

## Adult Protective Services: Abuse, Neglect, and Exploitation After Guardianship

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## Adult Protective Services as a growing field for DSS legal involvement.

Davidson County pre-2009

- 21 wards (very few MH/DD/SA)
- Legal representation limited to cases that were considered "highly contested" (2009-2 cases)
- Very informal court procedure
- Limited contact with attorney GALs, Clerk of Court's office

Davidson County post-2009

- 89 wards (most with MH/DD/SA diagnosis)
- Legal representation in all cases.
- More structured court proceedings, local rules?
- Good working relationship between players/MDE provider

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## Reasons for Growth (Davidson Example)

- Natural growth from aging population
- Caretaker limitations/frustration
- Typical APS client is getting younger and needs are more severe.
- Historically, DSS representation was on contract basis and was essentially devoted to child welfare/juvenile court. Different directors had different prerogatives.
- Post-2009 determination that identified concerns with UPL in way hearings were being conducted.
- Different legal perspective

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## What does an APS attorney do?

- Review/interpret legal instruments (POA, Personal Care Agreements, Deeds, all other things incident to "Medicaid Planning.")
- Draft pleadings such as incompetency petitions, motions in the cause, affidavits, and prepare Clerk's Orders upon request.
- "Other tasks as assigned."

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## Adult Protective Services in the Guardianship Context

- Person has previously been adjudicated to be an incompetent adult within the meaning of G.S. 35A-1101(7);
- Court-appointed guardian of the person, guardian of the estate, or general guardian is alleged to have abused, neglected or exploited the incompetent adult.
- These situations are on the rise in Davidson County.

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## Adult Protective Services in the Guardianship Context

- ISSUES
1. JURISDICTION?
  2. AUTHORITY?
  3. PLEADINGS?
  4. OTHER SITUATIONS?
  5. RESTORATION?

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## JURISDICTION: What Court?

- (a) Clerks of superior court in their respective counties have original jurisdiction for the appointment of guardians of the person, guardians of the estate, or general guardians for incompetent persons and of related proceedings brought or filed under this Subchapter. Clerks of superior court in their respective counties have original jurisdiction for the appointment of guardians of the estate for minors, for the appointment of guardians of the person or general guardians for minors who have no natural guardian, and of related proceedings brought or filed under this Subchapter.
- (b) The clerk shall retain jurisdiction following appointment of a guardian in order to assure compliance with the clerk's orders and those of the superior court. The clerk shall have authority to remove a guardian for cause and shall appoint a successor guardian, following the criteria set forth in G.S. 35A-1213 or G.S. 35A-1224, after removal, death, or resignation of a guardian.
- REF: N. C. G.S. §35A-1203

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## JURISDICTION: For how long?

- (a) Every guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward:
- (1) Ceases to be a minor as defined in G.S. 35A-1202(12),
- (2) Is adjudicated to be restored to competency pursuant to the provisions of G.S. 35A-1130, or
- (3) Dies.
- REF: N.C.G.S. § 35A-1295

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## JURISDICTION

The Clerk of Superior Court has original and continuing jurisdiction over a case to ensure that the guardian is in compliance with court orders until such time as the guardianship is terminated through a restoration of the ward's capacity or the ward's death.

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## Authority: What can the Clerk do?

- Removal of Guardian (35A-1290)
- Ex Parte Emergency (35A-1291)
- Enter other orders short of removal

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## Authority: Removal (in general)

- The clerk has the power and authority **on information or complaint** made to remove any guardian appointed under the provisions of this Subchapter, to appoint successor guardians, and to make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents. 35A-1290(a)
- "16 grounds for removal" are listed in (b) and (c) of 35A-1290:
  - Monetary ( 4 )
  - Disqualification ( 4 )
  - Violation of Fiduciary duty (3)
  - Lack of compliance with Court (4)
  - **Non-financial neglect/abuse (1), maybe part of another**

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## Authority: 1290(b-c) grounds most common in DSS situations

- (b)(1) The guardian wastes the ward's money or estate or **converts** it to his own use.
- (b)(2) The guardian in any manner mismanages the ward's estate.
- (b)(3) The guardian **neglects to care** for or maintain the ward or his dependents in a suitable manner.
- (b)(6) The guardian has violated a fiduciary duty through default or **misconduct**.
- (c)(8) The clerk finds the **guardian unsuitable** to continue serving as guardian for any reason.

