

ADULT PROTECTIVE SERVICES LEGAL TOOLS



Criminal Statutes



G.S. 14 – 32.3 imposes criminal penalties for the abuse and neglect of disabled or elder adults living in a domestic setting by a “caretaker.”



G.S. 14-112.2

Exploitation of an elder adult or disabled adult



- Imposes criminal penalties for exploitation of elder or disabled adults
- Wrongdoer does not have to be a caretaker of the elder or disabled adult to impose criminal penalties
- Elder or disabled adult does not have to be residing in a domestic setting
- Applies to a person who:
 - (i) stands in a position of trust and confidence with the adult; or
 - (ii) has a business relationship with the adult;
- Knowingly, by deception or intimidation



Agency Attorney



Agency Attorney as Part of APS Team:

- ☐ Provide APS Manual and Keep Informed with Updates.
- ☐ Share Social Work Philosophy and Approach in APS.
- ☐ Invite to Staffings for Difficult Cases.
- ☐ Develop Close Working Relationship Between APS Staff and Agency Attorney.

APS Authorizing Statute



• G.S. Chapter 108A, Article 6

• Definitions

A "disabled adult" shall be "in need of protective services" if that person, due to his physical or mental incapacity, is unable to perform or obtain for himself essential services and if that person is without able, responsible, and willing persons to perform or obtain for his essential services. G.S. 108A-101(e)

The words "essential services" shall refer to those 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)

The word "caretaker" shall mean an individual who has the responsibility for the care of the disabled adult as a result of family relationship or who has assumed the responsibility for the care of the disabled adult voluntarily or by contract. G.S. 108A-101(b)

APS Authorizing Statute



G.S. 108A-102 - Duty to Report, Content of Report, Immunity

- (a) Any person having reasonable cause to believe that a disabled adult is in need of protective services shall report such information to the director.
- (b) The report may be made orally or in writing. The report shall include the name and address of the disabled adult; the name and address of the disabled adult's caretaker; the age of the disabled adult; the nature and extent of the disabled adult's injury or condition resulting from abuse or neglect; and other pertinent information.
- (c) Anyone who makes a report pursuant to this statute, who testifies in any judicial proceeding arising from the report, or who participates in a required evaluation shall be immune from any civil or criminal liability on account of such report or testimony or participation, unless such person acted in bad faith or with a malicious purpose. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

APS Authorizing Statute



G.S. 108A-103 - Duty of Director upon receiving report

- (a) Any director receiving a report that a disabled adult is in need of protective services shall make a prompt and thorough evaluation to determine whether the disabled adult is in need of protective services and what services are needed. The evaluation shall include a visit to the person and consultation with others having knowledge of the facts of the particular case...
- (d) The director shall initiate the evaluation described in subsection (a) of this section as follows:
- (1) Immediately upon receipt of the complaint if the complaint alleges a danger of death in an emergency as defined in G.S. 108A-101(g).
 - (2) Within 24 hours if the complaint alleges danger of irreparable harm in an emergency as defined by G.S. 108A-101(g).
 - (3) Within 72 hours if the complaint does not allege danger of death or irreparable harm in an emergency as defined by G.S. 108A-101(g).

The evaluation shall be completed within 30 days for allegations of abuse or neglect and within 45 days for allegations of exploitation.

G.S. 15-27.2 Administrative Search & Inspection Warrant



- Prepare affidavit describing the agency's mandate to evaluate the APS Report.
- Describe the need for evaluation in the particular case and agency's attempt so far.
- Request warrant from magistrate (or judge, or clerk, deputy or assistant clerk of superior court).
- Warrant is valid for only 24 hours.

Affidavit to Obtain Administrative Inspection Warrant for Particular Condition or Activity



- Describe the condition, object, activity, or circumstance which the search is intended to check or reveal
- List owner or possessor of property
- Describe property to be inspected
- State the facts which establish probable cause to believe the condition, object, activity, or circumstance exists

Administrative Inspection Warrant for Particular Condition or Activity



- Must be executed within 24 hours
- Can be executed only between 8:00 a.m. and 8:00 p.m.



Protective Services Court Orders



- Order to Enjoin Caretaker from Interference with Protective Services.
- Orders to Authorize Protective Services
- Order to Freeze/Inspect Assets and Financial Records
- Subpoena to Provide Access to Financial Records



Enjoin Interference with Protective Services



- ☐ Disabled adult (with capacity) is in need of protective services.
- ☐ Disabled adult consents to the receipt of protective services.
- ☐ Caretaker refuses to allow the provision of such services.

Orders Authorizing Services



- Order Authorizing Protective Services
- Order Authorizing Emergency Services
- Ex Parte Order Authorizing Emergency Services



Petitioning for Protective Services



Petitioning Process:

- File Petition for Order Authorizing Protective Services.
- Give Notice to Adult and Others (at least 5 days before hearing).

Petitioning for Order Authorizing Protective Services



Order authorizing Protective Services

Finds clear, cogent, and convincing evidence that the disabled adult:

- Is in need of protective services
- Lacks capacity to consent to them.

