

Adult Protective Services vs. Guardianship

Comparing Tools for Helping Adults in Need

What is the purpose of adult protective services?

Temporary (and possibly immediate) protection of a disabled adult from abuse, neglect, or exploitation.

Adult protective services (APS) programs in North Carolina focus on providing the services that are necessary to protect a disabled adult from abuse, neglect (including self-neglect), or exploitation. An adult may consent to the services or, if the adult lacks capacity to consent, a district court may order that the services be provided. These may be short-term emergency situations (up to 14 days). They can also be longer-term situations – up to 120 days if services are being provided pursuant to a court order or possible longer if the adult consents.

Citation: G.S. Chapter 108A, Articles [6](#) and [6A](#)

What is the purpose of interim guardianship?

Immediate, short-term decision-making and/or action on behalf of an adult who is probably incompetent.

A clerk of superior court has the authority to appoint an interim guardian for an adult for a temporary period if someone needs to intervene on the adult's behalf in order to take steps to address a situation that presents an imminent and foreseeable risk of harm to the adult's physical well-being or estate. A motion for an interim guardian is only appropriate if an incompetency petition has been filed and or is filed at the same time as the motion. The clerk must find that there is reasonable cause to believe that the person is incompetent, even though he or she has not yet been adjudicated incompetent. The interim guardian's powers and duties must be limited to those necessary to address the reason for the appointment. The interim guardianship may last up to 90 days.

Citation: [G.S. 35A-1114](#)

What is the purpose of emergency guardianship?

Immediate, short-term decision-making and/or action on behalf of an adult when the court lacks jurisdiction to appoint a guardian otherwise.

If the clerk lacks standard jurisdiction to appoint a guardian or interim guardian but believes that a guardian must be appointed immediately to address an emergency situation, the clerk may rely on "special jurisdiction" to appoint an emergency guardian for a person who is present in North Carolina. A situation will qualify as an emergency only if: (1) it is a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare; and (2) no

other person has authority and is willing to act on the respondent's behalf. An appointment of an emergency guardian may last for no more than 90 days.

Citation: [G.S. 35B-18](#)

What is the purpose of guardianship?

Long-term decision-making and/or action on behalf of an adult who is incompetent.

A clerk of superior court has the authority to appoint a guardian for an adult who has been adjudicated incompetent. The clerk may appoint a general guardian, a guardian of the person and/or a guardian of the estate. A general guardian or guardian of the person has expansive authority to make decisions on behalf of the individual, including decisions about housing and medical care. The clerk may also narrow the scope of the guardian's authority with an order for limited guardianship. State law explains that guardianship "should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights." In addition, the law provides that the individual "should be permitted to participate as fully as possible in all decisions that will affect him."

G.S. [Chapter 35A](#)

Selected Statutes

Protective Services

§ 108A-100. Legislative intent and purpose.

Determined to protect the increasing number of disabled adults in North Carolina who are abused, neglected, or exploited, the General Assembly enacts this Article to provide protective services for such persons.

§ 108A-101. Definitions.

(a) The word "abuse" means 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.

(b) 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.

(c) The word "director" shall mean the director of the county department of social services in the county in which the person resides or is present, or his representative as authorized in G.S. 108A-14.

(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.

(e) 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.

(f) The words "district court" shall mean the judge of that court.

(g) The word "emergency" refers to a situation where (i) the disabled adult is in substantial danger of death or irreparable harm if protective services are not provided immediately, (ii) the disabled adult is unable to consent to services, (iii) no responsible, able, or willing caretaker is available to consent to emergency services, and (iv) there is insufficient time to utilize procedure provided in G.S. 108A-105.

(h) The words "emergency services" refer to those services necessary to maintain the person's vital functions and without which there is reasonable belief that the person would suffer irreparable harm or death. This may include taking physical custody of the disabled person.

(i) 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. These services shall include, but not be limited to, the provision of medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, protection from health and safety hazards, protection from physical mistreatment, and protection from exploitation. The words "essential services" shall not include taking the person into physical custody without his consent except as provided for in G.S. 108A-106 and in Chapter 122C of the General Statutes.

(j) The word "exploitation" means the illegal or improper use of a disabled adult or his resources for another's profit or advantage.

(k) The word "indigent" shall mean indigent as defined in G.S. 7A-450.

(l) The words "lacks the capacity to consent" shall mean lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including but not limited to provisions for health or mental health care, food, clothing, or shelter, because of physical or mental incapacity. This may be reasonably determined by the director or he may seek a physician's or psychologist's assistance in making this determination.

