

The Protected Consumer Credit Freeze: A New Tool to Prevent and Stop Financial Exploitation of Incapacitated Adults

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Sometimes an older person's most valuable asset is a strong credit rating. Unfortunately, like any other asset, credit is often the target of financial exploitation. Predatory actors aren't the only risk. Every elder law and estate-planning attorney knows of clients who get carried away with on-line shopping or investment trading. The temptations of the Internet have been the financial undoing of many well- educated, savvy older people - particularly those who are lonely or bored.

In recognition of these dangers, our state has taken recent steps to protect the assets of incapacitated adults by broadening the availability of credit security freezes. This article covers the basics of the new "protected consumer credit freeze" statute, discusses its ambiguities, and proposes practice tips for attorneys working with older clients and their families.

In our field, we probably don't need a lot of data to know that financial matters often go awry when mild cognitive impairment hits. *See, e.g.*, Tara Siegel Bernard, "As Cognition Slips, Financial Skills Are Often the First to Go," N.Y. Times, Apr. 25, 2015, <http://www.nytimes.com/2015/04/25/your-money/as-cognitvity-slips-financial-skills-are-often-the-first-to-go.html>. Now we have a new tool to address it.

What is a Security Freeze?

An easy way for any adult of any age or health status to get protection from identity theft is to put a "security freeze" on his or her credit report. Placing a security freeze prevents someone else from stealing the person's identity by opening a new account or increasing a credit line. Just Google "North Carolina security freeze," to get to the N.C. Attorney General's website with links to the three

credit reporting agencies. A freeze can be put into place at any or all of these agencies. It is also fairly easy to remove the freeze if a person decides to open a new credit card or alter an existing account, but not so easy that they'll be buying a huge flat screen TV on impulse.

Effective January 1, 2016, a guardian or an agent under a power of attorney (POA) can put a credit freeze in place for the principal if the principal is "incapacitated." N.C.G.S. §§ 75-61, 75-63.1 (2015). Many states have enacted these "protected consumer" laws in recent years and others are considering them now. For an overview of the state statutes, *see* Heather Morton, "Consumer Report Security Freeze State Laws," National Conference of State Legislatures, October 12, 2016, <http://www.ncsl.org/research/financial-services-and-commerce/consumer-report-security-freeze-state-statutes.aspx>. The protected consumer statutes also allow parents and guardians to protect minor children from being the victims of identity theft, so "protected consumer" also applies to those age 16 or 18 and younger, depending on the state.

Who is an "Incapacitated Person"?

The new statute sets out the procedures for creating and for removing a security freeze on what is termed a "protected person." A "protected person" is defined as someone who is "incapacitated," under age 16, or for whom a guardian or guardian ad litem (g/a/l) has been appointed. N.C.G.S. 75-61(11a) (2015).

North Carolina's new statute does not define "incapacitated" and, unlike some elder abuse statutes, is not triggered by the person having reached a certain age. Unlike states requiring the consumer first to be found incompetent, such as Florida, Indiana, and Tennessee, by not *requiring* a finding of incompetency in guardianship before a person can be a "protected consumer," our state opted for a broad application of the law. Fla. Stat. § 501.005 and 501.0051; Ind. Code § 24-5-24-1 *et seq.* and Ind. Code § 24-5-24.5-1 *et seq.*; Tenn. Code § 47-18-2101 *et seq.*

Besides the statute's failure to define "incapacitated," it also fails to include any requirement as to the evidence needed to establish incapacity. It may be that a verbal or written assertion by the representative will suffice. And what if the consumer simply disagrees with the allegations made by the representative that the consumer/principal is "incapacitated"? Sound like a familiar story? Is using a

wheelchair or suffering from arthritis sufficient to meet the criteria for incapacity? The credit reporting agency seems to be put in the position to adjudicate what it means to be “incapacitated” – with no set criteria to guide that decision. The only guidance is a provision that the freeze can be lifted if the consumer or his or her representative made a material misrepresentation of fact that caused the freeze to be put into effect. N.C.G.S. 75-63.1(c)(2) (2015).

Who Can Request a Security Freeze?

In addition to an agent under a POA, the statute also authorizes a “guardian” to request a freeze for a protected consumer. The statute does not specify whether it be a guardian of the estate or a general guardian. However, as we know, a guardian of the person has no authority over financial matters. N.C.G.S. 35A-1241 (2015). It makes sense that POA agents and court-appointed guardians should have the authority to ask for a security freeze because they have statutory authority to make financial decisions. The third category of authorized persons, though, does raise some questions.

