

Will We See More APS Petitions During COVID-19? What GALs Need to Know

I previously published on this blog [Guardian ad Litem Attorney Challenges in the Era of COVID-19](#), which explored the complications the current pandemic has posed for Guardians ad Litem (“GALs”) in Chapter 35A incompetency and guardianship proceedings. Given these challenges and other developments, GALs may see an increase in the number of Adult Protective Service (“APS”) petitions being filed under Chapter 108A. This could be good news for GALs and their clients in some situations; however, GALs also need to be aware of the potential risks that could go along with a rise in APS petitions.

A Brief Overview of APS

APS laws are found in Chapter 108A, Article 6 of the N.C. General Statutes. They are designed “to protect the increasing number of disabled adults in North Carolina who are abused, neglected or exploited” and “to provide protective services for such persons.” G.S. 108A-100. APS cases begin when a Department of Social Services (“DSS”) receives a report from someone with probable cause to believe that a disabled adult needs protective services. G.S. 108A-102(a); see also Aimee Wall’s [Adult Protective Services: A New Reporting Requirement](#) (June 23, 2015), Coates’ Cannons: NC Local Government Law, UNC Sch. Gov’t Blog. If DSS determines that the adult is disabled or is being abused, neglected, or exploited, and that the adult lacks the capacity to consent to protective services, DSS can file a petition in district court seeking the authority to administer those services. G.S. 108A-103; G.S. 108A-105. DSS is the only entity that has standing to initiate an APS petition.

The disabled adult has the right to attend the hearing on the petition and be represented by counsel. A disabled adult may represent himself or herself, but if the judge finds that the disabled adult lacks the capacity to waive the right to counsel, then a GAL must be appointed. G.S. 108A-105(b). Typically, a GAL is appointed to represent a disabled adult in an APS case. This is when a GAL enters the picture and is the focus of this post.

A Possible Increase in APS Petitions During the Pandemic

APS cases have several features that, particularly when contrasted with incompetency and guardianship proceedings, may result in more petitions being filed during these tumultuous times.

More Broadly Applicable. First, people will probably “qualify” more often for an APS order than for a guardianship order because of the different capacity determinations being made. Guardianship requires a determination that a person is incompetent, which means that the person lacks capacity to manage his or her own affairs and to make and communicate important decisions

about himself or herself, family, or property. G.S. 35A-1101(7). An APS order, on the other hand, more narrowly asks whether the adult lacks the capacity to consent to specific services. G.S. 108A-101(f). A person therefore may meet the incapacity requirements of APS under Chapter 108A whether or not he or she would be considered incompetent under Chapter 35A. As a result, Chapter 108A offers DSS the ability to reach more adults who may need assistance.

Increase in Reports. During the pandemic, DSS may receive an increased number of APS reports, which could result in an increase in APS petitions being filed. DSS may receive more APS reports right now because it is harder for people to lay eyes on their adult loved ones, including those in facilities with visitor restrictions. There may be a rise in reports because vulnerable populations have been hit hard during this pandemic; for some that has meant less familial help, loss of income, loss of health insurance, or decreased access to service organizations. This could lead to more APS reports being made, more petitions being filed, and more GALs being appointed.

Service and Notice Requirements. Ordinarily, incompetency and guardianship petitions must be “personally served on the respondent” pursuant to Rule 4 of the Rules of Civil Procedure, with a hearing scheduled between ten and thirty days after service. G.S. 35A-1108; G.S. 35A-1109. APS statutes, on the other hand, do not impose service of process requirements and only require five days’ notice of the hearing on the petition. G.S. 108A-105(b); see also N.C. Dept. of Health and Human Services, [Adult Protective Services: Division of Aging and Adult Services Manual](#) (Apr. 2011). At a time when it is difficult to get direct access to individuals, particularly disabled adults in facilities that are restricting visitor access, DSS may find that APS is the easier, if not the only, path forward. GALs therefore may see more of these petitions.

Recognizing the current difficulties of serving respondents with Chapter 35A petitions, the General Assembly enacted [Session Law 2020-3](#), effective May 4, 2020. Revised G.S. 35A-1109 allows alternative methods of service on respondents who reside in facilities that are restricting visitors due to the pandemic. It is unclear from the language of the statute whether this new provision applies to hospital patients. Additionally, this change to Chapter 35A expires August 1, 2020. Unless a new law is passed extending the revised service methods, or unless visitor restrictions are lifted on facilities, GALs may continue to see more APS petitions due to the challenges of serving respondents in incompetency actions.

Emergency and Emergency Ex Parte Orders. A standard APS order grants DSS or someone else chosen by the court the temporary authority to arrange for and consent to essential services on behalf of the disabled adult. Those services include the “social, medical, psychiatric, psychological or legal services necessary to safeguard the disabled adult’s rights and resources and to maintain the physical or mental well-being of the individual.” G.S. 108A-101(i). While a hearing for a full APS order requires five days’ notice to the disabled adult, DSS may seek faster results in an emergency. The court may issue an emergency APS order if it determines that (1) the disabled adult lacks capacity to consent to needed protective services, (2) an emergency exists, and (3) no one else is authorized to consent on the disabled adult’s behalf. G.S. 108A-106(a). The

disabled adult is entitled to just twenty-four hours' notice of an emergency APS hearing. G.S. 108A-106(d). The court can even issue an emergency ex parte order, with no prior notice to the disabled adult, if it determines "that there is a likelihood that the disabled adult may suffer irreparable injury or death if such order be delayed" and that reasonable attempts were made to locate interested parties to have them provide services or consent to services for the adult. In these situations, the disabled adult only receives notice of the APS case after issuance of the ex parte order. How long these different types of orders are good for is discussed further below.

