

Single Protective Arrangements and Single Transactions

Matt Kraus, Assistant Legal Counsel, N.C. Administrative Office of the Courts

Catherine L. Wilson, Attorney, McPherson, Rocamora, Nicholson, Wilson & Hinkle, PLLC

Timothy Heinle, Civil Defender Educator, UNC School of Government

Meredith Smith, Associate Professor, UNC School of Government


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Session Goals

1. Identify a new remedy available under G.S. Chapter 35A
2. Understand when a single transaction or single protective arrangement is available and when it is not
3. Learn the process for seeking a ST or SPA order
4. Understand the differences between a special fiduciary and temporary guardian
5. Identify the necessary components of a ST or SPA order
6. Apply the law to special situations involving sale, lease, mortgage, exchange, or gift of property

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Session Law 2021-53




- Recommended trust and estate changes from the North Carolina Bar Association's Estate Planning and Fiduciary Law Section
- Four parts to the bill:
 - (i) living probate
 - (ii) changes to the appointment of guardians
 - (iii) changes to trusts and estate proceedings
 - (iv) changes to powers of appointment

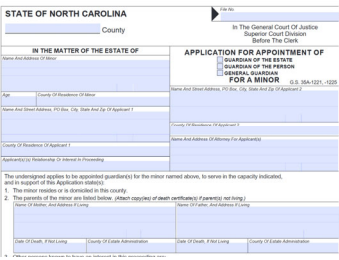
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Session Law
2021-53,
Part II

Authorizes the clerk to order a **single protective arrangement** or **single transaction** for the benefit of a minor or incompetent person.





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John has or will receive property....

1. Application for GOE
2. Appointment and qualification of GOE
 - Post a bond
 - Take oath
 - Obtain letters
3. Motion to approve the transaction and hearing (depending on action of GOE)
4. File an inventory and account

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New G.S. 35A-1121

Allows the clerk to order a “single protective arrangement or transaction” for the benefit of an incompetent person or minor without appointing a guardian (in the clerk’s discretion – the clerk “MAY” authorize)

Effective and applies to proceedings initiated on or after October 1, 2021

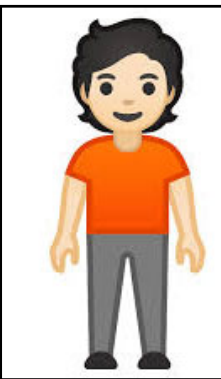
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Availability

- Respondent** to a 35A proceeding is adjudicated incompetent – petition for adjudication (SP-200) and adjudication must occur (SP-202)
 - Adjudication required to trigger availability of these provisions for a respondent
- Application made for appointment of guardian for **minor**

G.S. 35A-1120

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Remember for John....

- GS 35A-1121 orders do not avoid an adjudication of incompetency
- Any person can seek a single protective arrangement or transaction in connection with the original adjudication or years later after an adjudication of incompetency depending on when the need arises
- It could replace the need for a GOE or a GOP (or both in VERY limited circumstances)

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Transactions for service, care, or safety

Allows the clerk, without appointing a guardian, to:

1. Authorize, direct, or ratify any transaction necessary or desirable to achieve any service, care, or safety arrangement that meets the foreseeable needs of the incompetent person or minor
2. Authorize a **special fiduciary** to execute a transaction on behalf of the incompetent person or minor. The clerk may appoint a **temporary guardian** to assist in the accomplishment of any protective arrangement or transaction.

G.S. 35A-1121(a)(1), (b)

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Transactions for property and business affairs

Allows the clerk, without appointing a guardian, to:

1. Authorize, direct or ratify any contract, trust, or other transaction relating to a minor or incompetent person's property and business affairs
2. Authorize a **special fiduciary** to execute such contract, trust, or other transaction on behalf of the incompetent person or minor if the clerk determines it is in the best interests of the minor or incompetent person. The clerk may appoint a **temporary guardian** to assist in the accomplishment of any protective arrangement or transaction.

G.S. 35A-1121(a)(2), (b)

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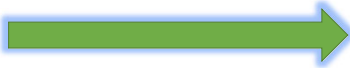
2015 Life Events	Carol's Petition Requests	G.S. 35A-1121
<ul style="list-style-type: none"> Experiencing cognitive decline. Diagnosed with dementia. 	<ul style="list-style-type: none"> Name Carol as GOP. Authorize Carol to sell Mike's car. 	<ul style="list-style-type: none"> Appropriate use? What are some of the considerations?



