

## More on Single Protective Arrangements and Single Transactions under G.S. Chapter 35A

Recently, the School of Government offered a webinar on single protective arrangements and single transactions under G.S. 35A-1121, which was enacted into law by [Session Law 2021-53](#) and applies to proceedings initiated on or after October 1, 2021. Meredith Smith and Timothy Heinle of the School of Government joined Catherine Wilson, an attorney with McPherson, Rocamora, Nicholson, Wilson & Hinkle, PLLC, and Matt Kraus, legal counsel with the N.C. Administrative Office of the Courts, to discuss some of the key questions and issues raised by this new law. Clerks of superior court, guardian ad litem attorneys, private attorneys, and directors, attorneys, and social workers from various departments of social services across the state participated in the webinar.

A recording of the webinar can be found [here](#), where the presentation can be viewed for free. In the coming weeks, the video will be added to the [online training library](#) for the SOG's Public Defense Education group, which will offer the option of purchasing access to the webinar for CLE credit.

The following materials were made available in connection with the webinar:

- [There's a New G.S. 35A-1121 in Town](#), blog post by Meredith Smith
- [Single Transactions and Protective Arrangements: A New Tool in Guardianship Proceedings and a Lot for GALs to Consider](#), blog post by Timothy Heinle
- [G.S. Chapter 35A Guardianships and single protective arrangements or transactions: S.L. 2021-53](#), memo by Matt Kraus, Office of General Counsel, N.C. Administrative Office of the Courts
- [Single Transaction Guardianship: A Tailored Alternative to General Guardianship](#), *The Will & the Way*, article by Catherine Wilson
- N.C. Rules of Recordkeeping, [Rule 6](#)
- Example of draft [Order Authorizing Single Transaction](#)

During the webinar, we reviewed (i) scenarios when a single protective arrangement or single transaction is available, (ii) the judicial process for seeking an order for this type of relief, (iii) the differences between special fiduciaries, temporary guardians, and traditional guardians, (iv) the necessary components of an order authorizing a single protective arrangement or single transaction, and (v) the additional requirements that apply when seeking the sale, lease, mortgage, exchange, or gift of property.

We received great questions from attendees during the webinar. We were not able to address all

the questions in the time allotted so we thought we would use this post to follow up and discuss some of the most generally applicable questions. This post focuses on the application of G.S. 35A-1121 to guardianship proceedings involving adults, emancipated minors, and minors age 17 ½ or older who may be adjudicated incompetent pursuant to G.S. Chapter 35A. Although the remedies under G.S. 35A-1121 are also available in the case of minor guardianships, minor guardianships are beyond the scope of this post.

### **What, if any, accommodations need to be made for court costs and GAL fees?**

Costs and fees, including GAL fees in proceedings under G.S. Chapter 35A, are governed by G.S. 35A-1116(d). This would presumably include costs and fees arising in connection with a single protective arrangement or single transaction under G.S. 35A-1121. A single protective arrangement or single transaction proceeding is intended, in part, to replace the need for multiple court proceedings and to authorize some action or actions for the benefit of the ward all in a single order. To prevent having to return to court to make an additional motion regarding costs and fees, the parties may want to consider including a request that the clerk include an allocation of costs and fees in the single protective arrangement or single transaction order. A failure to do so, however, would not prevent the parties from later filing, and the court entering an order related to, a motion for costs and fees pursuant to G.S. 35A-1116.

### **May the court authorize the payment of a commission to the temporary guardian or special fiduciary?**

It appears that the clerk may allow commissions to a temporary guardian as set forth in G.S. 35A-1269, which provides that the clerk may allow commissions to a guardian. The same rules that govern commissions to a personal representative in an estate (set out in G.S. 28A-23-3 and 28A-23-4) govern commissions to a guardian. G.S. 35A-1269.

Neither the statute on single protective arrangements and single transactions (G.S. 35A-1121) nor G.S. Chapter 35A specifically address or allow for a commission to a special fiduciary. It is likely, however, that the provisions of G.S. 32-59 would entitle a special fiduciary to compensation and reimbursement of reasonable expenses. G.S. 32-59 establishes the grounds for compensation of fiduciaries where the N.C. General Statutes and the instrument creating the fiduciary relationship do not provide for compensation. It provides that upon written request to the clerk, fiduciaries—other than trustees under a trust—are entitled to (i) reasonable compensation in an amount to be determined by the clerk after taking into consideration the factors set out in G.S. 32-54(b) and (ii) reimbursement for expenses properly incurred in the administration of the fiduciary relationship. “Fiduciary” as used in G.S. 32-59 includes any person acting in a fiduciary capacity for any

person, trust, or estate. G.S. 32-2(a). This would seem to include a special fiduciary under G.S. 35A-1121.