(m) 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. 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.

(n) The words "protective services" shall mean services provided by the State or other government or private organizations or individuals which are necessary to protect the disabled adult from abuse, neglect, or exploitation. They shall consist of evaluation of the need for service and mobilization of essential services on behalf of the disabled adult. (1973, c. 1378, s. 1; 1975, c. 797; 1979, c. 1044, ss. 1-4; 1981, c. 275, s. 1; 1985, c. 589, s. 34; 1987, c. 550, s. 24; 1989, c. 770, s. 29; 1991, c. 258, s. 2; 2007-177, s. 4.)

§ 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. When necessary for a complete evaluation of the report, the director shall have the authority to review and copy any and all records, or any part of such records, related to the care and treatment of the disabled adult that have been maintained by any individual, facility or agency acting as a caretaker for the disabled adult. This shall include but not be limited to records maintained by facilities licensed by the North Carolina Department of Health and Human Services. Use of information so obtained shall be subject to and governed by the provisions of G.S. 108A-80 and Article 3 of Chapter 122C of the General Statutes. The director shall have the authority to conduct an interview with the disabled adult with no other persons present. After completing the evaluation the director shall make a written report of the case indicating whether he believes protective services are needed and shall notify the individual making the report of his determination as to whether the disabled adult needs protective services.

(b) The staff and physicians of local health departments, area mental health, developmental disabilities, and substance abuse authorities, and other public or private agencies shall cooperate fully with the director in the performance of his duties. These duties include immediate accessible evaluations and in-home evaluations where the director deems this necessary.

(c) The director may contract with an agency or private physician for the purpose of providing immediate accessible medical evaluations in the location that the director deems most appropriate.

(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).
- (4) Repealed by Session Laws 2000, c. 131, s. 1.

The evaluation shall be completed within 30 days for allegations of abuse or neglect and within 45 days for allegations of exploitation. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1; 1985, c. 589, s. 35; c. 658, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 6; 1991, c. 636, s. 19(c); 1997-443, s. 11A.118(a); 1999-334, s. 1.10; 2000-131, s. 1.)

§ 108A-104. Provision of protective services with the consent of the person; withdrawal of consent; caretaker refusal.

(a) If the director determines that a disabled adult is in need of protective services, he shall immediately provide or arrange for the provision of protective services, provided that the disabled adult consents.

(b) When a caretaker of a disabled adult who consents to the receipt of protective services refuses to allow the provision of such services to the disabled adult, the director may petition the district court for an order enjoining the caretaker from interfering with the provision of protective services to the disabled adult. The petition must allege specific facts sufficient to show that the disabled adult is in need of protective services and consents to the receipt of protective services and that the caretaker refuses to allow the provision of such services. If the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and consents to the receipt of protective services and that the caretaker refuses to allow the provision of such services, he may issue an order enjoining the caretaker from interfering with the provision of protective services to the disabled adult.

(c) If a disabled adult does not consent to the receipt of protective services, or if he withdraws his consent, the services shall not be provided. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-105. Provision of protective services to disabled adults who lack the capacity to consent; hearing, findings, etc.

(a) If the director reasonably determines that a disabled adult is being abused, neglected, or exploited and lacks capacity to consent to protective services, then the director may petition the district court for an order authorizing the provision of protective services. The petition must allege specific facts sufficient to show that the disabled adult is in need of protective services and lacks capacity to consent to them.

(b) The court shall set the case for hearing within 14 days after the filing of the petition. The disabled adult must receive at least five days' notice of the hearing. He has the right to be present and represented by counsel at the hearing. If the person, in the determination of the judge, lacks the capacity to waive the right to counsel, then a guardian ad litem shall be appointed pursuant to G.S. 1A-1, Rule 17, and rules adopted by the Office of Indigent Defense Services. If the person is indigent, the cost of representation shall be borne by the State.

(c) If, at the hearing, the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and lacks capacity to consent to protective services, he may issue an order authorizing the provision of protective services. This order may include the designation of an individual or organization to be responsible for the performing or obtaining of essential services on behalf of the disabled adult or otherwise consenting to protective services in his behalf. Within 60 days from the appointment of such an individual or organization, the court will conduct a review to determine if a petition should be initiated in accordance with Chapter 35A; for good cause shown, the court may extend the 60 day period for an additional 60 days, at the end of which it shall conduct a review to determine if a petition should be initiated in accordance with Chapter 35A. No disabled adult may be committed to a mental health facility under this Article.

