

## Some Things to Remember About Interim Guardianship

Betty is 75 years old and lives alone. She was recently diagnosed with dementia. Betty's daughter, Pam, helps look after her mother and pay her monthly bills, but has noticed a decline in Betty's memory and ability to communicate. Upon reviewing Betty's monthly bank statement, Pam noticed three large payments to companies Pam did not recognize. After some investigation, Pam discovered that the drafts were the result of a telemarketer scam. To stop future drafts, Pam went to the bank and asked them to close Betty's account. However, the bank refused to close the account without Betty's authorization and told Pam that she would need to obtain guardianship of Betty to be able to close the account. Betty refused to consent to close the account as she was afraid Pam was trying to take too much control over her life.

Pam went online, did some research, and decided to seek interim guardianship of her mother so that she can quickly block the telemarketers from accessing her mom's account. What are some things Pam should keep in mind about interim guardianship before heading down to the courthouse?

### 1. An interim guardianship motion cannot exist on its own.

An interim guardian is a temporary guardian appointed prior to adjudication of incompetence. [G.S. 35A-1101\(11\)](#). The purpose of the interim guardianship is to provide protection for a person who requires immediate intervention to address conditions that constitute imminent or foreseeable risk of harm to the person's physical well-being or to the person's estate. *Id.* A verified motion for interim guardianship may only be filed **at the time of or subsequent to** the filing of a petition for the adjudication of incompetence. [G.S. 35A-1114\(a\)](#).

Once the court holds a hearing on the motion for appointment of an interim guardian, the petitioner may not voluntarily dismiss the petition for adjudication of incompetence. [G.S. 35A-1114\(f\)](#). The full hearing on the respondent's competency must be held. At the full hearing on the respondent's competency, the clerk has the authority to either enter an order:

- (1) adjudicating the respondent incompetent, or
- (2) dismissing the proceeding if the court does not find the respondent to be incompetent.

[G.S. 35A-1112\(c\) and \(d\)](#). There is not clear authority for the clerk to dismiss the incompetency proceeding after the hearing simply on the basis that the original emergency was resolved through the interim guardianship, particularly if there is sufficient evidence that the respondent is incompetent and the appointment of a guardian will give the individual a fuller capacity for exercising his or her rights. [G.S. 35A-1201\(4\)](#).

Once the court enters an order adjudicating an adult incompetent and appoints a guardian,

guardianship terminates in only one of two ways: (1) upon death of the adult, or (2) upon entry of an order by the clerk restoring the adult's competency. [G.S. 35A-1295\(a\)](#). The clerk may tailor the guardianship order and provide for a limited guardianship or only appoint a guardian of the person or guardian of the estate, depending on the ward's needs, but the guardianship remains ongoing until death or restoration.

Therefore, if Pam chooses to seek interim guardianship, she should be cognizant of the fact that it may result in a domino effect that ends up in a plenary guardianship until Betty passes away. In addition, a plenary guardianship may require regular status reports on Betty's well-being, if ordered by the clerk pursuant G.S. 35A-1242, and an inventory and regular accountings of her assets under G.S. 35A-1261 and G.S. 35A-1264. Pam could end up with a much broader, more restrictive, and more permanent solution to a very limited problem by seeking interim guardianship because the interim guardianship cannot exist on its own.

## **2. The clerk is required to make specific findings of fact in the interim guardianship order.**

The clerk's order on appointing the interim guardian must include specific findings of fact. [G.S. 35A-1114\(e\)](#). Frequently, the clerk uses [AOC Form SP-900M](#) when ordering an interim guardianship, which includes a space for the clerk to write in findings of fact. In the order, the clerk must include sufficient findings to support the conclusions of law. G.S. 35A-1114(e). At a minimum, this should include facts to support each of the following conclusions of law:

1. there is reasonable cause to believe the respondent is incompetent;
  2. there is an imminent or foreseeable risk of harm to the respondent's physical well-being and/or estate; and
- there is a need for immediate intervention by a guardian to protect the respondent or the respondent's interest (essentially, there should be some evidence as to why waiting for a full hearing would not adequately protect the respondent).

### [G.S. 35A-1114\(d\)](#).

If Pam seeks interim guardianship, she must present sufficient evidence at the interim guardianship hearing for the clerk to make such findings and the necessary conclusions of law set forth in G.S. 35A-1114(d). If, for example, no money remains in Betty's account, the immediacy of the need for an interim guardian may be significantly diminished, particularly if Betty previously executed a durable power of attorney and no other account access is threatened.

## **3. The authority of the interim guardian is limited.**

The appointment of an interim guardian does not give blanket authority to the interim guardian to

make all decisions about the person and/or property of the respondent. Interim guardianship is intended to give the interim guardian the **specific power or duty** to protect the respondent or the respondent's property in response to an imminent or foreseeable risk. [G.S. 35A-1114\(d\)](#). It is a limited authority and extends only so far as is "necessary to meet the conditions necessitating the appointment of an interim guardian." [G.S. 35A-1114\(e\)](#). The clerk must specify the powers and duties of the interim guardian on the interim guardianship order and such powers and duties must be tailored to meet the risk necessitating the appointment. *Id.* If the interim guardian takes some action on behalf of the respondent that is not set forth in the clerk's order, the interim guardian risks acting without authority.

If, for example, a petitioner sought the appointment of an interim guardian because a person lacks capacity and needed an emergency medical procedure, the interim guardian's authority is limited to provide such consent. It would not include the authority to access the person's bank accounts or to make decisions about where the person lives or who visits him or her at the hospital.

#### **4. The order appointing the interim guardian may not continue indefinitely.**

The interim guardianship terminates on the **earliest** of the following:

1. the date specified in the clerk's order for interim guardianship;
  2. 45 days after entry of the clerk's interim guardianship order unless the clerk, for good cause shown, extends that period for up to 45 additional days;
- when any guardians are appointed following an adjudication of incompetence; or
1. when the petition for the adjudication of incompetence is dismissed by the court.

[G.S. 35A-1114\(e\)](#). **As a practical matter, the longest period of time that an interim guardianship could possibly be in place is 90 days from entry of the clerk's order.** After that time, the interim guardian no longer has authority to act because the interim guardianship terminates. Chapter 35A does not state the clerk has the discretion to extend the appointment beyond that date, even if the hearing on the petition for adjudication of incompetence has been continued outside that time period (this may be the case if the parties and the court are waiting on a [multidisciplinary evaluation](#) to be returned to the court).

Perhaps law enforcement or the adult protective services division of the county department of social services could have helped Pam address Betty's situation from the outset without resulting in the permanent appointment of a guardian. My colleague, Aimee Wall, recently published a [bulletin](#) on financial exploitation of older adults and disabled adults in North Carolina, which touches other options outside of guardianship. I'll leave a side by side comparison on the use of guardianship versus adult protective services to provide protection for disabled adults for another day.

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What are your thoughts? What might cause someone to seek guardianship versus a more temporary remedy through adult protective services, law enforcement, or otherwise? Leave them below.