

Single Transaction Guardianship: A Tailored Alternative to General Guardianship

By Catherine L. Wilson

In every guardianship practice, situations will arise where the authority of a guardian is required but the ongoing management of a guardianship is not. For example, a wife seeks your counsel for her husband with moderate dementia. The couple owns and manages all assets jointly, but the Department of Transportation is expanding the public road near their property, resulting in a condemnation settlement that both spouses will need to sign. The husband has no power of attorney. How do you advise the wife?

Or perhaps the parents of an adult child with a severe disability come to you for advice. A deceased grandparent has left the child the contents of an investment account. The child is on Supplemental Security Income (SSI) and therefore automatically receives North Carolina Medicaid. A guardianship would cause these inherited assets to be a countable resource for SSI and Medicaid purposes, so a self-settled special needs trust must be created and funded. How should the parents proceed?

Or it could be that adult children are helping their mother, who has advanced Alzheimer's, move into a skilled nursing facility. She has less than \$25,000 in assets that must be spent down before she can qualify for Medicaid. The children want to purchase a pre-need burial plan and other necessities for her, as well as pay the skilled nursing facility until funds are spent below \$2,000. The mother has no power of attorney. What should the children do next?

Prior to October 1, 2021, the only way to address these situations would be to recommend the following steps:

1. File a petition for adjudication of incompetency for the husband/child/mother so that the individual could be declared legally incompetent and a guardian of the estate could be appointed for him or her.
2. The appointed guardian of the estate files an application, obtains a bond, and, upon qualification, is issued letters of guardianship.
3. The guardian of the estate files a motion in the cause to seek court approval of the proposed transaction (i.e., permission to sign the condemnation settlement, permission to fund an appropriate special needs trust, permission to execute a spend-down plan to qualify for Medicaid).
4. After any necessary hearing on the motion in the cause, the guardian of the estate takes the action ordered by the court.
5. The guardian of the estate files the required 90-day inventory.

6. The guardian of the estate files a second motion in the cause to terminate the guardianship.
7. The guardian of the estate attends any required hearing on termination.
8. Once termination is granted, the guardian of the estate files a final account to discharge his or her duties.

The above-described method is expensive, time-consuming, and uses more judicial resources than what common sense tells us should be required. After all, if we only need to do one thing in a guardianship, why can it not be done in a single step?

Fortunately, there is now a common-sense solution. Section 1121 of Chapter 35A has been added to allow the court to grant specific relief in a single transaction or protective arrangement, commonly referred to as "single transaction guardianship." Section 1120 has, until now, required that a guardian be appointed when an adult is adjudicated to be incompetent; however, as of October 1, 2021, that is no longer the case. The revised Section 1120 now reads as follows:

Except as otherwise provided in this Article, if the respondent is adjudicated incompetent, or proper application is made for appointment of the guardian of a minor under Article 6 of this Chapter, a guardian or guardians shall be appointed in the manner provided for in Subchapter II of this Chapter.

The italicized portions have been added to Section 1120. Prior to October 1, 2021, if a person was adjudicated incompetent, the court had no choice but to proceed with appointing a guardian for that person. The same result applied for applications made for appointment of a guardian of a minor. However, in certain situations, there is now a better alternative. Instead of appointing a guardian, the clerk of superior court has the discretion to determine whether the needs of the person would be better met by authorizing a single transaction or protective arrangement. Doing so would eliminate the need for a full guardianship administration and save a great deal of time and resources in the process.

How would this work? The answer lies in the newly enacted Section 1121:

(a) If it is established in a proper proceeding that a basis exists for the appointment of a guardian of a minor or an incompetent person, the clerk of superior court, without appointing a guardian, may order a single protective arrangement or single transaction for the benefit of a minor or incompetent person as follows:

(1) Authorize, direct, or ratify 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, including any of the following:

- a. The payment, delivery, deposit, or retention of funds or property.
- b. The sale, mortgage, lease, or other transfer of property in accordance with the requirements of subsection (c) of this section.
- c. The entry into an annuity contract, a contract for life care, a deposit contract, or a contract for training and education.
- d. 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).
- e. The establishment, funding, or administration of an ABL account, as defined in section 529A of the Internal Revenue Code.

