

Discussion Questions for County Attorneys

Re: Adult Protection Statutes

Pursuant to SL 2017-41 (Rylan's Law), a third-party organization, the Center for Support of Families (CSF), conducted an assessment of DHHS, which resulted in a plan to reform the State supervision and accountability for the social services system, including child welfare, adult protective services and guardianship, public assistance, and child support enforcement. As a continuation of that work, CSF is evaluating more deeply adult protective services. The evaluation includes a review of APS performance data, information from focus groups of various stakeholders, and adult protection statutes.

Earlier this year, CSF conducted a legal gap analysis of North Carolina's APS statutes. They reviewed the 2006 report of the NC Adult Protective Services Task Force, which included statutory recommendations, as well as legal literature on adult protection legislation; identified states that had amended their adult protective statutes within the last three years; and reviewed more closely laws in neighboring states and states that have expansive adult protection acts (Alabama, Alaska, Arizona, Delaware, Michigan, Georgia, Iowa, Ohio, Oregon, South Carolina, Tennessee, Texas, Virginia, and Wisconsin). Areas were identified where amendments to statutes and policies would better protect vulnerable adults in North Carolina while meeting ethical principles including respect for an individual's freedom, dignity, and autonomy; and consideration of least restrictive alternatives and interventions.

DHHS is partnering with the UNC School of Government to host two online meetings to share more information about this work and gain feedback from county attorneys. We want to hear about the challenges or limitations you experience under the current statutory framework. We also want your thoughts about proposed changes to APS statutes that would modernize them to reflect current terminology, legal practice, and national best practices.

A. Relationship between Adult Protection and Child Protection

What do you think the relationship should be between child welfare and adult protection statutes? For example, do statutory definitions need to be consistent? Do the mandatory reporters need to be consistent?

B. Statutory Barriers

The 2006 Report of the Adult Protective Services Task Force identified numerous statutory revisions, most of which impacted the delivery of services by county departments of social services. From your perspective as an attorney providing services to the DSS, are there amendments to Chapter 108A that would help you better advise your client, address barriers you have encountered in getting protection orders, or provide for more consistent interpretation by the courts?

C. Scope and Definitions

1. “Disabled Adult”

- **Background**

The current statute protects disabled adults who have been abused, neglected or exploited. N.C.G.S. 108A-101(d) defines a “disabled adult” as “any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to mental retardation, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.” The definition of disability focuses on a person’s diagnosis.

The national trend is to shift the provision of protective services from disabled adults to vulnerable adults. The term “vulnerable” has less negative connotations, and allows the focus to be more on what a person can and cannot do rather than on the person’s diagnosis.

Legislators have also been influenced by research on the impacts of aging. Older adults may be more at risk of abuse, neglect, or exploitation due to isolation from social support systems. Advanced age may also produce physical and mental changes that impair the person’s ability to adequately provide for his own care or protection. As a result, some state statutes -- such as that of Alaska, Michigan, South Carolina, and Tennessee -- include a reference to advanced age in their definition of vulnerable adults.

Other states -- such as Georgia, Oregon, Texas, and Wisconsin -- expressly expand the scope of their protective statute to include elder persons. That approach is similar to what North Carolina has done with regard to financial exploitation. For example, N.C.G.S. 108A-112 addresses the financial exploitation of disabled and older adults. An older adult is defined as an individual 65 years of age or older. North Carolina has also done this in the criminal arena; Chapter 14 includes criminal offenses for the domestic abuse, neglect, and exploitation of disabled or elder adults (N.C.G.S. 14-32.3) and the exploitation of an older adults or disabled adults (N.C.G.S. 14-112.2). Under N.C.G.S. 14-32.2 an elder adult is defined as “a person 60 years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person’s rights and resources and to maintain the person’s physical and mental well-being.” Under N.C.G.S. 14-112.2 an older adult is defined as “a person 65 years of age or older.”

The age of 60 or 65 seems to be the most common definition for advanced age or elder/older adult.

- **Proposal 1**

Replace “disabled adult” with “vulnerable adult” in the title, legislative intent and purposes, and definitions as follows:

§ 108A-99. Short title.

This Article may be cited as the "Protection of the Abused, Neglected, or Exploited ~~Disabled~~ Vulnerable Adult Act." (1973, c. 1378; s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-100. Legislative intent and purpose.