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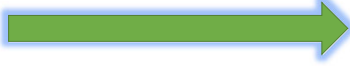
2016 Life Events	Carol's Motion Requests	G.S. 35A-1121
<ul style="list-style-type: none"> Carol serving as GOP. Carol finds evidence of a bank account in Mike's name. 	<ul style="list-style-type: none"> Authorize Carol to access the account, withdraw funds, close the account, and apply funds towards Mike's care. 	<ul style="list-style-type: none"> Appropriate use? What are some of the considerations?




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2022 Life Events	Marcia's Motion Requests	G.S. 35A-1121
<ul style="list-style-type: none"> Carol passes away. Marcia appointed as Mike's successor guardian of the person. Carol's life insurance policy named Mike as beneficiary, but insurance will not speak with Marcia, who is not guardian of Mike's estate. 	<ul style="list-style-type: none"> Marcia seeks an order authorizing her to speak with the insurance company, arrange for receipt of the funds, and use proceeds towards Mike's care. 	<ul style="list-style-type: none"> Appropriate use? What are some of the considerations?



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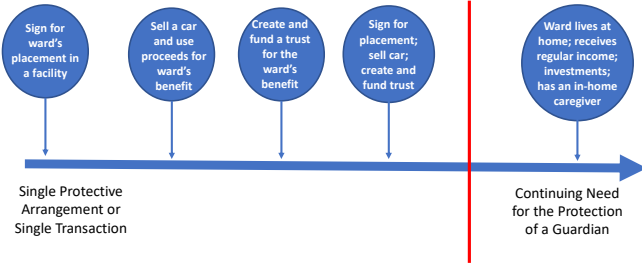


EXAMPLES OF WHAT G.S. 35A-1121 IS NOT INTENDED FOR

- Emergency custody of a minor
- To replace Adult Protective Services
- Expansion of powers beyond those already found in Chapter 35A and guardianship (e.g., a name change)

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When is something a **single** protective arrangement or **single** transaction?





Single Protective Arrangement or Single Transaction

Continuing Need for the Protection of a Guardian

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Who, when, and how are these requests made?

- Petitioner makes a written request simultaneous with filing the petition, ideally as an attached motion, but possible included directly in the petition.
- Any party files a written motion after the petition has been filed but prior to the adjudication of incompetency.
- Any party makes an oral motion during the hearing on adjudication or a hearing on appointment of a guardian.
- A motion is filed in the estate proceeding months or years later.
- Sua sponte by the clerk, at any time.

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Can a petition for adjudication of incompetence be converted to a motion under 35A-1121?

No. A clerk can, however, entertain a request pursuant to the statute prior to an adjudication of incompetence (including receiving and considering evidence). The clerk can only enter an order authorizing a single protective arrangement or transaction at the same time as an adjudication of incompetence or any time following an adjudication of incompetence.



Note!

A hearing on the need for guardianship and the possible appointment of a guardian may include or become a request for an order pursuant to G.S. 35A-1121. This is because the individual will have been adjudicated incompetent and the court's attention will have turned to the best plan to suit the individual's needs.

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Case Scenario



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Special Fiduciary

Special fiduciary is not defined anywhere in G.S. Chapter 35A. It is a new fiduciary role under G.S. Chapter 35A. However, it is clear given the use of the term and creation of the role that a special fiduciary is not a guardian. The clerk's order solely prescribes the special fiduciary's authority to act on behalf of the incompetent person or minor. Because a special fiduciary is not a guardian, other statutes within G.S. Chapter 35A that impose duties on a guardian do not automatically apply to special fiduciaries. Unless specifically ordered by the clerk:

- A special fiduciary is not required to apply for and qualify for letters. In fact, no qualification forms or letters have been created by the AOC for special fiduciaries,
- A special fiduciary is not required to be bonded, and
- The special fiduciary is not required to file an inventory or an accounting. If the clerk wants some type of an inventory or accounting from the special fiduciary it must be in the order.

Special fiduciaries are required to:

- Take an oath or affirmation pursuant to G.S. 11-11 and Article VI, Section 7 of the North Carolina Constitution, and
- Pay fees if a special fiduciary will administer any asset of a minor or incompetent person. The clerk must assess estate administration fees for incompetent adults and minors pursuant to G.S. 7A-307(a).

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Temporary Guardian

The term "temporary guardian" is not defined in G.S. Chapter 35A. However, given the use of the term guardian, and depending on the exact authority given to a temporary guardian, the provisions of G.S. Chapter 35A that impose requirements and responsibilities on other types guardians have been interpreted to apply to temporary guardians. Like a special fiduciary, a temporary guardian will have the authority conferred in the order appointing the temporary guardian. However, unlike special fiduciaries, in every instance the temporary guardian must:

- o Apply for and receive letters of temporary guardianship,
 - o Take an oath or affirmation pursuant to G.S. 11-11 and Article VI, Section 7 of the North Carolina Constitution,
 - o Receive a bond under the provisions of G.S. 35A, Article 7 (when a GOE or GG would need a bond),
 - o File an accounting or a report to the clerk of all matters done pursuant to the appointment, and
 - o Served until discharged by order of the clerk.
- o Pay fees if the temporary guardian will administer any asset of a minor or incompetent person. The clerk must assess estate administration fees for incompetent adults and minors pursuant to G.S. 7A-307(a).

