

The Intersection of Trusts, Single Transactions, and Guardianship

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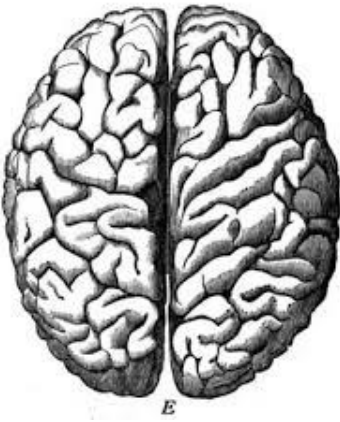
Family of Fiduciary Relationships

1. Decedents' estates – personal representative/estate
2. Guardianship – guardian/ward
3. Powers of attorney – principal/agent
4. Trusts – trustee/beneficiary



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Not All the Same: Separate Them in Your Brain

- 
1. Decedents' Estates
 2. Guardianship

1. Powers of Attorney
2. Trusts

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Trusts +
Guardianship:
Two Case
Studies

Skip the
Guardianship

Get out of
Guardianship

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Case #1



John, who is 25, receives government benefits and has capacity limitations but has not needed a guardian to date. John has a representative payee (his sister) who manages his benefits and provides day to day support to John.

Two common scenarios:

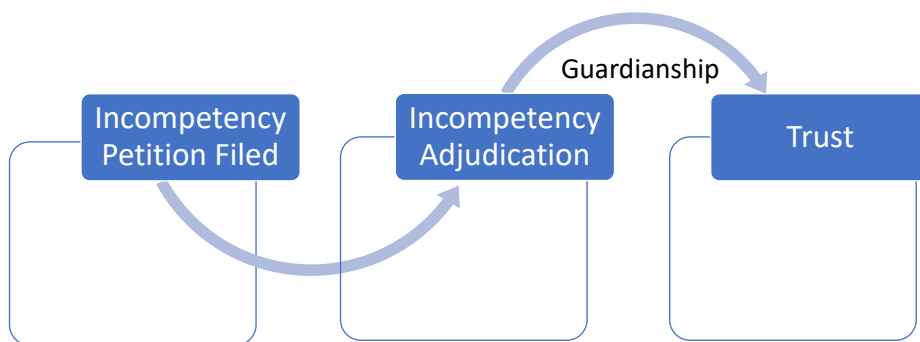
1. John entitled to settlement proceeds from a lawsuit.
2. John going to receive an inheritance from a deceased relative.

John's sister files a petition for adjudication of incompetency (SP-200) is filed before the clerk of superior court.

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Question:

Is it possible to skip the guardianship and go to a trust?



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Trust vs. Guardianship: What is the difference?

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Why have guardianship?

- Serves an essential purpose by protecting persons who are
 - Unable to manage their own affairs
 - Unable to make and communicate important decisions
- Court oversight through appointment of the guardian, determination of the guardian's authority, and reporting to court [not private]
- Public guardian option – county department of social services may be appointed as guardian
- Remember: guardianship is a last resort and alternatives must be examined before adjudicating a respondent incompetent

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Why have a trust?

- Available with or without capacity limitations
- Keep or qualify for benefits (assets under guardianship are a countable resource)
- Cost and expenses of ongoing guardianship take away from funds needed for other support
- Avoid probate and probate cost
- Impose more nuanced conditions on how money spent
- Protect assets from creditors
- Privacy
- Speed up/not inhibit asset distribution at death
- Professional management of assets

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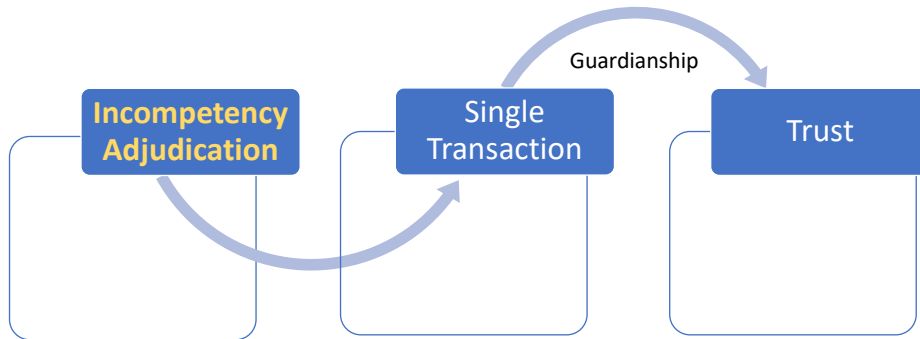
What works for John?