Subsection (a)(1) focuses on single transactions or protective arrangements necessary to meet an individual's "person-centric" needs of services, care, and safety. This includes ensuring that a person receives the services he or she needs, such as supportive or adaptive services provided through a government benefits program or from a private-pay provider. This also includes ensuring that the person receives the care he or she needs, whether in the form of ensuring continued access to health insurance (including maintaining access to Medicaid benefits) or health care (in the case of providing access to caregiving that the person may be receiving in a residential facility). Finally, it includes ensuring the safety of the person, which includes making sure that the living environment is safe and appropriate for his or her needs, whether at home or in a residential facility setting such as an assisted living, skilled nursing, group home, or family care home environment.

Subsection (a)(1) also contemplates a series of related transactions in the form of a "single protective arrangement." This would encompass the earlier example where the execution of a spend-down plan may be necessary to secure a safe living environment (i.e., a skilled nursing facility) for the clients' mother. Rather than approving one solitary transaction, this relief would encompass a series of tasks designed to secure the safe living environment — including purchase of a pre-need burial plan, spending funds to purchase items the mother may need, such as suitable furniture and personal care items, and authorization to pay the skilled nursing facility until the funds are spent down. All of these tasks form a single protective arrangement to accomplish a single goal: securing a safe living environment.

Subsection (a)(1) also introduces the concept of a special fiduciary. During the drafting process for Section 1121, three things became clear: first, that an individual may need to be empowered to

do certain things on behalf of the person otherwise subject to guardianship; second, that it may be helpful for the individual to have a specific legal title for dealing with third parties (particularly banks and financial institutions); and third, that care would need to be taken in distinguishing a person with limited authority under Section 1121 from a general guardian or guardian of the estate — hence, the concept of a special fiduciary.

The idea of a special fiduciary is not new in North Carolina law. Subsection 704(e) of Article 7 of the North Carolina Uniform Trust Code allows for the appointment of a special fiduciary if the court determines that it is necessary for the administration of a trust. A special fiduciary may also be appointed to address specific circumstances — for example, to make a decision that might violate a trustee's duty of loyalty under Section 802 of Article 8, to exercise discretion that might otherwise be prohibited under Section 814 of Article 8, to exercise a decanting power pursuant to Section 9 of Article 8B, or to remedy a breach of trust pursuant to Section 1001 of Article 10 by taking possession of trust property or assuming the administration of the trust. In contrast to the power of a trustee, the special fiduciary's power is not derived from the trust instrument itself but rather from the specific powers a court might grant, making it a tailored solution for certain trust-related issues.

The same concept applies to special fiduciaries in a guardianship setting. A general guardian or guardian of the estate's authority comes from the applicable statutes in Chapter 35A; in contrast, a special fiduciary's authority is limited to the specific directions contained in the court's order authorizing the single transaction or protective arrangement. This means that the practitioner will need to give careful thought to how the single transaction order is drafted, as having a detailed order for the special fiduciary will be a key component in ensuring the success of the transaction or protective arrangement.

Does This Mean That Single Transaction Guardianship is Designed to Replace a Guardian of the Person?

No. If a person is incapable of making medical decisions or directing his or her health care, the ongoing support and decision-making capabilities of a guardian of the person would still be needed. Single transaction guardianship is designed to address a specific concern for services, care, and/or safety when a single task or arrangement of related tasks is warranted; it is not designed to be a substitute for long-term medical decision making. Thus, it may be that situations will arise where a single transaction guardianship is necessary to address a specific need for which a guardian of the estate would otherwise be appointed, and a guardian of the person will be needed for long-term medical decisions.

What if the Proposed Transaction is Not Directly Related to Securing Services, Care, or Safety?

If the proposed transaction is not directly related to securing services, care, or safety necessary to meet the foreseeable needs of a person who would otherwise be subject to guardianship, the practitioner should determine if subsection (a)(2) applies instead. While subsection (a)(1) addresses "person-centric" needs of services, care, and safety, subsection (a)(2) addresses "property-centric" needs that may arise in relation to a person's financial or business affairs. To

that end, subsection (a)(2) provides that the court may authorize a single protective arrangement or single transaction for the benefit of a minor or incompetent person as follows:

Authorize, direct, or ratify 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 of superior court determines that the transaction is in the best interest of the minor or incompetent person.

Subsection (a)(2) encompasses transactions and protective arrangements relating to a person's financial or business affairs, even when they are not necessary for securing services, care, or safety for that person. This applies to the earlier example of the wife who needs authority to sign the condemnation settlement on behalf of her husband who lacks capacity. The transaction is not necessary to secure his safety or care, as those needs are currently being met, but it is needed to complete a transaction relating to his property. This is what subsection (a)(2) is designed to do.