(d) A determination by the court that a person lacks the capacity to consent to protective services under the provisions of this Chapter shall in no way affect incompetency proceedings as set forth in Chapters 33, 35 or 122 of the General Statutes of North Carolina, or any other proceedings, and incompetency proceedings as set forth in Chapters 33, 35, or 122 shall have no conclusive effect upon the question of capacity to consent to protective services as set forth in this Chapter. (1973, c. 1378, s. 1; 1975, c. 797; 1977, c. 725, s. 3, 1979, c. 1044, s. 5; 1981, c. 275, s. 1; 1985, c. 658, s. 2; 1987, c. 550, s. 25; 2000-144, s. 36.)

§ 108A-106. Emergency intervention; findings by court; limitations; contents of petition; notice of petition; court authorized entry of premises; immunity of petitioner.

(a) Upon petition by the director, a court may order the provision of emergency services to a disabled adult after finding that there is reasonable cause to believe that:

- (1) A disabled adult lacks capacity to consent and that he is in need of protective service;
- (2) An emergency exists; and
- (3) No other person authorized by law or order to give consent for the person is available and willing to arrange for emergency services.

(b) The court shall order only such emergency services as are necessary to remove the conditions creating the emergency. In the event that such services will be needed for more than 14 days, the director shall petition the court in accordance with G.S. 108A-105.

(c) The petition for emergency services shall set forth the name, address, and authority of the petitioner; the name, age and residence of the disabled adult; the nature of the emergency; the nature of the disability if determinable; the proposed emergency services; the petitioner's reasonable belief as to the existence of the conditions set forth in subsection (a) above; and facts showing petitioner's attempts to obtain the disabled adult's consent to the services.

(d) Notice of the filing of such petition and other relevant information, including the factual basis of the belief that emergency services are needed and a description of the exact services to be rendered shall be given to the person, to his spouse, or if none, to his adult children or next of kin, to his guardian, if any. Such notice shall be given at least 24 hours prior to the hearing of the petition for emergency intervention; provided, however, that the court may issue immediate emergency order ex parte upon finding as fact (i) that the conditions specified in G.S. 108A-106(a) exist; (ii) that there is likelihood that the disabled adult may suffer irreparable injury or death if such order be delayed; and (iii) that reasonable attempts have been made to locate interested parties and secure from them such services or their consent to petitioner's provision of such service; and such order shall contain a show-cause notice to each person upon whom served directing such person to appear immediately or at any time up to and including the time for the hearing of the petition for emergency services and show cause, if any exists, for the dissolution or modification of the said order. Copies of the said order together with such other appropriate notices as the court may direct shall be issued and served upon all of the interested parties designated in the first sentence of this subsection. Unless dissolved by the court for good cause shown, the emergency order ex parte shall be in effect until the hearing is held on the petition for emergency services. At such hearing, if the court determines that the emergency

continues to exist, the court may order the provision of emergency services in accordance with subsections (a) and (b) of this section.

(e) Where it is necessary to enter a premises without the disabled adult's consent after obtaining a court order in compliance with subsection (a) above, the representative of the petitioner shall do so.

(f) (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.

(g) No petitioner shall be held liable in any action brought by the disabled adult if the petitioner acted in good faith. (1975, c. 797; 1981, c. 275, s. 1; 1985, c. 658, s. 3.)

Interim Guardianship

§ 35A-1114. Appointment of interim guardian.

(a) At the time of or subsequent to the filing of a petition under this Article, the petitioner may also file a verified motion with the clerk seeking the appointment of an interim guardian.

(b) The motion shall set forth facts tending to show:

- (1) That there is reasonable cause to believe that the respondent is incompetent, and
- (2) One or both of the following:
 - a. That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being and that requires immediate intervention;
 - b. That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate that requires immediate intervention in order to protect the respondent's interest, and
- (3) That the respondent needs an interim guardian to be appointed immediately to intervene on his behalf prior to the adjudication hearing.

(c) Upon filing of the motion for appointment of an interim guardian, the clerk shall immediately set a date, time, and place for a hearing on the motion. The motion and a notice setting the date, time, and place for the hearing shall be served promptly on the respondent and on his counsel or guardian ad litem and other persons the clerk may designate. The hearing shall be held as soon as possible but no later than 15 days after the motion has been served on the respondent.

(d) If at the hearing the clerk finds that there is reasonable cause to believe that the respondent is incompetent, and:

- (1) That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being, and that there is immediate need for a guardian to provide consent or take other steps to protect the respondent, or
- (2) That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate, and that immediate intervention is required in order to protect the respondent's interest,

the clerk shall immediately enter an order appointing an interim guardian.