Trust vs. Guardianship: It depends....

1. Will guardianship impact John's benefits?
2. What are John's ongoing needs?
3. Someone available to serve as trustee? Someone available to create and fund the trust?
4. What does John want?
5. What is in John's best interests?
6. What are the interests of creditors and dependents?

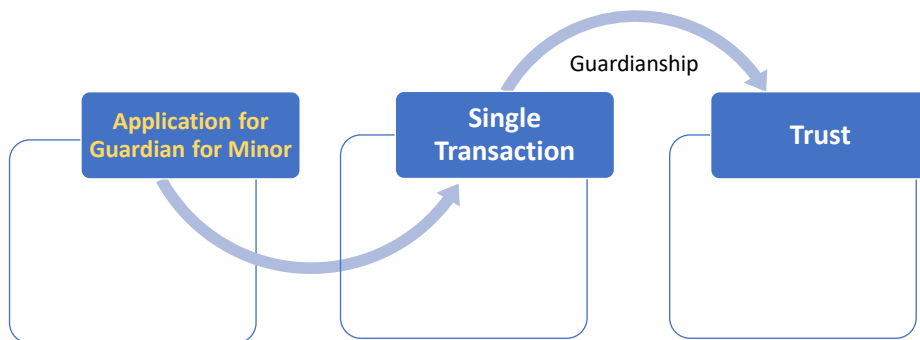
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Skip the Guardianship and Go to a Trust



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Skip the Guardianship and Go to a Trust



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G.S. 35A-1121

Authorizes the clerk to order a **single protective arrangement** or **single transaction** for the benefit of a minor or incompetent person without appointing a guardian.

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New(ish) G.S. 35A-1121

In the clerk's discretion – the clerk "MAY" authorize

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

When is Section 1121 available?

1. *If it is established*
2. *in a proper proceeding that*
3. *a basis exists*
4. *for appointment of a guardian.*

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What type of proceeding?

Adults who have NOT
been adjudicated →
*Petition for
Adjudication*

Adults who HAVE
been adjudicated →
Motion in the Cause

Minors → *Application
for Guardianship*

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Availability: Adults

Adults (and minors 17.5 or older): there must be a petition for adjudication (SP-200) and an adjudication of incompetency (SP-202)

- Adjudication **required** to trigger availability of relief under G.S. 35A-1121

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THIS TOOL IS **NOT** AVAILABLE FOR AN ADULT (OR CERTAIN MINORS 17.5+) WITHOUT AN INCOMPETENCY ADJUDICATION.

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Availability: Minors

Option 1: Use AOC-E-208 and attach an addendum to the form requesting a single protective arrangement or transaction.

STATE OF NORTH CAROLINA				File No.
County				In The General Court Of Justice Superior Court Division Before The Clerk
IN THE MATTER OF THE ESTATE OF		APPLICATION FOR APPOINTMENT OF		
Name And Address Of Minor		☐ GUARDIAN OF THE ESTATE ☐ GUARDIAN OF THE PERSON ☐ GENERAL GUARDIAN FOR A MINOR		
Age		Date Of Birth	Name And Street Address, PO Box, City, State And Zip Of Applicant 2	
Name And Street Address, PO Box, City, State And Zip Of Applicant 1		County Of Residence Of Applicant 2		
County Of Residence Of Applicant 1		Name And Address Of Attorney For Applicant(s)		
Applicant(s) Relationship Or Interest In Proceeding				
The undersigned applies to be appointed guardian(s) for the minor named above, to serve in the capacity indicated, and in support of this Application state(s): 1. The minor resides or is domiciled in this county. 2. The parents of the minor are listed below. (Attach copy(ies) of death certificate(s) if parent(s) not living.) Name Of Mother And Address If Living: _____ Name Of Father And Address If Living: _____ Date Of Death, If Not Living: _____ County Of Estate Administration: _____ Date Of Death, If Not Living: _____ County Of Estate Administration: _____				
3. Other persons known to have an interest in this proceeding are: Name And Address: _____ Name And Address: _____				

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Availability: Minors

Option 2: Write own application and include a request for single protective arrangement or transaction.



