



## Choosing the Right Path: APS v. Guardianship

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### Six of one...



Images: Wikipedia; publicdomainpictures.net

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### How Many? SFY 2016-17

APS Orders	Guardianship
<ul style="list-style-type: none"><li>• APS = 27</li><li>• Emerg. = 32</li><li>• Ex parte = 42</li><li>• Pending = 72</li><li>• <b>Total = 173</b></li></ul>	<ul style="list-style-type: none"><li>• Appointed = 186</li><li>• Pending = 513</li><li>• <b>Total = 699</b></li></ul>

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### What's the Purpose?

Adult protective services	Interim guardianship
Emergency guardianship	Guardianship

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### Protective Services – When?

- Report received
- Disabled adult is in need of services to protect him or her from abuse, neglect or exploitation
  - May include self-neglect



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### Protective Services – What?

- Bottom line: DSS mobilizes necessary services
- Consent → provide essential services
- Lack capacity to consent → court order
  - Emergency services
  - Ex parte order
  - Freeze and inspect financial records
  - 35A petition



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### Lacks Capacity v. Incompetent

<p>"... 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." G.S. 108A-101(l)</p>	<p>"...lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property ..." G.S. 35A-1101(7)</p>
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### Pros/Cons

Pros	Cons
<ul style="list-style-type: none"><li>• Discretion to craft protective services</li><li>• Ex parte and emergency options</li><li>• Limited duration</li><li>• Preserve rights</li><li>• Consent v. order</li></ul>	<ul style="list-style-type: none"><li>• Slow</li><li>• Unfamiliar/courts</li><li>• Limited in scope and duration</li><li>• DSS unable to access adult's resources to pay for services</li></ul>

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### Emergency Guardianship – When?

1. NC does not have jurisdiction for guardianship
2. An emergency exists
3. A petition is filed for emergency guardianship

**What is an emergency?**

- A circumstance that likely will result in substantial harm to the adult'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 adult's behalf.

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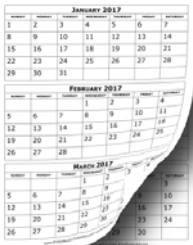
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## Emergency Guardianship – What?



- Clerk may appoint a guardian of the person for up to 90 days.
  - No extensions
  - Court must dismiss the proceeding if requested by the court of the adult's home state at any time



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## Pros/Cons

### Pros

- Fast
- Available to help in an emergency when jurisdiction lacking

### Cons

- Very limited utility



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## Interim Guardianship – When?

1. NC has jurisdiction for guardianship (G.S. 35B)
2. Reasonable cause to believe that incompetent
3. One or both of the following:
  - a. Adult's condition constitutes or reasonably appears to constitute imminent/ foreseeable risk of harm to his physical well-being and requires immediate attention;
  - b. There is or reasonably appears to be an imminent/foreseeable risk of harm to the estate that requires immediate intervention; and
4. Adult needs an interim guardian to be appointed immediately to intervene on his behalf prior to the adjudication hearing



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### Interim Guardianship – What?

- Powers and duties shall be limited
  - Extend only so far and so long as necessary to meet the conditions necessitating the appointment
- Terminates
  - Date specified in clerk's order or;
  - 45 days after entry *unless* clerk extends for up to 45 days for good cause shown




Image: Amazon.com

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### Pros/Cons

Pros	Cons
<ul style="list-style-type: none"><li>• Fast</li><li>• Narrowly tailored</li><li>• Allows guardian to provide immediate assistance</li></ul>	<ul style="list-style-type: none"><li>• Fast</li><li>• Sometimes used when adult is competent</li><li>• Extreme remedy</li></ul>

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### Guardianship – When?

1. NC has jurisdiction for guardianship
2. The adult has been adjudicated incompetent
3. A petition has been filed

**Incompetent?**  
“...lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property...”

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### Guardianship – What?

- Clerk may appoint
  - Guardian of the person
  - Guardian of the estate
  - General guardian
- Decision-making shifts from the adult to the guardian to the extent ordered by the clerk
- May seek restoration of competency
  - DSS duty to address in status report annually

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### Pros/Cons

Pros	Cons
<ul style="list-style-type: none"><li>• Clerk processes smooth relatively smooth</li><li>• Allows DSS to help the adult quickly</li><li>• Straightforward</li></ul>	<ul style="list-style-type: none"><li>• Sometimes pursued when adult is competent simply because APS too cumbersome</li></ul>

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### Scenario #1

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graph LR; A[DSS receives APS report regarding financial exploitation] --> B[Evaluation -> Disabled adult is institutionalized and clearly incompetent];
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### Scenario #2

Adult (78 y.o.) had been living independently. Admitted to hospital after a fall.

Develops hospital-induced delirium but recovers; some concern about early onset dementia

Hospital unwilling to discharge her; contacts DSS requesting interim guardian

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graph TD; A[Adult (78 y.o.) had been living independently. Admitted to hospital after a fall.] --> B[Develops hospital-induced delirium but recovers; some concern about early onset dementia]; B --> C[Hospital unwilling to discharge her; contacts DSS requesting interim guardian];
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### Scenario #3

Adult (25 y.o) with bipolar disorder and mild intellectual disabilities.

Lives with mother, who disagrees with diagnosis and discards his medication.

Neighbor calls APS when Tony was wandering neighborhood in cold. Evaluation → Disabled adult in need of PS

```
graph TD; A[Adult (25 y.o) with bipolar disorder and mild intellectual disabilities.] --> B[Lives with mother, who disagrees with diagnosis and discards his medication.]; B --> C[Neighbor calls APS when Tony was wandering neighborhood in cold. Evaluation → Disabled adult in need of PS];
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### Scenario #4

SC resident has a car accident in NC

Hospitalized in NC; unconscious with brain damage

Hospital contacts DSS; asks DSS to file petition for guardianship

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graph TD; A[SC resident has a car accident in NC] --> B[Hospitalized in NC; unconscious with brain damage]; B --> C[Hospital contacts DSS; asks DSS to file petition for guardianship];
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**Questions?**

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