Determined to protect the increasing number of ~~disabled~~ vulnerable adults in North Carolina who are abused, neglected, or exploited, the General Assembly enacts this Article to provide protective services for such persons. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-101. Definitions.

~~(d) — The words "disabled adult" shall mean any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to mental retardation, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.~~

(o) The words “vulnerable adult” shall mean a person 18 years of age or older or any lawfully emancipated minor who is present in the State of North Carolina and who is unable to protect himself or herself from abuse, neglect, or exploitation by others because of a physical or mental impairment.

- **Proposal 2** (expand the definition of vulnerable adult to reference advanced age)

Replace “disabled adult” with “vulnerable adult” defined as follows:

(#) The words “vulnerable adult” shall mean a person 18 years of age or older or any lawfully emancipated minor who is present in the State of North Carolina and who is unable to protect himself or herself from abuse, neglect, or exploitation by others because of a physical or mental impairment or because of advanced age.

OR

(#) The words “vulnerable adult” shall mean a person 18 years of age or older or any lawfully emancipated minor who is present in the State of North Carolina and who is unable to protect himself or herself from abuse, neglect, or exploitation by others because of a physical or mental impairment, including a mental or physical impairment due to advanced age.

- **Proposal 3** (expand the scope of NC’s ADP statutes beyond vulnerable adults to include a separate category of older adults)

Expand the title of 108A-99, replacing “disabled adult” with “vulnerable adult” and adding a reference to “older person.”

Expand the legislative intent and purpose accordingly.

In addition to a definition for “vulnerable adult,” add a definition for “older adult.”

§ 108A-99. Short title.

This Article may be cited as the "Protection of the Abused, Neglected, or Exploited ~~Disabled~~ Vulnerable Adult and Older Person Act." (1973, c. 1378; s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-100. Legislative intent and purpose.

Determined to protect the increasing number of ~~disabled~~ vulnerable adults and older persons in North Carolina who are abused, neglected, or exploited, the General Assembly enacts this Article to provide protective services for such persons. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-101. Definitions.

(#) The words “older person” shall mean a person 65 years of age or older.

2. “Abuse”

- **Background**

The current statute defines “abuse” as “the willful infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful deprivation by a caretaker of services which are necessary to maintain mental and physical health.”

The emphasis is on intentional acts. A number of state statutes either are silent regarding the element of willfulness, include the unnecessary infliction of pain or injury, or include reckless acts.

Unlike many other state adult protection statutes, NC's statute also fails to expressly mention sexual abuse. For those states that expressly include sexual abuse, the definition varies in the level of specificity. Some states list acts that constitute sexual abuse; other states, such as Wisconsin, cross-reference the definition within the criminal code.

- **Proposal 1:**

Expand the definition of abuse beyond intentional acts.

§ 108A-101. Definitions.

- (a) The word "abuse" means (i) the ~~willful~~ infliction of physical pain, injury or mental anguish, (2) unreasonable confinement, or ~~(iii)~~ the ~~willful~~ deprivation by a caretaker* of services ~~which~~ that are necessary to maintain mental and physical health.

NOTE –The language above is based on language proposed in the 2006 Report by the N.C. Adult Protective Services Task Force.

An alternative proposal is the following:

§ 108A-101. Definitions.

- (a) The word "abuse" means (i) the intentional, knowing, or reckless nonaccidental and nontherapeutic~~willful~~ infliction of physical pain, injury or mental anguish, (2) unreasonable confinement, or ~~(iii)~~ the ~~willful~~ deprivation by a caretaker* of services ~~which~~ that are necessary to maintain mental and physical health.

That language is based on Alaska Sec. 47.24.900.

- **Proposal 2:**

Expand the definition of abuse to include sexual abuse.

§ 108A-101. Definitions.

- (a) The word "abuse" means (i) the ~~willful~~ infliction of physical pain, injury or mental anguish, (2) unreasonable confinement, ~~or~~ (iii) the ~~willful~~ deprivation

by a caretaker* of services ~~which~~ that are necessary to maintain mental and physical health, or (iv) sexual abuse.

(#) The words “sexual abuse” shall mean a person’s use of force, trickery, threat, or other coercion of a vulnerable adult into sexual activity, involuntary exposure to sexually explicit material or language, or sexual contact against such adult’s will. Sexual abuse also occurs when a vulnerable adult is unable to give consent to such sexual activities or contact and is engaged in such activities or contact with another person.

