



SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES
Adult Services

South Carolina Department of Social Services

Adult Protective Services

Policy Manual

Probate Court

**South Carolina Department of Social Services
Adult Protective Services Policy and Procedure Manual**

APS Program Policy – Probate Court

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APS Program Policy: Probate Court

Table of Contents

- [1.1](#) Purpose of Probate Court**
- [1.2](#) Basic Considerations**
- [1.3](#) Obtaining a Guardianship or Conservatorship**
- [1.4](#) Filing a Petition with the Probate Court**
- [1.5](#) What if no one is willing to serve as a Guardian or Conservator**
- [1.6](#) Mental Health Commitments**
- [1.7](#) Involuntary Admission (Commitment) to Programs or Services Operated by DDSN**
- [1.8](#) Adult Health Care Consent Act**
- [1.9](#) Powers of Attorney**
- [1.10](#) Durable Powers of Attorney**

**South Carolina Department of Social Services
Adult Protective Services Policy and Procedure Manual**

APS Program Policy – Probate Court

APS Program Policy: Probate Policy

1.1 Purpose of Probate Court

When APS determines that a vulnerable adult in need of protection cannot remain protected due to incapacity and there are not sufficient alternatives to guardianship or conservatorship, a petition for the appointment of a guardian and/or conservator can be filed with a probate court.

1. **Guardianship** - The court may appoint a guardian for an adult only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety.

2. **Conservatorship** - The court may appoint a conservator for the adult only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property. The adult may still have the ability to live on their own with property management assistance.

There are other options called least restrictive alternatives. Least restrictive alternatives encourage independence and allow a person to be involved in decisions about his or her care and well-being, while still providing protection for the person. In some situations, guardianship may be the best choice to protect a person and that person's rights and property if the person is incapacitated. This may be a full guardianship or a limited guardianship. Because guardianship can be very restrictive for an individual, it is important to explore other alternatives first. If guardianship is appropriate for a vulnerable adult, the guardianship should be structured to protect the individual's right to self-determination as much as possible.

1.2 Basic Considerations

Below are some basic considerations when determining if probate court is appropriate for a case.

- If the Vulnerable Adult is unable to handle their own finances, determine whether there is someone who is properly handling the adult's financial affairs.
- If the Vulnerable Adult is not able to handle their own finances and does not have anyone designated to do so, the adult's monthly income should be redirected by family court to pay for the adult's care.
- If the Vulnerable Adult has leftover monthly income or has assets (e.g. real estate, savings account) and is not able to take of their own finances, consider whether the adult needs a conservator.
- If a conservator is appropriate and necessary, APS staff should contact the Vulnerable Adult's family members and other interested parties to determine if one of them is capable and willing to serve. If so, the APS staff should direct the party to the local Probate Court for guidance on applying to become a conservator. Staff may also direct the party to contact the South Carolina Bar Lawyer Referral Service at 1-800-868-2284 for information about representation by an

**South Carolina Department of Social Services
Adult Protective Services Policy and Procedure Manual**

APS Program Policy – Probate Court

attorney. DSS will not assist in having an individual appointed as conservator if that individual was suspected of being involved in the underlying abuse, neglect or exploitation.

- If APS staff locates someone who knows and cares for the Vulnerable Adult and is willing to serve as the adult’s conservator but the applicant does not have the means to file a petition in Probate Court, DSS’s county attorneys or a paid outside attorney may file the petition for conservatorship in Probate Court. This assistance is available in very limited circumstances.
- If it is determined that a Vulnerable Adult could benefit from a Conservator, but there is nobody in the adult’s life who is willing to petition the Probate Court for Conservatorship, DSS’s county attorneys or a paid outside attorney may file the petition for conservatorship in Probate Court. The outside attorney will be paid an hourly rate.

1.3 Obtaining a Guardianship or Conservatorship

Obtaining a guardianship or conservatorship is handled through Probate Court, however, APS staff must be familiar with and understand this process. The appointment of a guardian or conservator for an incapacitated adult is started by filing the proper petition with the probate court in the county where the incapacitated person is present or resides. The probate court will often appoint an attorney to act as guardian ad litem for the purpose of protecting the ward’s interest during the legal proceedings to ensure that all due process rights are protected. Due process rights can include representation by counsel, notice of the proceedings, opportunity to cross-examine witnesses, and the opportunity to present evidence at the proceedings. A probate judge hears all cases in probate court. There is no jury. If the adult is incapacitated to the extent that he or she cannot make or communicate responsible decisions, the court will need evidence to prove this. Such evidence usually comes from qualified medical, social workers, or nursing professionals.

1.4 Filing a Petition with the Probate Court

The county DSS attorney may file the petition for probate court or a contract attorney may be hired to file the petition.