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## Authority: What standard does the Clerk use in a decision to remove a guardian?

- Moderate language conflict between G.S. 35A-1203(b) "for cause" and G.S. 35A-1290 "better care and maintenance."
- How is the conflict resolved?
- *In the matter of the Guardianship of Clara Stevens Thomas*, 183 N.C. App. 480 (2007) treated the issue as one of first impression and held that the proper standard for the removal of a guardian was the "better care and maintenance" standard and not "for cause."

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## Authority: Removal 35A-1290

- The Clerk of Superior Court maintains the discretion and authority to remove a previously appointed guardian for any of the enumerated grounds listed in 35A-1290 or for any reason in which the Clerk determines the ward will receive better care and maintenance by removal.

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## Authority: Emergency Removal

- The clerk may remove a guardian without hearing if the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate. In all cases where the letters of a guardian are revoked, the clerk may, pending the resolution of any controversy in respect to such removal, make such interlocutory orders and decrees as the clerk finds necessary for the protection of the ward or the ward's estate or the other party seeking relief by such revocation. G.S. 35A-1291

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## Authority: Elements of Emergency Removal

- The clerk may remove a guardian without hearing if the clerk finds:
  - (a) **reasonable cause** to believe
  - (b) **an emergency exists**
  - (c) and that emergency
    - (1) threatens the **physical well-being** of the ward or
    - (2) constitutes a risk of substantial **injury to the ward's estate**.

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## Authority: Local Process of Emergency Removal

- Social worker/SW supervisor staff with attorney
- Attorney requests ex parte hearing from Clerk's Office; drafts an affidavit based on information provided by social worker; drafts proposed order; social worker reviews, then executes affidavit
- social worker/attorney attend ex parte hearing; present affidavit; available for direct questions from clerk;
- "follow up/review hearing" scheduled for 7-10 days later.
- Last time 12-31-15, process took about two hours.

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## Motion in the Cause to "review?"

- Widely used in Davidson County
- Used when situation can be remedied, perhaps removal not necessarily in ward's best interest; mitigating factors, etc.
- Any interested person may file a motion in the cause with the clerk in the county where a guardianship is docketed to request modification of the order appointing a guardian or guardians or **consideration of any matter pertaining to the guardianship**. G.S. § 35A-1207(a).

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## Pleadings

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## Motions in the Cause (35A-1207)

- (a) Any interested person may file a motion in the cause with the clerk in the county where a guardianship is docketed to request modification of the order appointing a guardian or guardians or consideration of any matter pertaining to the guardianship.
- (b) The clerk shall treat all such requests, **however labeled**, as motions in the cause.

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## Pleadings: What if DSS was not a party to original incompetency/guardianship case

- Is there a requirement that DSS be granted permission to intervene pursuant to Rule 24, NCRCP?
- Most likely not, local practice can differ; however, most clerks see the language "any interested person" expansively and do not require intervention.
- Davidson usually includes language in its motions to this effect:
  - Davidson County Department of Social Services was not an original party in the above-captioned matter but has since been involved in securing protective and remedial services for the incompetent person since receiving a report that alleged that the above-referenced ward was at risk under the statutory authority granted it under G.S. 108A-100 et seq.

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## Pleadings

- NCAOC forms
  - AOC-E-415 (Motion in the Cause to Modify Guardianship)
  - AOC-E-211 (Notice of Hearing)
  - AOC-E-214 (Certificate of Service)
  - AOC-E-416 (Order on Motion in the Cause to Modify)
- Attorney-Generated Forms (if local practice or hopeless perfectionists)
- All forms, regardless of creator, are required to be served pursuant to Rule 5 of the N.C. R. C.P. (35A-1207(c)) unless the clerk orders otherwise; Personal Note: All Orders require service according to Rule 58 of the N.C.R.C.P.