The above language is based on Tenn. § 71-6-102.

3. Missing Definitions under Definition of Abuse

- **Background**

There no definition of “mental anguish” in G.S. 108A-101. Has that caused proof problems? What type evidence have you presented that resulted in a finding of abuse due to mental anguish?

There is no definition of “unreasonable confinement” in G.S. 108A-101. Has that caused proof problems? What type evidence have you presented that resulted in a finding of abuse due to unreasonable confinement?

- **Proposal 1:**

§ 108A-101. Definitions.

(#) “Unreasonable confinement” includes the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use on an individual of physical restraining devices, or the provision of unnecessary or excessive medication to an individual, but does not include the use of these methods or devices in entities regulated by XX if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint.

- **Proposal 2:**

§ 108A-101. Definitions.

(#) “Unreasonable confinement” includes the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use on an individual of physical

restraining devices, or the provision of unnecessary or excessive medication to an individual, but does not include an act of restraint or provision of medication prescribed by a physician licensed under G.S. xxx and any treatment activities that are consistent with an approved treatment plan or in connection with a court order.

The above proposals are based on Wisconsin Sec. 46-90 and Oregon Rev. Stat. 124-005-140.

4. Neglect

- **Background**

The current NC statute says that the word “neglect” refers to a disabled adult who is either living alone and not able to provide for himself or herself the services which are necessary to maintain the person’s mental or physical health or is not receiving services from the person’s caretaker. Because the statute focuses on the adult himself or herself, it does not identify the acts or conditions that result in neglect.

- **Proposal:**

§ 108A-101. Definitions.

- (m) The word "neglect" ~~refers to a disabled adult who~~ means the failure of a vulnerable adult is either who is living alone and not able to provide for himself or herself, or to make arrangements to provide himself or herself, with adequate food, clothing, shelter, health care, or other essential the services which are necessary to maintain the person's mental or physical health; or the failure of a vulnerable adult's is not receiving services from the person's caretaker* to provide or obtain adequate food, clothing, shelter, health care, or other essential services necessary to maintain the vulnerable adult's mental or physical health. A person is not receiving services from his caretaker if, among other things and not by way of limitation, the person is a resident of one of the State-owned psychiatric hospitals listed in G.S. 122C-181(a)(1), the State-owned Developmental Centers listed in G.S. 122C-181(a)(2), or the State-owned Neuro-Medical Treatment Centers listed in G.S. 122C-181(a)(3), the person is, in the opinion of the professional staff of that State-owned facility, mentally incompetent to give consent to medical treatment, the person has no legal guardian appointed pursuant to Chapter 35A, or guardian as defined in G.S. 122C-3(15), and the person needs medical treatment.

* indicates that the word is subject to a proposed statutory change.

5. Definition of Exploitation

- **Background**

Article 6 of Chapter 108A defines “exploitation” as the “illegal or improper use of a disabled adult or his resources for another’s profit or advantage.”

There is a separate Article 6A that refers to the growing problem of fraud and financial exploitation targeting disabled and older adults. It defines “financial exploitation” as “the illegal or improper use of a disabled adult’s or older adult’s financial resources for another’s profit or pecuniary advantage.”

- **Proposal**

Should the definition of “exploitation” in G.S. 108A-101 include a cross-reference to the definition of financial exploitation in G.S. 108A-113?

6. Caregiver vs. Caretaker

- **Background**

North Carolina’s statute defines a “caretaker” as “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.”

The majority of state statutes use the term “caregiver” rather than “caretaker.” They also more expressly include close relationships beyond family.

Some states expressly state that the caregiving may be on a temporary or permanent or full or part-time basis.

When listing examples of the basis for the relationship, several states are more expressly expansive. For example, Georgia includes “or by operation of law.” Several states include “or by order of the court.” Many states expressly include employees of facilities such as an out-of-home care facility (Alaska), day care (South Carolina), public or private institution or facility (South Carolina), or an adult foster home sponsor (South Carolina).

- **Proposal:**

§ 108A-101. Definitions.

(b) The word ~~“caretaker”~~ “caregiver” shall mean an individual who has the responsibility for the care of ~~the disabled~~ a vulnerable adult as a result of family relationship or who has assumed some or all of the responsibility for the care of the ~~disabled~~ vulnerable adult voluntarily, ~~or~~ by contract, or through employment.