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If the applicant writes their own application....

Clerk needs to confirm that the applicant's application otherwise shows that a basis exists for the appointment of a guardian for the minor i.e. the requirements of Article 6, G.S. Chapter 35A have been met.

G.S. 35A-1121(a)

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Either
option....

Follow the same path as you would
for any other minor guardianship

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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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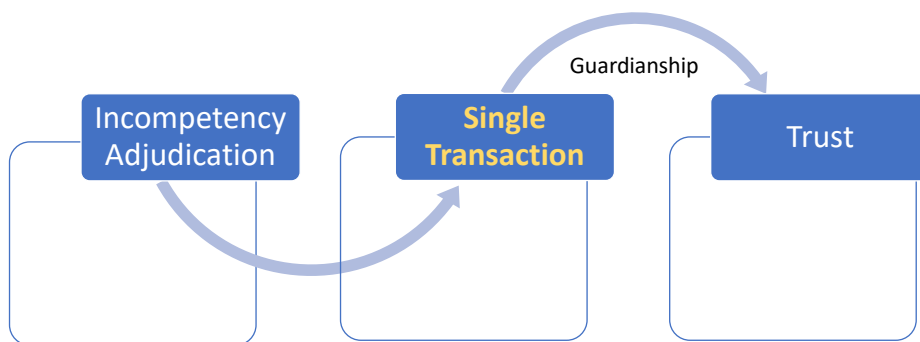
Pause and Consider...

- G.S. 35A-1120 gives the court time to pause and consider whether full guardianship (of the estate) is the best solution.
- Most cases will still require a guardian of the person.



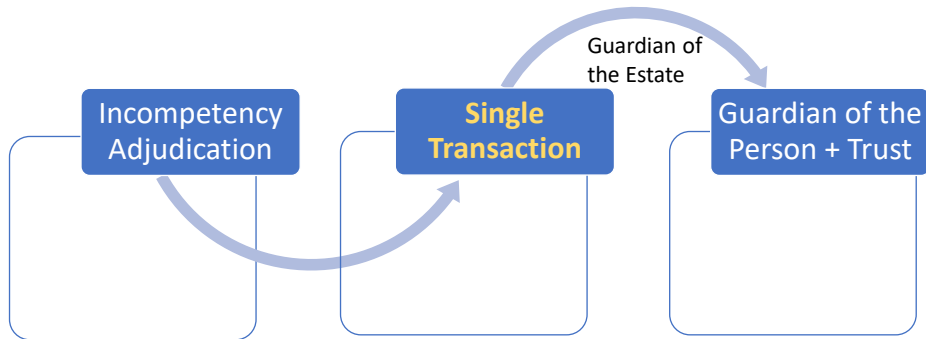
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Skip the Guardianship and Go to a Trust



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Skip the GOE and Go to a GOP + Trust



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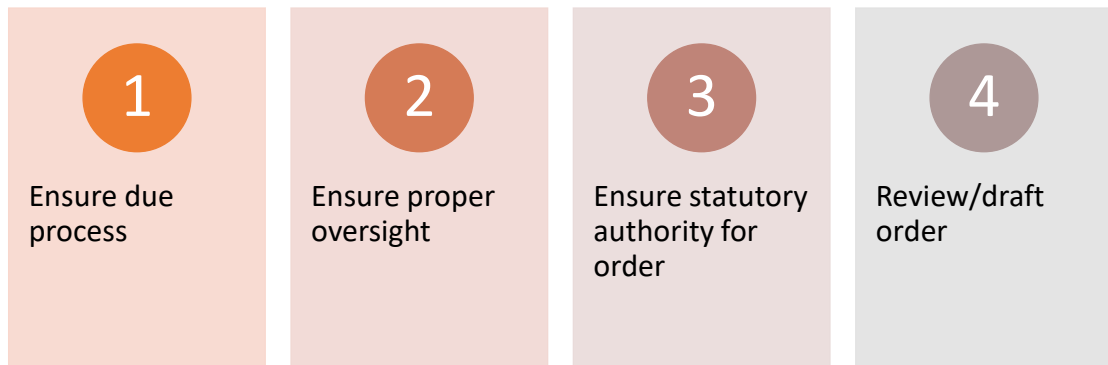
Back to John...