The new statute provides that when a g/a/l has been appointed, a credit freeze *can be requested*. But, interestingly, a g/a/l is not listed in the statute as an entity with the *authority to make such a request*. The new statute only requires a consumer reporting agency to place a freeze if the “protected consumer’s representative” makes the request N.C.G.S. 75-63.1(a)(1) (2015).

The “representative” of an incapacitated person is defined as a person who provides “sufficient proof of authority to act on behalf of a protected consumer.” N.C.G.S. 75-61(13a) (2015). “Sufficient proof of authority” to act on behalf of a protected consumer is defined as including:

1. An order issued by a court of law.
2. A valid power of attorney.
3. A written, notarized statement signed by the person that expressly describes the authority of the representative to act on behalf of the protected consumer. N.C.G.S. 75-61(16) (2015).

The statute does not make clear whether “person” is referring to the consumer or the representative. In at least a few states, the definition of “sufficient proof of authority” is clear in that the written, notarized statement is to be signed

by the representative. What “authority to act” the person has, without a POA or guardianship, is hard to imagine. Perhaps family members who are Social Security representative payees will use that status to assert this authority?

If “person” is referring to the consumer, then it seems possible for a guardianship respondent, prior to any adjudication of incompetency, to authorize the g/a/l to make a security freeze request on the respondent’s behalf. However, in my experience, most respondents are in no shape to do so. With this in mind, where appropriate, the g/a/l should ask the Clerk of Court to issue an order authorizing the g/a/l to request a security freeze for a guardianship respondent.

Additionally, the statute allows the request to be made by first-class mail, phone call, or secure website or secure electronic mail, but the statute doesn’t address how the proof of one’s authority is established when the credit freeze request is made by phone. TransUnion, and perhaps the other agencies, currently only accepts written requests for protected consumer security freezes.

Doesn’t a POA Already Allow an Agent to Request a Freeze?

It seems that a broad, general power of attorney should already be legally adequate to request a security freeze without waiting until the principal becomes “incapacitated.” As we know, it is not always clear when a person has reached that point. Also, if the POA is adequate to buy and sell real estate, file tax returns, and handle all financial affairs, why wouldn’t it suffice to simply freeze the principal’s credit?

Should the Agent Under a Springing POA be Able to Request a Freeze?

Consider the adult who has a springing POA that is triggered only by a doctor’s determination of the principal’s incapacity. Will consumer credit agencies notice if the springing POA hasn’t yet technically “sprung” (since there is no doctor’s letter) and the agent isn’t yet authorized to handle financial issues?

Contesting or Removing the Security Freeze (and could an impaired person figure this out?)

The process for “protected consumer security freezes” is more focused on providing protection from identity theft and improvident spending than on giving impaired individuals a chance to keep taking out credit. At the outset, when a security freeze is put in place for most consumers, the agency must send a written

confirmation to those consumers within three (3) business days of placing the freeze. N.C.G.S. 75-63(c) (2015). Also, the “regular” consumer is provided a personal identification number or password to be used when the consumer wants to lift the freeze for a specific party, for a specific time period, or permanently. *Id.*

This statutory provision is not referenced in the new statute on security freezes for protected consumers, so it is not clear how an incapacitated person would know that a freeze had been put into place or how to request that it be removed. Frankly, the process for an incapacitated person to remove or lift the freeze is such that an impaired elder would probably not be able to figure it out or get it done. This is especially true if the person is not provided notice that the freeze was put in place or an explanation of how to contest it or ask to lift it.

To remove the freeze, the statute allows the protected consumer to submit proof that the “authority for the [...] representative is no longer valid.” N.C.G.S. 75-63.1(c)(1)(b) (2015). Presumably, this would include revocation of the POA by the consumer, dismissal of a guardianship petition concerning the consumer, or the consumer’s restoration to capacity in the guardianship context. The protected consumer must submit a request to remove the freeze to the consumer reporting agency in the manner specified by the agency. N.C.G.S. 75-63.1(c) (2015).

The protected consumer may have to pay a fee to have the freeze removed. Unless the consumer is over age 62 (or under 16), the agency may require payment of up to five dollars (\$5.00). N.C.G.S. 75-63.1(d) (2015). This fee is also waived if a report of identity theft was made to law enforcement. *Id.*

The statute seems to contemplate that the process for lifting (and placing) a freeze on a protected consumer’s credit will work slowly. The agency has up to thirty (30) days to process the request to lift (and place) the freeze. N.C.G.S. 75-63.1(c) (2015). For unprotected consumers, however, the lift must occur within fifteen (15) minutes of an electronic request or within three (3) days of receiving a written or telephonic request. N.C.G.S. 75-63(j) (2015).