Subsection (a)(2) also allows the appointment of a special fiduciary to execute the transaction, and care should be taken in drafting the order that will allow the special fiduciary to act with the required detail, keeping in mind the various third parties, such as financial institutions, with whom the special fiduciary may need to interact.

Additional Considerations for Single Transaction Guardianship

To qualify for a single transaction guardianship, the basic requirements for a guardianship must still be met — namely, there must still be a basis for an adult (which, for purposes of Chapter 35A, includes emancipated minors and certain minors over age 17.5) to be adjudicated incompetent. For all other minors, application must still be made for the appointment of a guardian.

In the case of adults, emancipated minors, and certain minors over age 17.5, this means that evidence must still be provided to adjudicate the individual to be incompetent. A guardian ad litem will be appointed to administer the required duties under Section 35A-1107 and, as a practical matter, give a recommendation as to the suitability of the proposed single transaction or protective arrangement. A hearing on the issue of adjudication must be held, and the clerk must enter an order adjudicating the respondent to be incompetent. The primary difference, however, is that instead of proceeding to an appointment of guardian after incompetence has been adjudicated, the clerk instead enters an order pursuant to Section 1121 that authorizes a specific action or series of actions to address the issue at hand.

When specifying the particular relief in a single transaction guardianship, a special fiduciary is not the only individual who can be appointed to carry out the tasks set forth in the order. The statute also introduces the concept of a temporary guardian who may be granted some or all of the powers of a general guardian or guardian of the estate. For example, if a single transaction guardianship includes a spend-down plan to enable a protected person to move into a skilled nursing facility, the clerk may choose to appoint a temporary guardian and require a final report once the tasks of the

spend-down have been completed. Another purpose for appointing a temporary guardian would be to create a self-settled special needs trust because, by federal law, this type of trust can only be established by certain persons, including a court, a parent, a grandparent, a disabled individual or his or her legal *guardian*.

The powers and duties of the temporary guardian must also be specified in the single transaction order. A well-drafted order should not only include the tasks to be performed by the temporary guardian, but it should also specify the guardian's powers, the duration of the guardian's appointment, and any reporting that the court may require at the conclusion of the temporary guardian's duties. It is also recommended that if the order requires the temporary guardian to file a final report, then the order specify that, upon the filing of such an order, the powers and duties of the temporary guardian will cease and the duties of the temporary guardian will be discharged, negating the need for any additional order or court action to effectuate the termination of the temporary guardianship.

But what if the single transaction or arrangement involves a sale, lease, mortgage, or gift of property? In such cases, subsection (c) of Section 1121 will apply, which provides that the "sale, mortgage, exchange, lease, or gift of any property by a special fiduciary or temporary guardian as provided in this section shall be subject to the same procedural and reporting requirements that would otherwise apply to the sale, mortgage, exchange, lease, or gift of such property by a guardian of the estate of general guardian." Thus, if the contemplated single transaction is a sale of real property, then the practitioner would need to structure her petition for adjudication in such a way as to ensure compliance with Articles 14 or 15 of Chapter 35A. This structure must also extend to the court's order, which would need to be drafted in a way that the contemplated transaction or protective arrangement meets the requirements of Article 14 or 15.

With respect to bonding, because Section 1121 does not authorize the court to waive bond if a temporary guardian is appointed, it is anticipated that bond will be required for all temporary guardians who receive property of a ward pursuant to Article 7 of Chapter 35A. Because a special fiduciary is not a guardian, and therefore not subject to the other statutes within Chapter 35A that would otherwise apply to guardians unless specifically ordered, the requirement of bond is within the court's discretion.

Will AOC Forms be Updated to Reflect Single Transaction Guardianship?

Yes. On September 30, the Administrative Office of the Courts (AOC) added or revised the following forms:

- AOC-E-421 (Letters Of Appointment Temporary Guardian) – New form. Available to be used with a temporary guardian appointed under new N.C.G.S. Section 35A-1121(b). Includes a space to describe scope of the temporary guardian's authority to accomplish the single transaction or arrangement.
- AOC-E-206 (Application For Letters Of Guardianship For An Incompetent Person) – Revised form. On Side One, in the title block, a "TEMPORARY GUARDIANSHIP" checkbox option was added, as was a citation to N.C.G.S. Section 35A-1121.

- ACO-E-415 – Revised form. The words “to modify guardianship” have been removed from the title and now it simply reads “MOTION IN THE CAUSE (GUARDIANSHIP)” making clear that the motion in the cause can be for consideration of any matter pertaining to guardianship, including relief under N.C.G.S. Section 35A-1121.