John going to receive \$500,000 in inheritance. The GAL proposes using a single protective arrangement to fund a special needs trust for John.

What should the order contain?

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What is the court's role before entering an order?



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#1: Ensure Due Process

- Ensure proper notice on parties
 - G.S. 35A-1109 (adults)
 - Respondent
 - GAL or respondent's counsel
 - Next of kin
 - Anyone else designated by the clerk
 - G.S. 35A-1222 (minors)
 - Each parent, guardian, and legal custodian who is not an applicant
 - Any other person who the clerk may direct

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#1: Ensure Due Process

- Ensure incompetency is not presumed and burden of proof (clear, cogent and convincing evidence) is met
- Ensure less restrictive alternatives are considered and found to be insufficient to meet the respondent's needs
- Ensure respondent has opportunity to be heard
 - Is the respondent present at the hearing? If not, why not?
- Appoint guardian ad litem who then considers issues of guardianship vs. trust as part of the GAL's representation of the adult or minor
 - GAL required for adults pre-adjudication
 - GAL optional for minors and adults post-adjudication – any reason not to appoint?

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#2: Ensure Proper Oversight

- Does the trust accomplish the purpose it is intended to serve?
 - Has the trust instrument been submitted to DHHS for approval?
 - Can the trust be amended to comply with government benefit rules?

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DHHS Special Needs Trust Review Unit

North Carolina Department of Health & Human
Services

Division of Medical Assistance

Trust Review Unit

Health Management Systems (HMS), designated
agent of DHHS

Email – NCTrust@hms.com

Phone – 949-424-2805

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#2: Ensure Proper Oversight

- Does the trust accomplish the purpose it is intended to serve?
 - Has the trust instrument been submitted to DHHS for approval?
 - Can the trust be amended to comply with government benefit rules?
- Do the mechanics of the trust work to ensure proper oversight for **this individual**?
 - Who will serve as the trustee?
 - Require bond?
 - Require accounting?

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#2: Ensure Proper Oversight: Accounting

Court ordered accountings (AOC-E- 506) in trust instrument

STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice Superior Court Division Before The Clerk
IN THE MATTER OF THE ESTATE OF		
Name		
☐ Deceased ☐ Minor ☐ Adult Ward ☐ Trust		
ACCOUNT ☐ ANNUAL ☐ FINAL G.S. 28A-21-1, -21-2, -21-3, -23-1; 35A-1264, -1266		
I, the undersigned representative, being first duly sworn, say that the following is a complete and accurate account of my receipts, disbursements and other transactions as representative of this estate or trust.		
Accounting Period From	Extending To	Date Of Death
NOTE: If Date Of Death is prior to January 1, 2013, do not use this version of the form. Instead, use the Rev. 12/17 version of the form.		
PART I. SUMMARY		
1. Subtotal Personal Property on Inventory or Subtotal Personal Property Held/Invested as Shown on Last Account		\$
2. Minus Loss from Sale of Personal Property when Compared to Value Listed on Inventory or Prior Account (Include or attach explanation.)	-	\$
3. SUBTOTAL		\$
4. Plus Total Receipts as Shown on Reverse [Part III.] (costs apply to this amount)	+	\$
5. TOTAL ASSETS		\$
6. Minus Disbursements (Debts or Expenses) as Shown on Reverse [Part IV.]	-	\$
7. SUBTOTAL		\$
8. Minus Distributions (Inheritance to Heirs) as Shown on Reverse [Part V.]	-	\$
9. BALANCE AT END OF ACCOUNTING PERIOD (When filing Final Account, this should equal zero.)		\$

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#2: Ensure Proper Oversight: Report

Alternative to typical E-506 accounting: G.S. 36C-8-813 imposes a “duty to inform and report” on the trustee to any qualified beneficiary

- Typically, in form of a year end trust bank account statement; satisfied by account statement
- This may be waived in the trust instrument
- Court could require this to be filed with the court annually as opposed to E-506 account

Discretion of the court to require the E-506 accountings vs. 36C report – why order one over the other?