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Special fiduciary vs. Temporary Guardian

Required Procedures & Forms	Special Fiduciary	Temporary Guardian
Order Authorizing Arrangement or Transaction	Required. No AOC form Available.	Required. No AOC form Available.
Application for Letters	Not required.	Required. AOC-E-206, -208.
Order on Application for Letters	Not required.	Required. AOC-E-402.
Letters	Not required.	Required. AOC-E-421.
Bond	Not required unless ordered.	Required if Article 7 of G.S. Chapter 35A applies. AOC-E-401.
Oath	Required. AOC-E-400.	Required. AOC-E-400.
Fees	Required, if administering asset pursuant to G.S. 7A-307(a)	Required, if administering asset pursuant to G.S. 7A-307(a)
Accounting or report	Not required unless ordered.	Required. For accountings use AOC-E-506.

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Special Fiduciary vs. Temporary Guardian

What's the difference?

Special Fiduciary may be appointed to execute any transaction, contract, or trust necessary to

- Achieve service, care, or safety arrangement
- Take necessary action relating to property and business affairs

Temporary Guardian may be appointed "to assist in the accomplishment of any protective arrangement or other transaction authorized under this section"

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How do you choose between them?

Think about what each case is trying to accomplish:

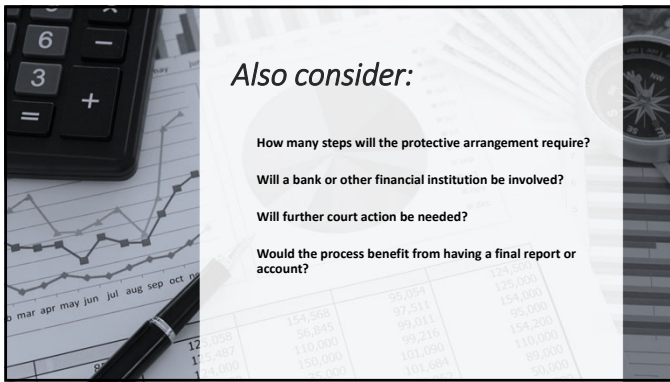
- Execute a care agreement or service contract?
- Apply for government benefits?
- Will a spend-down be needed?
- Establish and fund a special needs trust?
- Is a sale or gift of property involved?



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Also consider:

- How many steps will the protective arrangement require?
- Will a bank or other financial institution be involved?
- Will further court action be needed?
- Would the process benefit from having a final report or account?



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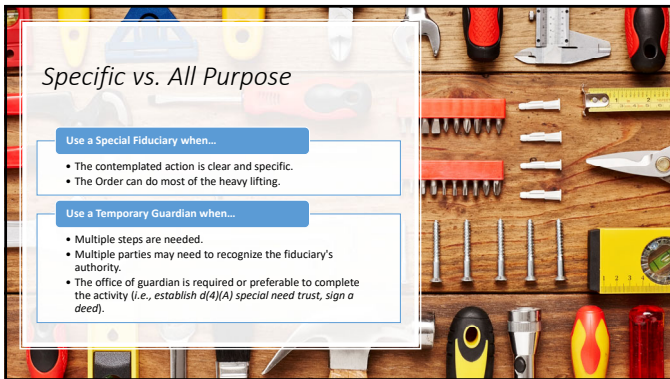
Specific vs. All Purpose

Use a Special Fiduciary when...

- The contemplated action is clear and specific.
- The Order can do most of the heavy lifting.

Use a Temporary Guardian when...

- Multiple steps are needed.
- Multiple parties may need to recognize the fiduciary's authority.
- The office of guardian is required or preferable to complete the activity (i.e., establish d(4)(A) special need trust, sign a deed).



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Case Scenario

Dean and Linnea

Mike

John

Jimmy

Bobby

Clerk Swofford

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The Clerk's Order

The decision whether to authorize a single protective arrangement or single transaction is in the discretion of the clerk.