### **May a GAL attorney request an order authorizing a single protective arrangement or single transaction if the respondent is not in agreement with that request?**

GALs in incompetency and guardianship proceedings serve a unique role. The GAL acts as the attorney for the respondent to the proceeding, expressing the individual's wishes to the clerk at all stages of the proceeding. G.S. 35A-1107(b). The GAL also has the discretion to make recommendations to the clerk regarding what the GAL believes is in the respondent's best interests, even when the GAL's recommendations differ from the respondent's express wishes. G.S. 35A-1107(b). The GAL may file a written motion prior to the hearing or make an oral motion at a hearing seeking an order authorizing a single protective arrangement or single transaction if, after reviewing the filings, meeting with the respondent, and investigating the allegations in the petition, the GAL determines that such an order is in the respondent's best interests, even if the respondent's express wishes are contrary to the GAL's recommendation.

For example, a GAL is appointed to represent a respondent who only owns one asset: a car that sits in the driveway unused because the respondent is no longer able to drive. The respondent may not want the car to be sold but the respondent lacks the ability to drive and the expense of maintaining repairs and insurance on the car outweigh the benefit of the car. The car is not needed to provide for the respondent's transportation needs as a family member of the respondent drives the respondent everywhere they need to go. In addition, the funds from the sale of the car will be deposited in an account at the facility where the respondent lives and will be used to pay for day-to-day needs of the respondent. The GAL therefore determines it is in the respondent's best interests that a special fiduciary be appointed to sell the car and use the proceeds for the respondent's care. The GAL could then file a motion requesting the clerk order a single protective arrangement and appoint a special fiduciary to sell the car and deposit the funds in the facility account if the respondent is adjudicated incompetent.

### **What is the difference between an interim guardian and a temporary guardian?**

An interim guardian may be appointed *prior* to an adjudication of incompetence if the clerk determines that (i) there is reasonable cause to believe that the respondent is incompetent, and (ii) immediate intervention is needed to address conditions that pose, or reasonably appear to pose, an imminent or foreseeable risk of harm to the respondent's physical well-being or the respondent's estate. G.S. 35A-1114(b). An order appointing an interim guardian terminates on the earlier 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. G.S. 35A-1114(e). Interim guardianship is intended to protect the respondent and respondent's estate in the interim period between the filing of the petition and an adjudication of incompetence.

An order authorizing single protective arrangement or single transaction, including an order appointing a temporary guardian to effectuate the arrangement or transaction, is only available *after* an adult, an emancipated minor, or a minor over age 17 ½ is adjudicated incompetent. G.S. 35A-1121(a). G.S. 35A-1121 offers the possibility of an alternative to a guardian of the estate or guardian of the person after an adjudication of incompetency in certain qualifying situations, rather than a remedy that is available while the petition for adjudication is pending before the court. In addition, the court does not have to find that there is an imminent or foreseeable risk of harm to the respondent or the respondent's estate to appoint a temporary guardian. The temporary guardianship appointment continues until the time set forth in the clerk's order appointing the temporary guardian. There is no statutorily prescribed expiration date. For example, a clerk may appoint a temporary guardian to create and fund a trust for the ward's benefit and set forth in the order that the temporary guardian's authority terminates upon the earlier of three months after the order or the funding of the trust.

### **How does a person seek an order authorizing a single protective arrangement or transaction after a person is adjudicated incompetent?**

The need for a single protective arrangement or single transaction may not arise until after a person is adjudicated incompetent and a guardian is appointed to act on their behalf. In those cases, any interested party may file a motion in the cause ([AOC-E-415](#)) pursuant to G.S. 35A-1207 to request a single protective arrangement or single transaction. It could be filed months or years after the original incompetency and guardianship hearing. Consider, for example, a ward who, at the time of the initial adjudication, had no assets that would require the appointment of a guardian of the estate. Years later, the ward's guardian of the person discovers a checking account in the ward's name. The guardian of the person could file a motion in the cause seeking authorization to withdraw the funds, close the account, and use the funds on the ward's care. Upon the filing of the motion, the clerk should appoint a GAL to help guard the rights of the ward and to ensure the ward's best interests are pursued. G.S. 35A-1217. The movant must obtain a time, date, and place for a hearing on the motion and then serve the motion and notice of hearing on all parties and anyone else the clerk directs pursuant to Rule 5 of the N.C Rules of Civil Procedure. G.S. 35A-1207(c).

The guardian and the GAL for the ward should consider whether attending the hearing is in the ward's best interests. One of the stated purposes of guardianship in North Carolina is to "preserve

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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.” G.S. 35A-1201(a)(5). If the ward’s attendance or participation is appropriate, the guardian or the GAL—or both collaboratively—should arrange for the ward to attend.

Please reach out to us at [Meredith.smith@sog.unc.edu](mailto:Meredith.smith@sog.unc.edu) and [Heinle@sog.unc.edu](mailto:Heinle@sog.unc.edu) if you have additional questions or thoughts.