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## Other Situations

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## Suspending the Authority of Health Care Agent

- if the patient (ward) has a health care agent appointed pursuant to a valid health care power of attorney, the health care agent shall have the right to exercise the authority granted in the health care power of attorney unless the Clerk has suspended the authority of that health care agent in accordance with G.S. 35A-1208. (see G.S. 35A-1241.)
- **§ 35A-1208. Authority for health care decisions.**
- (a) A guardian of the person or general guardian of an incompetent adult may petition the Clerk, in accordance with G.S. 32A-22(a), for an order suspending the authority of a health care agent, as that term is defined in G.S. 32A-16(2).

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## Suspending the Authority of Health Care Agent

- G.S. 32A-22 established the rough requirements:
  - The Court must have previously appointed a guardian of the person/general guardian other than the health care agent under an HCPOA
  - Guardian petitions/motions court
  - Guardian provides notice to health care agent
  - Once the procedural requirements are met, the Clerk may suspend the authority of the health care agent **for good cause** shown.
  - Clerk must produce a written order with proper findings and conclusions of law

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## Interplay with Durable Powers of Attorney

- § 32A-10. Relation of attorney-in-fact to court-appointed fiduciary.
- (a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, **guardian of the principal's person or estate**, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal. The **fiduciary** has the same **power to revoke or amend** the power of attorney that the principal would have had if he were not incapacitated or mentally incompetent.

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## Restoration

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## Restoration

- "If incompetency is essentially a withholding of a person's civil right to self-determination, it is wrong to allow someone with capacity to manage their own affairs to remain as a ward of the government"
- School of Government Resources:
  - Smith, Meredith, Restoration to Competency under 35A-1130: Common Issues and Questions, Social Services Law Bulletin, vol 45 (October 2015).

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## Restoration

- Procedurally, Counties generally use two options for Motions for Restoration of Competency: (1) use the Motion in the Cause to Modify or (2) generate their own verified motion.
- Generally, both approaches seem correct provided they comply with the requirements of G.S. 35A-1130 that expressly require
  - Statement of the facts tending to show that the ward is competent
  - Verification (no specific form required)

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## Restoration

- Gleaning procedure from the statute sometimes not helpful
  - Motion/Petitioner disjoint
  - SP or E file
    - filing a motion in the cause of the incompetency proceeding –SP
    - But good practice is to use both file nos. on the motion/petition
- Once the verified Petition or Motion is filed it is required to be served on the ward, guardian (if not "Petitioner"), and original parties to the incompetency proceeding pursuant to Rule 4.
- Ward (now alleged competent) shall be appointed a guardian ad litem if indigent and not represented.
- Ward has the right to request a jury trial under Rule 39.
- Standard for restoration is preponderance of the evidence (as opposed to CCE for incompetence)

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## Just when you thought you could start eating your lunch, .....

- Appeals from the Clerk (SPs)

- (e) Appeal of Clerk's Decisions. - Except as provided in G.S. 46-28.1(f), a party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, **within 10 days of entry of the order or judgment**, appeal to the appropriate court for a **hearing de novo**. Notice of appeal shall be in writing and shall be filed with the clerk. The order or judgment of the clerk remains in effect until it is modified or replaced by an order or judgment of a judge. A judge of the court to which the appeal lies or the clerk may issue a stay of the order or judgment upon the appellant's posting of an appropriate bond set by the judge or clerk issuing the stay. G.S. 1-301.2

- Incompetency proceedings are non-transferrable, aka, they must first be heard by the Clerk.

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## Just when you thought you could start eating your lunch, .....

Appeals from the Clerk (E's)

- § 1-301.3. Appeal of trust and estate matters determined by clerk.

- (c) Appeal to Superior Court. - A party aggrieved by an order or judgment of the clerk may appeal to the superior court by filing a written notice of the appeal with the clerk **within 10 days of entry of the order or judgment after service of the order on that party**. The notice of appeal shall contain a short and plain statement of the basis for the appeal. While the appeal is pending, the clerk retains authority to enter orders affecting the administration of the estate, subject to any order entered by a judge of the superior court limiting that authority.

- (d) Duty of Judge on Appeal. - Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

- (1) Whether the findings of fact are supported by the evidence.
    - (2) Whether the conclusions of law are supported by the findings of facts.
    - (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

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