Hearing Authorizing Protective Services



- Hearing held within **14 days** of petition being filed
- One of two events may occur at the hearing:
 - Order for protective services **Is Issued**
 - Court Review within 60 days
 - Extend Order for 60 more days (if needed)
 - Initiate Guardianship Petition (if needed)
 - Continue Offering Court Authorized Services
 - Close Protective Services Case
 - Order for Protective Services **Is NOT Issued**
 - Close Protective Services
 - Offer Other Adult Services



ORDER AUTHORIZING EMERGENCY PROTECTIVE SERVICES



AN EMERGENCY ORDER SHOULD BE OBTAINED WHEN:

- Disabled adult lacks capacity to consent;
- Is in need of protective services;
- An emergency exists; and
- No other person authorized by law or order to give consent for the disabled adult is available and willing to arrange for emergency services.



Definition of “Emergency”



An Emergency Exists When:

- The disabled adult is **in substantial danger of death or irreparable harm** if protective services are not provided immediately;
- The disabled adult is **unable to consent to services**;
- **No** responsible, able or willing **caretaker** is **available to consent to emergency services**; and
- There is **insufficient time to obtain a regular order** authorizing protective services.

Petitioning for Emergency Services



Petitioning Process:

- File Petition for Order Authorizing Emergency Protective Services.
- Give Notice to Adult and Others (at least 24 hours before hearing).



Hearing on Emergency Services



One of two events may occur at the hearing:

- Order Authorizing Emergency Services IS Issued
 - If services are needed for more than 14 days, file petition for Order Authorizing Protective Services.
 - Only for services necessary to remove the conditions creating the emergency.
- Order Authorizing Emergency Services IS NOT Issued
 - Offer other Adult Services, as appropriate.
 - Close Protective Services.

Ex Parte Order



Ex Parte Order is issued upon finding that:

- ✓ The conditions specified for obtaining an emergency order exist;
- ✓ Reasonable attempts have been made to locate interested parties and secure emergency services from them or get their consent to the provision of emergency services; and
- ✓ There is likelihood the disabled adult may suffer irreparable injury or death if an order is delayed.

The emergency order ex parte shall be in effect until the hearing is held on the petition for emergency services.

Order to Freeze/Inspect Assets



Upon petition by DSS, the court may order that:

- The adult's financial records be made available for inspection.
- The adult's financial assets be frozen.

The order freezing assets expires 10 days after inspection, unless extended by the court for good cause shown.

Order to Freeze/Inspect Assets



Court Must Find Reasonable Cause to Believe:

- Disabled adult **lacks capacity to consent** and is need of protective services
- Disabled adult is being financially exploited **by his or her caretaker**
- No other person is able or willing to arrange for protective services

Order to Freeze/Inspect Assets



Notice

- "Provided, before any such inspection is done, the caretaker and every financial institution involved shall be given notice and a reasonable opportunity to appear and show good cause why this inspection should not be done. And, provided further, that any order freezing assets shall expire ten days after such inspection is completed, unless the court for good cause shown, extends it." G.S. 108A-106(f)(3)

Subpoena - Access to Financial Records



- Upon petition, investigating entity may petition the district court to issue a subpoena directing a financial institution to provide financial records of a disabled adult OR older adult
- “Investigating entity” : Law enforcement agency or county department of social services
- Court shall hear the case within two business days after the filing of the petition
- Court shall issue subpoena upon finding that the following conditions are met:
 - IE is investigating credible report of financial exploitation pursuant to statutory authority
 - The disabled adult or older adult’s financial records are needed to substantiate or evaluate the report
 - Time is of the essence to prevent further exploitation

Subpoena - Access to Financial Records



- (b) An investigating entity may include in its application for a subpoena pursuant to G.S. 108A-116 a request for an order delaying the customer notice required pursuant to subsection (a) of this section. The court issuing the subpoena may order a delayed notice in accordance with subsection (c) of this section if it finds, based on affidavit or oral testimony under oath or affirmation before the issuing court, that all of the following conditions are met:
- (1) The investigating entity is investigating a credible report that the adult is being or has been financially exploited.
- (2) There is reason to believe that the notice will result in at least one of the following:
 - a. Endangering the life or physical safety of any person.
 - b. Flight from prosecution.
 - c. Destruction of or tampering with evidence.
 - d. Intimidation of potential witnesses.
 - e. Serious jeopardy to an investigation or official proceeding.
 - f. Undue delay of a trial or official proceeding.

Comparison



	Freeze and Inspect	Subpoena
Advantages	<ul style="list-style-type: none">• Ability to prevent assets from being withdrawn, spent, or transferred	<ul style="list-style-type: none">• Notice to customer only• May delay notice• Time (2 days from filing)
Disadvantages	<ul style="list-style-type: none">• Can only be used for “disabled” adults• Notice requirement may alert exploiter• Time (10 days from service)	<ul style="list-style-type: none">• Inability to freeze assets; delayed notice mitigates the need to freeze)

Other Legal Alternatives for APS



Civil Commitment

Guardianship

Power of Attorney

- General or "Attorney in Fact"
- Durable



Advance Directives

- Living Will
- Health Care Power of Attorney

Substitute Payee

- Protective Payee
- Personal Representative
- Representative Payee

STATISTICS



- As of January 2016, nearly 8,000 reports of abuse, neglect and/or exploitation have been evaluated by APS staff.
- Need for protective services substantiated in approximately 1 out of 4 cases
- Subpoena has been used 175 times to date in response to allegations of financial exploitation
- Use of guardianship vs. protective services orders