South Carolina Code of Laws §§ 62-5-303, 62-5-402 and 62-5-403 allows any “interested party” to petition the Probate Court for a protective order. If DSS determines that a guardian and/or conservator needs to be appointed for a vulnerable adult, the following options should be explored as to who should petition the Court:

- 1. Relative and/or next of kin.**
- 2. Other interested party such as power of attorney, or the facility that the vulnerable adult is located in. See South Carolina Code of Laws §§ 62-5-308 and 62-5-408 for priority of appointments.**
- 3. SCDSS through either the County Attorney or Private Attorney specifically contracted for this purpose.**

**South Carolina Department of Social Services
Adult Protective Services Policy and Procedure Manual**

APS Program Policy – Probate Court

1.5 What if no one is willing to serve as a Guardian or Conservator?

If no family member or fictive kin is willing to serve as the Guardian or Conservator a law firm may be contracted with to fulfill this need.

1.6 Mental Health Commitments

Commitment to mental health treatment is the most common form of commitment and should not be confused with APS emergency protective custody. The law in South Carolina lays out two processes for mental health commitment: (1) emergency and (2) judicial. S.C. Code 44-17-410 through 620. Inpatient treatment occurs in a psychiatric hospital, and outpatient treatment is when with a mental health center or a private mental health professional.

1.7 Involuntary Admission (Commitment) to Programs or Services Operated by DDSN

Probate Court and the Family Court both have jurisdiction to conduct proceedings to involuntarily admit an individual to a facility, program, or services operated by or provide by DDSN. S.C. Code 44-20-450

1.8 Adult Health Care Consent Act

The Adult Health Care Consent Act (S.C. Code Ann. 44-66-10, et seq.) provides a process for making health care decisions for a patient who is unable to consent, but who did not sign an advance directive. The Adult Health Care Act applies only to health care decisions. It does not apply to other types of decisions, including who may live with the vulnerable adult or how to handle the vulnerable adult's money. "Unable to consent" means the patient is unable to appreciate the nature and implications of the patient's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner. A patient's inability to consent usually must be certified by two licensed physicians.

The law establishes an order of priority for those who may make health care decisions for a patient who is unable to consent. The Adult Health Care Consent Act puts into law our ideas of "next of kin." The order of priority for decision makers is:

1. Probate court guardian, if the decision is within the scope of the guardianship;
2. An attorney-in-fact appointed by the patient in a durable power of attorney, if the decision is within the scope of his authority;
3. A spouse of the patient unless the spouse and the patient are separated;
4. An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available;
5. A parent of the patient;
6. An adult sibling of the patient;
7. A grandparent of the patient;
8. Any other relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient.
9. A person given priority to make health care decisions for the patient by another statutory provision;

**South Carolina Department of Social Services
Adult Protective Services Policy and Procedure Manual**

APS Program Policy – Probate Court

10. If, after good faith efforts, the hospital or other health care facility determines that the persons listed in items (1) through (9) are unavailable to consent on behalf of the patient, a person who has an established relationship with the patient, who is acting in good faith on behalf of the patient, and who can reliably convey the patient's wishes but who is not a paid caregiver or a provider of health care services to the patient. For the purposes of this item, a person with an established relationship is an adult who has exhibited special care and concern for the patient, who is generally familiar with the patient's health care views and desires, and who is willing and able to become involved in the patient's health care decisions and to act in the patient's best interest.

APS county staff are not to sign for medical procedures. If there is no one available under the Adult Health Care Consent Act and the physicians/hospital refuse to make health care decisions for the APS patient who is unable to consent, the case manager should contact their county attorney and the APS Area Manager for advisement.

1.9 Powers of Attorney

A power of attorney is a written document in which one person, called the “principal” authorizes another person, called the “attorney-in-fact” or the “agent” to act for him or her. Through the power of attorney, the principal can give the agent **general power**-the ability to conduct all the principal’s business, or **special power**-the ability to transact only a particular type of business for the principal. No matter whether the power of attorney is general or special, it should specifically state the powers granted to the agent.

When a vulnerable adult in the APS system has authorized another person to act for him or her as attorney-in-fact the case manager must defer decision making to this person where the document gives that authority to the agent. The attorney-in-fact should be responsible for signing the adult into a facility or make medical decisions for the adult if necessary. If the adult is the victim of abuse, neglect or exploitation by the attorney-in-fact, DSS will ask the court to decide how to move forward.

1.10 Durable Powers of Attorney

Although the power of attorney discussed above terminates upon the incapacity of the principal, there is a power of attorney that remains effective even after the principal becomes incapacitated. It is called a “durable power of attorney,” and may be effective immediately or only upon the disability or incapacity of the principal. A durable power of attorney provides instructions to an agent about the principal’s desires concerning the principal’s business affairs, finances, and health care at a time when the principal becomes incapacitated.