

There's a New G.S. 35A-1121 in Town

John was adjudicated incompetent in a court proceeding three years ago. The court found that John lacked the capacity and needed the assistance of a guardian. At the time of the adjudication, John did not own any assets that required management by a guardian of the estate. Therefore, the court appointed only a guardian of the person to assist John in making decisions related to his health care, housing, and other personal matters. Last year, John was entitled to receive a stimulus payment from the government. His guardian of the person is not authorized by law to negotiate the check and use the funds on his behalf. Prior to October 1, 2021, the guardian of the person (or some other interested person) would have to go through a multi-step process to have the court appoint a guardian of the estate who could use the funds on John's behalf. This process may have included multiple court hearings and modifications of the guardianship to appoint and then discharge a guardian of the estate. In addition to taking up time, it would create expenses for John in the form of court costs, a bond, and, in some cases, attorneys' fees. Those expenses could ultimately be more costly than the amount that John was entitled to receive from the stimulus payment.

As of October 1st, there is an alternative path for John under the new North Carolina statute, G.S. 35A-1121. It authorizes the court to order a single protective arrangement or single transaction for the benefit of a minor or incompetent person where it is established in a proper proceeding that a basis exists for the appointment of a guardian for a minor or an incompetent person. G.S. 35A-1121(a). "Incompetent person" includes adults, emancipated minors, and minors age 17 ½ or older who are adjudicated incompetent. G.S. 35A-1202(11). This post discusses some of the key features of G.S. 35A-1121, which was enacted as part of [Session Law 2021-53](#).

To obtain relief under G.S. 35A-1121, it must first be "established in a proper proceeding that a basis exists for the appointment of a guardian." What does that mean?

Adults and other incompetent persons. For an adult, emancipated minor, and certain minors age 17 ½ or older, this means that the relief set out in G.S. 35A-1121 is not available unless they are adjudicated incompetent. Typically, an incompetency proceeding is initiated using North Carolina Administrative Office of the Courts (AOC) form petition, [AOC-SP-200](#), and an order is entered by the clerk of superior court using the AOC form order, [AOC-SP-202](#). The court may not order the remedies set out in G.S. 35A-1121 unless the respondent to the incompetency proceeding is adjudicated incompetent. This is unlike [interim guardianship](#), which may be granted while an incompetency proceeding is pending. G.S. 35A-1114.

Minor. Minors, by contrast, are incompetent as a matter of law and no adjudication of incompetency occurs as part of a minor guardianship proceeding. To seek the appointment of a guardian for a minor, an application is made with the clerk. Most applicants use the AOC form

application, [AOC-E-208](#). A guardian of the estate may be appointed for any minor. G.S. 35A-1221. A guardian of the person may only be appointed for a minor where the minor has no natural guardian. G.S. 35A-1221. If the single arrangement or transaction sought on behalf of a minor would execute a power or duty that falls under the authority of a guardian of the person, as set out in G.S. 35A-1241, the arrangement or transaction may not be ordered unless the minor has no natural guardian.

What is a single protective arrangement or transaction?

A single protective arrangement or single transaction is a process by which a court authorizes, directs, or ratifies

1. any transaction necessary or desirable to achieve any service, care, or safety arrangement meeting the foreseeable needs of the minor or incompetent person and authorize a **special fiduciary** to execute any such transaction on behalf of the minor or incompetent person.
2. any contract, trust, or other transaction relating to the minor or incompetent person's property and business affairs and authorize a **special fiduciary** to execute any such contract, trust, or other transaction on behalf of the minor or incompetent person, if the clerk determines that the transaction is in the best interest of the minor or incompetent person.

In addition to the authority to appoint a special fiduciary, the clerk has the authority to appoint a temporary guardian to assist in the accomplishment of any protective arrangement or transaction. G.S. 35A-1121(b). See below for the differences between the appointment of a special fiduciary and a temporary guardian.

Note that the statute uses the terms “authorize, direct, or ratify.” Authorize implies that a person is seeking approval for some transaction or arrangement that has not yet been completed. Direct implies that the court is instructing a person to take an action or refrain from taking an action. Ratify indicates that the court may confirm acceptance of a previous act done on behalf of the incompetent person or the minor and thereby make the act valid from the moment it was done.

