

Single Transactions and Protective Arrangements: A New Tool in Guardianship Proceedings and a Lot for GALs to Consider

Effective for all incompetency and guardianship proceedings filed after October 1, 2021, [S.L. 2021-53](#) (S 50) created a new statute, G.S. 35A-1121, that enables clerks to authorize a single transaction or protective arrangement—without appointing a guardian. I have received a lot of consults on the new law since it passed. It is not intended to be a magic wand. The law is a tool—one that may prove effective when used in the right situations. To make sure their clients remain protected, GALs need to understand what the law is and is not.

A (somewhat) short summary of G.S. 35A-1121

This post focuses on the law as it relates to incompetent adults and minors who are at least seventeen-and-a-half years-old, not younger minors. After an adult has been adjudicated incompetent, clerks now have the authority to enter an order that allows for a single transaction or protective arrangement without appointing a guardian. The statute contemplates various possibilities, including property transfers, annuity contracts, and trust creation and funding. G.S. 35A-1121(a)(1). Other contracts, trusts, or transactions dealing with the ward's property may be approved or ordered by the clerk as well. G.S. 35A-1121(a)(2).

Clerks can appoint a special fiduciary or a temporary guardian to help carry out the terms of such an order under the statute. G.S. 35A-1121(a)(1), (a)(2), (b). The statute does not define special fiduciary, but it is clear that a special fiduciary differs from a guardian. There is no requirement that special fiduciaries apply for or be given letters of appointment under G.S. 35A-1206—that is, unless the clerk orders otherwise, special fiduciaries are not required to be bonded before serving, nor must they file accountings or reports.

Suppose, for example, an adult is adjudicated incompetent, and a guardian of the person is appointed. Other than owning a car, the ward has no assets or income that would necessitate the appointment of a guardian of the estate. Rather than appointing a guardian of the estate to manage that one asset, the clerk could name a special fiduciary who is responsible for selling the ward's car for the ward's benefit. For example, the clerk could order that the special fiduciary use the profits from the car to pay the ward's outstanding obligation to a nursing facility so that the ward can continue living there. The special fiduciary could be, but does not have to be, the same person or agency serving as the ward's guardian of the person. The special fiduciary would not need to be

bonded to complete this transaction and would not need to file a report with the court, unless the clerk orders otherwise.

Special fiduciaries are not temporary guardians, which as the name implies are a type of guardian. Temporary guardians can be appointed to perform the duties ordered by the clerk. They serve until the clerk, after receiving a report from the temporary guardian, is satisfied the tasks ordered have been completed. G.S. 35A-1121(b). Like all guardians, temporary guardians must apply for and receive letters of appointment, which is why forms like [AOC-E-206](#) (application for letters), [AOC-E-402](#) (order on application for letters), and [AOC-E-421](#) (letters) have been created or amended to reflect this new role. Temporary guardians also must be bonded to serve, if applicable under Chapter 35A, Article 7, and must file accountings or reports with the clerk.

For a closer look at the specific terms of the new legislation, see my colleague Meredith Smith's post, [There's a New G.S. 35A-1121 in Town](#).

What GALs should consider when it comes to G.S. 35A-1121

The benefits. The new statute offers potential benefits to some wards, depending on their circumstances. GALs should consider possible benefits, some of which are discussed below, when deciding whether to advocate for or against a request for an order.

The proceeds from a single transaction may help fund the individual's care. Take, for example, a ward who had no assets at the time of being adjudicated incompetent, and therefore only a guardian of the person was appointed. Sometime later, the ward is hurt in an accident and receives a small personal injury settlement. The clerk could entertain a motion pursuant to G.S. 35A-1121 to appoint a special fiduciary or temporary guardian to deposit and use the settlement proceeds for the ward's needs, such as paying for the ward's food, shelter, and medicine. Or the clerk could order that the money be used to purchase a medically necessary bed or other equipment that would allow the ward to remain in his or her home. Or the clerk may authorize a contract with a residential care facility for the ward. Whatever the proposed use, GALs should consider whether the new statute can be used in a way that ensures the ward's needs are met, preserving the highest quality of life, comfort, and dignity possible.

A single transaction or arrangement may reduce the ward's estate in a way that makes the ward eligible to receive certain benefits. For example, appointing a special fiduciary or temporary guardian to create and fund a trust for the ward's benefit may reduce the ward's estate, making him or her Medicaid eligible. GALs need to be cognizant of what their client's needs are and whether any aid or resources are available to help meet those needs.

The new statute expands the opportunity for family and other individuals to provide care for the

ward. Maybe there is a relative the ward is comfortable with, who has the ward's best interest at heart but whose credit score is poor. The poor credit score may prevent the relative from being bonded as guardian of the estate, but the ward and GAL may trust the relative to be able to complete a single transaction, such as selling a vehicle, for the ward's benefit. G.S. 35A-1121 offers the possibility of that relative serving as a special fiduciary to complete a single transaction, rather than a corporation or disinterested public agency being appointed as a guardian of the estate. Having relatives or other kin in this role may cost the ward less as well as make the ward more comfortable. GALs should determine their client's wishes on possible special fiduciaries (or temporary guardians). See G.S. 35A-1201(5).