- E-506 account more familiar to the court
- 36C-8-813 report allows for lower costs and burden on trustee

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#2: Ensure Proper Oversight: Report

§ 36C-8-813. Duty to inform and report.

(b)(2) A trustee is considered to have discharged the trustee's duty under subdivision (1) of subsection (a) of this section as to a qualified beneficiary for matters disclosed by **a report sent at least annually and at termination of the trust to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values, including estimated values of assets with uncertain values.** No presumption shall arise that a trustee who does not comply with this subdivision failed to discharge the trustee's duty under subdivision (1) of subsection (a) of this section.

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#3: Ensure statutory authority for order

Before authorizing a single protective arrangement or single transaction, the Clerk must consider:

1. Whether a basis for the appointment of a guardian for the minor or incompetent person exists.
2. The interests of creditors and dependents of the minor or incompetent person.
3. In view of the disability, whether the minor or incompetent person needs the continuing protection of a guardian.
4. Whether the arrangement or transaction is in the minor or incompetent person's best interest.

G.S. 35A-1121

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#4: Review/Draft the Order

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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Who carries out the necessary actions?

Two options:

- *Special Fiduciary*
- *Temporary Guardian*

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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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What Needs to be in John's SPA/ST Order?

1. Approves and authorizes the creation of the Special Needs Trust (SNT)
2. Authorization to fund the SNT
 - Who is going to transfer the money?
 - Does the court need to appoint a special fiduciary or temporary guardian needed to accomplish the funding of the trust?
3. Reporting
 - To the court (verify that the mission accomplished)
 - To other agencies (anywhere receiving benefits)



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Resulting Documents in John's Files: GOP + SNT

SP File:

- Petition for Adjudication – SP-200
- Adjudication Order – SP-202

E File:

- **SPA/ST Order [No Form Order] + Report to Court, if required**
- Order Appointing GOP, E-406
- Oath, E-400
- Bond, if required, E-401
- GOP Letters, E-408

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Case #2: Out of Guardianship to a Trust



Jillian adjudicated incompetent five years ago. The court appointed her mother as her GOP and a private attorney as her guardian of the estate. The private attorney resigns, and another attorney is appointed. The new attorney examines Jillian's case and determines that she would be better served by placing the assets under guardianship in a trust, applying for benefits on Jillian's behalf, and modifying the guardianship to just a GOP.

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Get Out of Guardianship to Trust

- **Guardianship** – ward retains ownership + assets counted for purposes of Medicaid and other benefits
- **Trust** – default rule is no qualification of trustee, no account, and no bond



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Trusts Out of a Guardianship

General Guardian or Guardian of the Estate Powers

1. **Create a Special Needs Trust** – trust established to provide for supplemental needs of a disabled person over and above basic care. G.S. 36C-4-401.2; G.S. 35A-1251(23).
2. File a motion in the cause to **transfer guardianship assets** to a trust. G.S. 35A-1207.
 - Must petition for court approval to expend principal (G.S. 35A-1251(12) (adults); G.S. 35A-1252(9) (minors))
3. Petition court for approval to create, revoke, amend, add to, and dispose of property of a **revocable trust**. G.S. 35A-1251(24).

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Out of Guardianship to a Trust