What are some examples of single protective arrangements or single transactions?

The statute sets out a list of the types of single protective arrangements and single transactions that may be ordered by the court. The list is not exhaustive. It includes:

- the payment, delivery, deposit, or retention of funds or property.
- the sale, mortgage, lease, or other transfer of property. (Note, this must comply with other laws, as discussed further below.)
- the entry into an annuity contract, a contract for life care, a deposit contract, or a contract for training and education.
- the establishment, funding, or addition to a suitable trust, including, but not limited to, a trust

for the benefit of the minor or incompetent person pursuant to 42 U.S.C. 1396p(d)(4). (It is important to note that a trust may be established pursuant to 42 U.S.C. 1396p(d)(4) by a disabled individual, the disabled individual's parent, grandparent, or guardian, or a court; guardian as used in this context may include a temporary guardian but would likely not include a special fiduciary.)

Other types of single protective arrangements and single transactions may include authorizing a special fiduciary to (i) sign a contract with an adult care home, (ii) sign a contract for in home services, (iii) consent to Community Alternatives Programs (CAP services), (iv) sign a settlement agreement, or (v) sell a vehicle and use the proceeds for the benefit of the incompetent person or minor.

Is a special proceeding still required for the sale of real property?

Yes. G.S. 35A-1121 makes clear that the sale, mortgage, exchange, lease, or gift of any of the property of a minor or incompetent person by a special fiduciary or temporary guardian is still subject to the same procedural and reporting requirements that otherwise apply to a guardian of the estate or general guardian. G.S. 35A-1121(c). This includes compliance with G.S. 35A-1301 which requires (i) the filing of a special proceeding and (ii) adherence to the requirements for judicial sales under G.S. Chapter 1, Article 29A to sell, exchange, mortgage, or lease most real property of an incompetent person or a minor.

What is the difference between a special fiduciary and a temporary guardian?

Special fiduciary. G.S. 35A-1121 does not define special fiduciary but it is clear given the use of the term and creation of the role that a special fiduciary is not a guardian. G.S. 35A-1121 does not require that a special fiduciary qualify or obtain letters. The court's order authorizing the single arrangement or transaction should name the special fiduciary and set out the powers and duties of the special fiduciary. Like an order appointing an interim guardian (AOC-SP-900), there is an order, rather than letters, that evidences the special fiduciary's power and authority to act. A special fiduciary is not required to post a bond or file an accounting or other report with the court unless required to do so in the clerk's order. Legal guidance published by the North Carolina Administrative Office of the Courts (AOC) states that a special fiduciary must "take an oath or affirmation pursuant to G.S. 11-11." Memorandum from N.C. Admin. Off. of the Cts., Off. of Gen. Couns., "G.S. Chapter 35A Guardianships & Single Protective Arrangements or Transactions, S.L. 2021-53" (Sept. 29, 2021) (AOC Memo) (on file with author).

Temporary guardian. A temporary guardian has the authority that is conferred by the clerk's order and serves until discharged by the clerk after making a report to the clerk of all matters done pursuant to the order of appointment. G.S. 35A-1121(b). A temporary guardian must file an application for letters and qualify and obtain letters. The AOC (i) amended the application for letters for an incompetent person, [AOC-E-206](#), to provide an option for temporary guardianship on the

application and (ii) published new form letters of temporary guardianship that may be used for minors and incompetent persons, [AOC-E-421](#). Legal guidance published by the AOC states that a temporary guardian must “take an oath or affirmation pursuant to G.S. 11-11” and “receive a bond pursuant to [G.S. Chapter 35A,] Article 7 (if applicable).” AOC Memo (on file with author).

The following chart sets out what may be required of the special fiduciary or temporary guardian and the different AOC forms available depending on whether the court appoints a special fiduciary or a temporary guardian.

	Special Fiduciary	Temporary Guardian
Order Authorizing the Arrangement or Transaction	Required. No form available.	Required. No form available.
Application for Letters	Not required.	