The limitations and risks. For some wards, there are drawbacks and risks to orders under the new statute. GALs should consider all possible factors, including the ones discussed below, when deciding whether to advocate for or against an order under G.S. 35A-1121.

The new statute expands the pool of individuals who may serve—but is that always a good thing? As I mentioned above, sometimes an individual the ward prefers is unable to serve as guardian of the estate—maybe because of a poor credit score or a long-ago mistake in judgment, such as defaulting on a loan. If that individual is preferred and trusted by the parties and the clerk, the new statute allows for that individual to serve as special fiduciary because of the lack of a bonding requirement. Sometimes, however, someone's background *should* prevent them from serving. An individual who has a criminal record because of repeatedly writing bad checks, or exploiting or defrauding others, may be ineligible to serve as guardian under Chapter 35A. This same individual may "qualify" to serve as special fiduciary under the new statute, but that does not mean it is in the ward's best interest for them to be appointed. GALs must vet potential appointments under the new statute just as they assess possible guardians in all proceedings to ensure any appointment is appropriate.

The statute can only be used in cases where the respondent is adjudicated incompetent. The new statute is not a way to avoid the rest of Chapter 35A. The individual must still be adjudicated incompetent. G.S. 35A-1121(a). That determination of incompetence results in the same consequences for a ward that it always has. Declaring a person incompetent is significant and should not be done solely to get to step two—ordering a single transaction or protective arrangement to give someone other than the ward access to the ward's money or authority to take a particular step. An adjudication of incompetence should only be pursued when it is necessary for the protection of the ward and is in the ward's best interest.

Most people who are incompetent need a guardian, which is the very reason why Chapter 35A exists. Before entering an order for a single transaction or protective arrangement, the clerk must first consider whether the ward needs the continuing protection of a guardian. G.S. 35A-1121(b). It is difficult to imagine a situation in which a ward is incompetent and does not need a guardian, instead only having a special fiduciary to carry out a single transaction. After the transaction is completed, the ward would remain incompetent without any protection or assistance going forward.

A better use for G.S. 35A-1121 seems to be where a guardian of the person is appointed to a ward and a single transaction or arrangement needs to be accomplished, e.g., selling a valuable piece of jewelry for the benefit of an otherwise destitute ward. An order under G.S. 35A-1121 in this situation could eliminate the need for an appointment of a guardian of the estate.

GALs should consider the wisdom—or lack thereof—of an order for a single transaction or arrangement in all cases. The statute does not restrict who can make a request for an order. The possibility could be raised by any party, the court itself, or any interested person who files a motion in the cause pursuant to G.S. 35A-1207. There is also no restriction on when a request for an order can be raised. An order under G.S. 35A-1121 cannot be entered until after the ward is adjudicated incompetent, but a request for an order can come at any time in the life of a proceeding. The lack of restrictions on who can request an order, and when, is consistent with Chapter 35A's overall statutory scheme, which favors the flow of information about the ward and guardianship to the clerk. GALs need to investigate and consider (i) whether an order would benefit their client, (ii) what the client's wishes are, (iii) whether to request an order, and (iv) how to respond if someone else requests an order. GALs should consider including recommendations in their GAL report about whether an order under G.S. 35A-1121 is in the client's best interest.

Clerks have discretion to appoint a special fiduciary or temporary guardian, to require a special fiduciary to be bonded or file accountings, and to impose time restrictions on the transaction or arrangement. A GAL should consider whether it would be in the client's best interest for the clerk to exercise that discretion with additional requirements. For example, consider a clerk who is contemplating naming a special fiduciary to close the ward's checking account and use the money to purchase the ward a wheelchair. The GAL should consider whether to advocate that the clerk set a time limit for the special fiduciary to complete the transaction, which will help ensure the ward has the wheelchair as soon as possible.

The ward's protection and interests are paramount and must remain the focus of the proceedings. The new statute has many potential uses and benefits. Sometimes people other than the ward will benefit from an order under the statute. That is perfectly fine if the benefits to others do not come at the expense of the ward's best interests. The statute makes this clear, stressing that the purpose is "for the benefit of" the incompetent person. G.S. 35A-1121(a). If the focus of a proceeding shifts to the ways an order authorizing a single transaction or arrangement will make the ward's sibling's life easier, or the bank's job easier, or a company or agency happy, the GAL should ultimately redirect the court's attention to the needs and interests of the ward.

Reach out to me anytime at Heinle@sog.unc.edu if you want to discuss the possibility of a single transaction or protective arrangement in your cases.