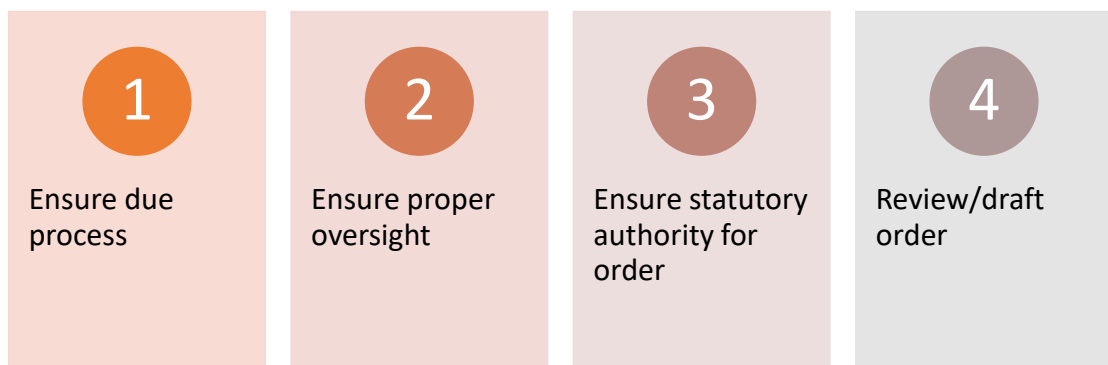


GOE files a motion in the cause (AOC-E-415) to:

1. Fund the trust with guardianship assets
2. Modify the guardianship to a GOP only

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What is the court's role before entering an order?



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#1: Ensure Due Process

- Ensure proper notice on interested parties
- Ensure less restrictive alternatives are considered; potential path to limited guardianship or restoration
- Consider ward's best interests and expressed wishes
 - Ensure ward has opportunity to be heard
 - Is the ward present at the hearing? If not, why not?
- Appoint guardian ad litem who then considers issues of guardianship vs. trust as part of the GAL's representation of the adult or minor
 - GAL not required for adults post-adjudication – standard is whether wards interests are adequately represented
 - GAL optional for minors – any reason not to appoint?

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#2: Ensure Proper Oversight

Do the mechanics of the trust work to ensure proper oversight for **this individual**?

- Who will serve as the trustee?
- Require bond?
- Require accounting?
- Is the trust instrument prepared and ready to be funded?
- Has the trust instrument been submitted to DHHS for review? Does it allow for amendment if it is not approved?

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#3: Ensure statutory authority for order

- Court approval required to expend principal (G.S. 35A-1251(12) (adults); G.S. 35A-1252(9) (minors))
- Highly discretionary - standard is best interests:
 - What benefit does this have for Jillian versus an ongoing guardian of the estate?
 - Does Jillian otherwise need an ongoing GOE?
 - What does Jillian want? What is in her best interests?
 - What does GAL recommend?

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#4: Draft/Review Order

Finding that the disbursement from the guardianship to the trust is in ward's best interest

Authorization to use principal of the estate to fund of the trust

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Out of Guardianship to a Trust



No motion in the cause is filed. Guardian of the estate simply funds the trust with guardianship assets and the issue isn't brought to the court's attention until the next accounting.

What may the court do?

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§ 35A-1290. Removal by Clerk.

(a) The clerk has the power and authority on information or complaint made to remove any guardian appointed under the provisions of this Subchapter, to appoint successor guardians, and to make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents.

(b) It is the clerk's duty to remove a guardian or to take other action sufficient to protect the ward's interests in the following cases:

- (1) The guardian wastes the ward's money or estate or converts it to his own use.
- (2) The guardian in any manner mismanages the ward's estate.
- (3) The guardian neglects to care for or maintain the ward or his dependents in a suitable manner.
- (4) The guardian or his sureties are likely to become insolvent or to become nonresidents of the State.
- (5) The original appointment was made on the basis of a false representation or a mistake.
- (6) The guardian has violated a fiduciary duty through default or misconduct.
- (7) The guardian has a private interest, whether direct or indirect, that might tend to hinder or be adverse to carrying out his duties as guardian.

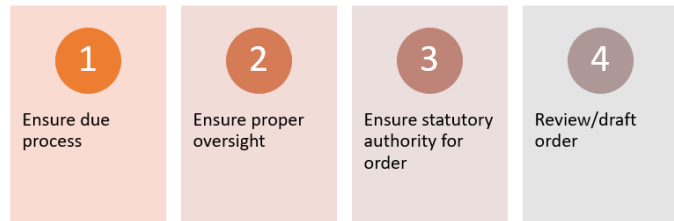
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Key Takeaways

- Must have adjudication before you reach a single transaction or single protective arrangement for an adult
- Must follow the same path for minors (application and other proof sufficient to show a basis exists to appoint a guardian) before you reach single transaction or single protective arrangement for minors
- The clerk's four step plan



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Questions?

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