help obtain those services for the adult. Although the adult is physically disabled, she may have the mental capacity to consent to protective services, which DSS could then provide based on the adult's consent. In contrast, a guardian may be appointed and take action only if the adult is first adjudicated incompetent by a court.

In addition, the scope of the capacity analysis is not the same. In an APS case, if DSS determines the disabled adult is in need of protective services, DSS must determine whether the disabled adult has the *specific* capacity to consent to services. This is a narrow analysis. The lack of capacity may be temporary or intermittent and may be limited to the adult's ability to *perceive and understand a specific situation*. See [APS Manual, pg. III-29](#).

This is unlike a guardianship proceeding where the court is charged with determining competency, which is a much more global analysis of all aspects of an individual's life. An incompetent adult is someone who lacks sufficient capacity (i) to manage his or her affairs or (ii) to make or

communicate important decisions concerning the adult's person, family, or property, whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. [G.S. 35A-1101\(7\)](#).

A judicial determination of incapacity requires proof that a respondent's decision-making capacity is *significantly* impaired. [John L. Saxon, NC Guardianship Manual](#), sec. 6.4 (2008). Proof that an adult's decision-making ability is not optimal or perfect is not sufficient to support a judicial determination of incompetence. *Id.* As noted in the APS Manual, an adult who has been adjudicated incompetent probably lacks the capacity to consent to services, but an adult who lacks the capacity to consent may not be incompetent. See [APS Manual, pg. III-29](#).

Permanency of the Court Order. APS proceedings and related protective orders are temporary in nature. They extend only so long as the adult needs assistance mobilizing services. If an adult lacks capacity to consent to services, DSS may seek a protective order from district court that enables DSS to provide services notwithstanding the adult's inability to consent. In the event a protective order is put in place, it may be initially imposed for 60 days and extended for another 60 days for good cause shown. [G.S. 108A-105\(c\)](#).

In contrast, guardianship is a more permanent mechanism to provide protection. After an adult is adjudicated incompetent and a guardian is appointed on his or her behalf, the only two ways the guardianship ends are by a [restoration proceeding](#) if the person regains capacity or if the person dies. [G.S. 35A-1295\(a\)](#).

Nature of the Authority Granted by the Court. As I described in my [earlier post](#), the authority of the court is limited in APS proceedings. Where an adult lacks capacity and is in need of protective services, DSS may seek a protective order, including an ex parte order authorizing emergency services, from district court. The order gives DSS the authority to authorize the provision of services. [G.S. 108A-105](#). It does not empower DSS to use or manage the adult's money or other property to pay for those services even though the adult may be responsible for the payment of such services. [APS Manual, pg. III-38](#). This is unlike guardianship where the court has the power to authorize the guardian to take control of and manage the adult's entire estate on the adult's behalf.

In addition, a protective order and other APS procedures do not empower DSS to revoke a power of attorney or health care power of attorney, something that a guardian may and likely will do when the agent under either of those documents is the one who is the perpetrator. This limits the ability of DSS through APS to permanently stop an agent under a POA or HCPOA from continuing to exploit the adult.

Who May File. Any person may initiate an incompetency proceeding before the clerk that may lead to the appointment of a guardian. [G.S. 35A-1105](#). This includes DSS. In contrast, while anyone may [make an APS report](#), only DSS may file for a protective order when the director reasonably

determines that a disabled adult is being abused, neglected, or exploited and lacks capacity to consent to services. [G.S. 108A-105\(a\)](#).

Given these distinctions, it is possible when a report is made to APS about an adult who lacks capacity, the underlying abuse, neglect, or exploitation may be resolved by DSS entirely through a protective order. This is true in particular for those cases where the adult may have a medical condition that is not likely to recur or is of a short duration or is likely to be improved with the provision of services such as medical treatment, better nutrition, or drug management. In those cases, the adult may need only short-term assistance to mobilize services to protect against a specific crisis rather than a long-term, more permanent decision-maker in the form of a guardian. However, in many cases given the limitations of APS and APS protective orders, guardianship may be necessary to protect an adult who lacks capacity against abuse, neglect, or exploitation.

While guardianship may be an appropriate remedy in some circumstances to end ongoing elder abuse, the guardian may also be the perpetrator of such abuse. My third and final post in this elder abuse series will examine the guardian as the perpetrator of elder abuse and how that may intersect with APS. Stayed tuned for the final installment in this elder abuse series.

* For purposes of this post, the term “guardianship” includes both the incompetency and guardianship proceedings.