(e) The clerk's order appointing an interim guardian shall include specific findings of fact to support the clerk's conclusions, and shall set forth the interim guardian's powers and duties. Such powers and duties shall be limited and shall extend only so far and so long as necessary to meet the conditions necessitating the appointment of an interim guardian. In any event, the interim guardianship shall terminate on the earliest of the following: the date specified in the clerk's order; 45 days after entry of the clerk's 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 when the petition is dismissed by the court. An interim guardian whose authority relates only to the person of the respondent shall not be required to post a bond. If the interim guardian has authority related to the respondent's estate, the interim guardian shall post a bond in an amount determined by the clerk, with any conditions the clerk may impose, and shall render an account as directed by the clerk.

(f) When a motion for appointment of an interim guardian has been made, the petitioner may voluntarily dismiss the petition for adjudication of incompetence only prior to the hearing on the motion for appointment of an interim guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 12.)

Emergency Guardianship

Article 2.

Jurisdiction.

§ 35B-15. Definitions.

(a) The following definitions apply in this Article:

- (1) **Emergency.** – A circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian of the person is necessary because no other person has authority and is willing to act on the respondent's behalf.

- (2) Home state. – The state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for the adjudication of incompetence; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition for the adjudication of incompetence.
 - (3) Significant-connection state. – A state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.
- (b) In determining under G.S. 35B-17 and G.S. 35B-30(e) whether a respondent has a significant connection with a particular state, the court shall consider:
- (1) The location of the respondent's family and other persons required to be notified of the incompetency, guardianship, or protective proceeding.
 - (2) The length of time the respondent at any time was physically present in the state and the duration of any absence.
 - (3) The location of the respondent's property.
 - (4) The extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, drivers license, social relationship, and receipt of services. (2016-72, s. 1.)

§ 35B-16. Exclusive jurisdictional basis.

This Article provides the exclusive jurisdictional basis for a court of this State to adjudicate incompetence, appoint a general guardian or guardian of the person, or issue a protective order for an adult. (2016-72, s. 1.)

§ 35B-17. Jurisdiction.

Notwithstanding the provisions of G.S. 1-75.4(1), a court of this State has jurisdiction to adjudicate incompetence, appoint a general guardian or guardian of the person, or issue a protective order for a respondent only if:

- (1) This State is the respondent's home state; or
- (2) On the date the petition for the adjudication of incompetence is filed, this State is a significant-connection state and either of the following is true:
 - a. The respondent does not have a home state, or a court of the respondent's home state has declined to exercise jurisdiction because this State is a more appropriate forum.
 - b. The respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order, all of the following are true:
 - 1. A petition for an appointment or order is not filed in the respondent's home state.
 - 2. An objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding.

3. The court in this State concludes that it is an appropriate forum under the factors set forth in G.S. 35B-20; or
- (3) This State does not have jurisdiction under either subdivision (1) or (2) of this section, the respondent's home state and all significant-connection states have declined to exercise jurisdiction because this State is the more appropriate forum, and jurisdiction in this State is consistent with the constitutions of this State and the United States; or
- (4) The requirements for special jurisdiction under G.S. 35B-18 are met. (2016-72, s. 1.)

§ 35B-18. Special jurisdiction.

(a) A court of this State lacking jurisdiction under G.S. 35B-17 has special jurisdiction to do any of the following:

- (1) Appoint a guardian of the person in an emergency for a term not exceeding 90 days for a respondent who is physically present in this State.
- (2) Issue a protective order with respect to real or tangible personal property located in this State.
- (3) Appoint a general guardian, guardian of the person, or guardian of the estate for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to G.S. 35B-30.

(b) If a petition for the adjudication of incompetence and application for the appointment of a guardian of the person in an emergency is brought in this State and this State was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment. (2016-72, s. 1.)

Guardianship

§ 35A-1201. Purpose.

(a) The General Assembly of North Carolina recognizes that:

- (1) Some minors and incompetent persons, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.
- (2) Incompetent persons who are not able to act effectively on their own behalf have a right to a qualified, responsible guardian.
- (3) The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.
- (4) Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.

- (5) Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.
 - (6) Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.
- (b) The purposes of this Subchapter are:
- (1) To establish standards and procedures for the appointment of guardians of the person, guardians of the estate, and general guardians for incompetent persons and for minors who need guardians;
 - (2) To specify the powers and duties of such guardians;
 - (3) To provide for the protection of the person and conservation of the estate of the ward through periodic accountings and reports; and
 - (4) To provide for the termination of guardianships. (1987, c. 550, s. 1.)