D. **Mandatory Reporting – Reporters and Confidentiality**

- **Background**

Most states contain mandatory reporting provisions within their adult protective statutes.

The mandatory reporting provision within N.C.G.S. 108A-102 is broad, requiring reporting by “any person having reasonable cause to believe that a disabled adult is in need of protective services.”

Many state statutes identify specific individuals who have reporting duties, in addition to anyone who has reasonable cause to believe that abuse has occurred. By identifying individuals who have a mandatory reporting responsibility, the states ensure there is widespread training on adult abuse.

- **Proposal 1:**

§ 108A-102. Duty to report; content of report; immunity.

(a) Any person having reasonable cause to believe that a ~~disabled~~ vulnerable adult has been abused, neglected, or exploited and is in need of protective services shall report such information to the director in the county in which the adult resides or is present. Such persons include, without limitation:

(1) Physicians or other licensed health care providers;

(2) Physical therapists;

(3) Occupational therapists;

(4) Mental health professionals as defined in XXX;

(5) Pharmacists;

(6) Administrators or employees of a nursing home, residential care, or health care facility;

(7) Medical examiners;

(8) Law enforcement officers;

(9) Guardians or conservators as defined in XXX:

- (10) Social workers;
- (11) Attorneys admitted to the practice of law in this state; and
- (12) Financial institutions, or officers or employees thereof with a duty to report under G.S. 108A-115.

- (b) The report may be made orally or in writing. The report shall include the name and address of the ~~disabled~~ vulnerable adult; the name and address of the ~~disabled~~ vulnerable adult's caretaker; the age of the ~~disabled~~ vulnerable adult; the nature and extent of the ~~disabled~~ vulnerable 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.)

- **Background:**

Some states, such as Texas, expressly provide that the mandatory reporting duty applies without exception to a person whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, employee or member of a board that licenses or certifies a professional, and mental health professional. Other states, such as Oregon, expressly provide that a psychiatrist, psychologist, member of the clergy or attorney is not required to report such information communicated by a person if the communication is privileged.

- **Proposal 2:**

Do you think NC should address privileged communications in its statute?

E. **Access to Financial Information and Freezing of Financial Assets**

- **Background**

The current statute at G.S. 108A-106(f) provides the following:

- (1) Upon petition by the director, a court may order that:
 - a. The disabled adult's financial records be made available at a certain day and time for inspection by the director or his designated agent; and
 - b. The disabled adult's financial assets be frozen and not withdrawn, spent or transferred without prior order of the court.

- (2) Such an order shall not issue unless the court first finds that there is reasonable cause to believe that:
 - a. A disabled adult lacks the capacity to consent and that he is in need of protective services;
 - b. The disabled adult is being financially exploited by his caretaker; and
 - c. No other person is able or willing to arrange for protective services.

- (3) 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.

The statute permits the freeze of the disabled adult's financial assets but only if the court finds that the disabled adult is being financially exploited by his caretaker. It also requires prior notice to the caretaker before an inspection of financial records can occur.

Article 6A, which governs the Protection of Disabled and Older Adults From Financial Exploitation, also addresses access to financial information. G.S. § 108A-116 focuses on the production of financial records in cases of suspected financial exploitation. It provides:

(a) An investigating entity may, under the conditions specified in this section, petition the district court to issue a subpoena directing a financial institution to provide to the investigating entity the financial records of a disabled adult or older adult customer. The petition shall be filed in the county of residence of the disabled adult or older adult customer whose financial records are being subpoenaed. The court shall hear the case within two business days after the filing of the petition. The court shall issue the subpoena upon finding that all of the following conditions are met:

- (1) The investigating entity is investigating, pursuant to the investigating entity's statutory authority, a credible report that the disabled adult or older adult is being or has been financially exploited.

- (2) The disabled adult's or older adult's financial records are needed in order to substantiate or evaluate the report.

- (3) Time is of the essence in order to prevent further exploitation of that disabled adult or older adult.

The statute is not limited to financial exploitation by the disabled adult's caretaker and there is no requirement of prior notice. However, the statute only provides for access to financial records; it does not provide for the freezing of financial assets.

- **Proposal**

What statutory recommendations do you have that would improve access to financial information in order to determine if financial exploitation has occurred as well as ensure assets are not depleted during any investigation?