If a GAL is appointed in a case in which an emergency ex parte order has been issued, the GAL will need to act quickly to learn the facts of the situation and to ascertain the disabled adult's position. If the GAL or disabled adult disagree with the emergency services being provided, or with the lack of prior notice to the adult and opportunity to be heard, the GAL can raise those issues with DSS and may want to file a motion seeking the court's review. It may be too late depending on the situation, but in some cases the GAL may successfully pause the services being supplied to the adult or may affect the decisions being made about the adult's care and needs.

Duration of APS Orders. All APS orders are temporary in nature. Full APS orders are effective for sixty days and can be extended for sixty additional days if the court finds good cause. G.S. 108A-105(c). An emergency APS is only for as long as is "necessary to remove the conditions creating the emergency." G.S. 108A-106(b). If the emergency lasts longer than fourteen days, DSS must petition for a full APS order. *Id.* If the court issues an emergency ex parte order, that order is effective until the court dissolves it for good cause or until a hearing is held on the petition for emergency services, whichever comes first. G.S. 108A-106(d).

DSS may conclude that the options available in the APS law are sufficient to achieve its goals, removing the need to file a Chapter 35A petition altogether. Or, DSS may use APS orders as a stop gap until the challenges caused by COVID-19 to Chapter 35A actions are eliminated. Near the expiration of an APS order, the court is expected to hold a review hearing for the express purpose of determining if an incompetency petition should be filed. G.S. 108A-105(c). As a result, GALs may be appointed in emergency APS proceedings, full APS proceedings, Chapter 35A proceedings, or potentially all three.

Benefits of APS Petitions

At their core, APS petitions are about the government asking the court for the authority to provide a service to someone who lacks the capacity to consent. That can significantly curtail disabled adults' authority to manage their own lives and is why APS cases should be taken seriously by everyone involved, including GALs. Still, APS cases often have silver linings, if not outright good news, for many clients.

Helping clients who need help. The fact of the matter is that APS petitions are often filed to provide services to an adult who needs those services but lacks the capacity to consent. As a GAL,

I was appointed to work with any number of disabled clients who desperately needed help. Sometimes they were being physically assaulted, other times they were being deprived of necessary medication or health care services. I had a client who needed to have a limb removed to halt the spread of a deadly disease and several who were being sexually or financially exploited, but because of their disability they lacked the capacity to understand and get the help they needed. When used appropriately, APS orders can be life savers for the more vulnerable among us and can serve as a much-needed solution to a very bad problem.

APS orders are temporary. The maximum duration of any APS order is 120 days—an initial period of 60 days and an additional 60 days if it is extended for good cause by the court. Incompetency adjudications under Chapter 35A, however, remain in place for the remainder of the ward's life unless a later petition to restore the ward's competency is granted. G.S. 35A-1130. While an APS order constitutes a curtailment of the adult's rights, it is limited in duration and therefore can be less burdensome on the adult.

APS orders are limited in scope. By design, APS cases are more narrowly focused on the pressing issue at hand rather than broad determinations of incompetence. As a result, APS orders tend to be more narrowly crafted to address the primary issue of concern, the result being that the client's rights are less affected. Take, for example, a situation where a disabled adult is being financially exploited by a caretaker. If a Chapter 35A petition is filed and the respondent is deemed incompetent, a guardian of the estate would likely be appointed. Guardians of the estate have broad powers over a ward's property and money, often including the ability to relinquish interest in or abandon property, buy or sell assets, and spend money. G.S. 35A-1251. APS orders offer a temporary, more limited solution. If the court has reasonable cause to believe that the adult would qualify for APS protection and is being financially exploited by his or her caretaker, the court can issue what is commonly referred to as a Freeze and Inspect Order. G.S. 108A-106(f). This makes the disabled adult's financial records available for inspection and prevents their finances from being withdrawn, spent, or transferred without the court's permission. G.S. 108A-106(f)(1). Freeze and Inspect Orders are valid for ten days unless extended for good cause by the court. G.S. 108A-106(f)(3). This is an example of one way in which APS orders can be less intrusive in the rights of the client.

Challenges for GALs Appointed in APS Cases

Of course, APS petitions are not all good news for GALs and their clients. These cases pose a burden, even if sometimes a justified one, on clients' independence and ability to make decisions for themselves. GALs need to be vigilant about performing their duties and ensuring the best outcome for their clients.

GAL duties may be more difficult. Just because APS cases may be easier for DSS to pursue right now does not mean it is easier for GALs to carry out their responsibilities. In fact, the opposite is likely true. COVID-19 may complicate GALs' ability to visit with their clients, access records, or

speak with witnesses. This [previous post](#) of mine includes a discussion of different steps a GAL should consider taking when encountering these types of problems.

The Client can be left out of the process. For the reasons discussed in this post, DSS may decide that APS petitions are easier to pursue in the current climate. But with the more efficient path forward for DSS comes risk to the client. Given the lighter service and notice requirements and emergency ex parte access to the court, APS proceedings create the possibility of the adult being left almost entirely out of a proceeding about him or herself.

GALs should look at what efforts were made by DSS to see if help could be provided short of court action. GALs also need to look at what attempts were made to provide the client with notice of the APS action and whether the client got notice. Meeting and speaking with the client is paramount—the GAL needs to take reasonable steps to ensure that happens. It is possible for a court to grant an APS petition authorizing DSS to provide significant services, even on matters such as major surgery, without the adult in question receiving actual notice of the proceeding and without even speaking to his or her court-appointed GAL. A GAL must remain vigilant about these issues and immediately bring concerns to the court.

If you are a GAL in an APS case and are dealing with these or other issues, feel free to reach out and let me know how things are going. You can reach me at Heinle@sog.unc.edu or (919) 962-9594. I would also love to hear any ideas you have for ensuring that your clients are receiving the services they need while still protecting their rights.