Before entering any order authorizing a protective arrangement or other transaction under G.S. 35A-1121, pursuant to G.S. 35A-1121(b) the clerk must consider, the clerk's order should specifically address:

- The interests of creditors and dependents of the minor or incompetent person.**
 - If the interests of a dependent or creditor of the minor or incompetent adult will be impacted, the court may choose to deny a request for relief under G.S. 35A-1121 and instead appoint a guardian, a guardian of the estate, both, or a general guardian.
- In view of the disability, whether the minor or incompetent person needs the continuing protection of a guardian.**
 - G.S. 35A-1121 contemplates a single arrangement or transaction. If after the completion of the single transaction or arrangement, the minor or incompetent person will need the continuing protection of a guardian, the court may choose to deny a request for relief under G.S. 35A-1121 and instead appoint a guardian, a guardian of the estate, both, or a general guardian.
- Whether the arrangement or transaction is in the minor or incompetent person's best interest.**
 - Pursuant to G.S. 35A-1121(a)(2), when deciding whether to authorize a single transaction or to appoint a guardian, the clerk should always consider whether the arrangement is for the benefit, and in the best interests, of the incompetent person or minor.

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What should the order contain?

Authority to achieve the single transaction or protective arrangement.

Specifics about what must happen.

Tailoring to fit each situation (*there's a reason there is no AOC form...*)

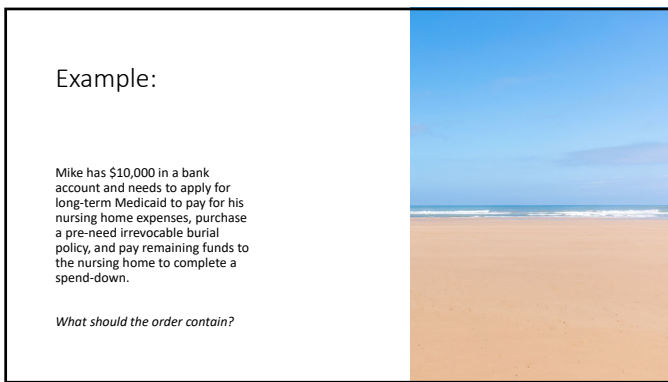
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Precision is the key. How do we get from A to B? Spell out each step.

Practice Tip: Doing this at the outset will also help determine whether you need a Special Fiduciary or a Temporary Guardian.

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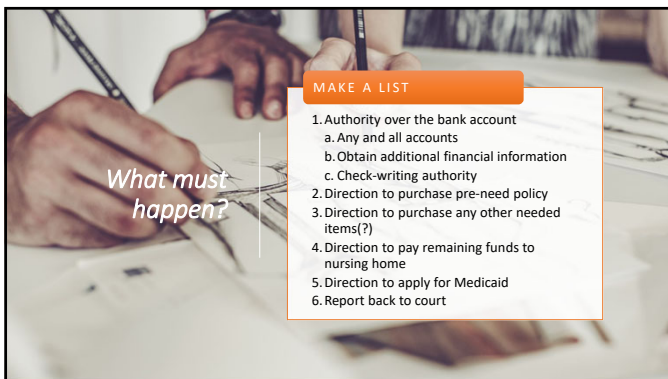


Example:

Mike has \$10,000 in a bank account and needs to apply for long-term Medicaid to pay for his nursing home expenses, purchase a pre-need irrevocable burial policy, and pay remaining funds to the nursing home to complete a spend-down.

What should the order contain?

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What must happen?

MAKE A LIST

1. Authority over the bank account
 - a. Any and all accounts
 - b. Obtain additional financial information
 - c. Check-writing authority
2. Direction to purchase pre-need policy
3. Direction to purchase any other needed items(?)
4. Direction to pay remaining funds to nursing home
5. Direction to apply for Medicaid
6. Report back to court


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Who should draft?

- Petitioner's Attorney
- GAL
- Pro se Petitioner


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Caution!

If a sale, mortgage, exchange, lease or gift of property is desired, additional requirements must be met.

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Five Categories to watch out for:

- *Sale*
- *Mortgage*
- *Exchange*
- *Lease*
- *Gift*

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Sales of Real Property

- Still required to file special proceeding per 35A-1301.
- May need to serve presumptive heirs.
- Subject to judicial sale procedures and reporting requirements under Article 29A of G.S. Chapter 1.
- *These cannot be waived.*



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Gifts

- Approval of superior court judge still required.
- Additional evidentiary requirements must be met with respect to creditors, potential heirs, ward's estate plan, not jeopardizing ward's support, etc.
- 10-day notice must still be given to will devisees, presumptive heirs, and/or named beneficiaries.



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Questions?

Meredith Smith, SOG:
meredith.smith@sog.unc.edu

Timothy Heinle, SOG:
heinle@sog.unc.edu

Matt Kraus, AOC:
Matthew.R.Kraus@nccourts.org

Catherine Wilson:
cwilson@macroclaw.com

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