Practice and Counseling Tips.

It seems that the new “protected consumer security freeze” could arise in many of our typical interactions with older clients and their surrogates. Here are some recommendations for counseling clients about the new rules.

First, I suggest we discuss with all older clients the pros and cons of their putting in place a security freeze, even before incapacity. It is probably a good safeguard for most clients, it is free if the consumer is over 62, and the clients may not be aware of it.

Second, we should discuss the security freeze issue as a POA option with clients who don't yet have a credit freeze in place. Possible provisions include:

- To grant power: Whenever my agent, in his or her complete discretion, determines that I have become incapacitated, [or, "When a physician determines in writing that I have become incapacitated], I grant my agent the power to initiate a consumer credit freeze under the provisions of N.C. Gen. Statutes, including but not limited to the Identity Theft Protection Act, Chap. 75-60 et seq.
- To deny the power: My agent does not have the power to request a protected consumer security freeze, or any kind of security freeze, unless he or she has been appointed by a court as guardian of my estate or as my general guardian.

Third, although the statute is not clear whether "person" refers to the consumer or the representative, for an older client who doesn't want a POA, consider simply preparing a statement for them to sign and have notarized, authorizing you or someone else to request a freeze on their behalf. N.C.G.S. 75-61(16)(b)(3) (2015). It may not be the correct reading of the statute (as discussed earlier), but when there is nothing else in place, it may be worth a try. If feasible, you and the incapacitated client can, together, request the security freeze in one letter.

Fourth, and perhaps most important, we sometimes represent the POA agents who are concerned about the principal's ability to manage finances. In those situations, we should recommend that the agents contact the consumer reporting agencies to request a protected consumer security freeze for the principal. Of course, one must be mindful of the ethical limitations in these cases. If instead of representing the agent, we are representing the principal or if the principal is a former client, we would need to analyze the situation to avoid conflicts of interest. *See* N.C. State Bar, Rules of Professional Conduct 1.7 - 1.9 on conflicts of interest,

and Rule 1.14 on the attorney's obligations to a client with diminished capacity. <http://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/>. The client might not appreciate your helping his or her children to clamp down on his or her new spending habits!

Finally, in some situations, the POA agents or de facto agents will need to file for guardianship. If there is no POA, the g/a/l can seek a court order for authority to request a security freeze. The petitioners can even file for an interim (emergency) guardian if the financial risk is significant and urgent. N.C.G.S. 35A- 1114 (2015). If there is a POA, the agent can use the new statute to freeze the incapacitated adult's credit.

Without filing for guardianship and without a POA, the concerned relative (essentially, a de facto guardian who is usually an adult child) may not be able to get a protected consumer security freeze put into place. However, if the statute is read to allow the representative to simply aver in writing his authority in a notarized statement, this significantly broadens the range of people who can request these security freezes.

Conclusion

North Carolina's new statute allowing a security freeze for protected consumers provides an easy process for preventing and addressing identity theft and profligate spending that might result from cognitive impairments. While it won't prevent an impaired elder from "giving away the farm," it might keep them from mortgaging it!

BOX:

What You Need - as POA Agent - to Freeze the Principal's Credit

First, it is probably easiest to simply help the principal put a security freeze in effect without using the new protected consumer statute. The agent should be sure to keep track of the PIN or password provided, in case the freeze on the principal's credit needs to be lifted for a new account or simply for a credit check.

If, however, the agent uses the new "protected consumer security freeze law," the agent must assemble and send to each credit-reporting agency:

- The complete name and address of the principal and the agent.
- The POA.
- Social Security card of the principal and the agent.
- A government issued I.D., such as a driver's license, for the principal and the agent.
- A letter enclosing a copy of these items, saying the principal is incapacitated.
- Note that Experian also requires a copy of the following items for both the agent and the principal: a birth certificate plus one of these: a utility bill, bank statement or insurance statement.

The process is free if the principal is older than 62. Read each site carefully, because they vary slightly. Some only allow submission of documents via U.S. mail, at this time. For more details, see:

- www.experian.com/freeze 1-888-397-3742
- www.transunion.com/fraud-victim-resource/protected-consumer
1-800-680-7289
- www.equifax.com 1-800-525-6285

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