There is no applicable form to appoint a special fiduciary or a temporary guardian, and no new forms are currently anticipated. An order must be drafted to appoint a special fiduciary or temporary guardian. That same order must also include the specific instructions needed to carry out the single transaction or protective arrangement. In cases where a temporary guardian is appointed, these instructions should also be included on the letters of temporary guardianship (AOC-E-421).

For adults who have not yet been adjudicated to be incompetent prior to requesting single transaction relief, the Petition for Adjudication of Incompetency (AOC-SP-200) will still be used. There are no revisions currently anticipated for this form; see below for a discussion about how to best adapt this form for single transaction situations.

For minors in need of a single transaction or protective arrangement, application must still be made for a guardianship using AOC-E-208. There are no revisions currently anticipated for this form; see below for a discussion about how to best adapt this form for single transaction situations.

How do I Request a Single Transaction or Protective Arrangement?

It will depend upon the current posture of the case. The process will look different for adults who have already been adjudicated to be incompetent and those who have not, as well as the process for minors. Each scenario is explored below.

For Adults Who Have Not Yet Been Adjudicated

If the person who needs the single transaction or arrangement is an adult who has never been adjudicated to be incompetent, a petition for adjudication of incompetence (AOC-SP-200) must be filed and evidence presented to the court proving that the individual lacks sufficient capacity to manage his or her own affairs or to make or communicate important decisions concerning the adult’s person, family, or property. The term *adult* in this context also includes emancipated minors and minors over age 17.5 who would otherwise meet the definition of incompetency.

In addition, the practitioner will want to ask for single transaction or single arrangement relief. It is recommended that he or she do so by attaching an addendum to AOC-SP-200 to clearly identify the relief sought and the reasons why the petitioner feels this particular relief best meets the needs of the respondent. It may also be helpful to clearly identify from the outset that the relief requested is relief under Section 1121. One option for doing this could be to strike through a portion of the title on page one referencing appointment of a guardian and make note that single transaction relief is being sought instead. This could be worded as follows:

PETITION FOR ADJUDICATION OF INCOMPETENCE AND ~~APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN~~ FOR RELIEF PURSUANT TO G.S. § 35A-1121

To explain the reasons single transaction relief is being requested, it may be helpful to indicate this intention in Box 9 of Form AOC-SP-200, which is reserved for a recommendation of guardian. Suggested language for this box might be as follows:

Petitioner hereby seeks relief via single transaction pursuant to G.S. § 35A-1121 for the reasons attached hereto (see Addendum 1 incorporated herein by reference).

In situations where a temporary guardian is being requested, list the name of the proposed temporary guardian in Box 9, and consider adding the following:

John Doe, 123 ABC Street, Somewhere, NC 00000
As Temporary Guardian pursuant to G.S. § 35A-1121
for the reasons attached hereto (see Addendum 1 incorporated herein by reference).

Following this would be an addendum attached to the petition setting forth the reasons for a single transaction guardianship and specifying the exact relief the petitioner is requesting. If a special fiduciary or temporary guardian is being requested, the practitioner will also want to indicate that in the addendum. The more detail the practitioner can provide about the type of relief being sought and laying out the steps needed to achieve the desired result, the more comprehensive and effective the order will be.

Thought should also be given as to whether the respondent would also benefit from an ongoing guardian of the person. While a single transaction or protective arrangement may be the best solution to fulfill a specific person or property-centric need, such as securing an appropriate living arrangement or handling a particular financial matter, there may be an ongoing need to manage the respondent’s health care if he or she is unable to make medical decisions. In this case, an ongoing guardianship of the person would be needed.

Take for example the earlier hypothetical involving the parents of the severely disabled adult child. If the child is unable to make his own medical decisions and there is no health care power of attorney in place, the parents should also request a guardianship of the person in addition to the single transaction of funding a special needs trust with the unexpected inheritance. Similar considerations may also be appropriate in the analyses involving the husband who has moderate dementia or the mother who needs to move into the skilled nursing facility.

If a guardian of the person is needed in addition to a special fiduciary or temporary guardian, make sure to clearly note this in Box 9.

For Adults Who Have Already Been Adjudicated

For adults who were adjudicated to be incompetent in a previous proceeding, a motion in the cause will need to be filed pursuant to N.C.G.S. Section 35A-1207 seeking additional relief. Instead

of modifying the existing guardianship, the movant will instead request that additional relief be provided (and, if necessary, a special fiduciary or temporary guardian be appointed to carry out the single transaction or arrangement). Like any motion in the cause, this motion should be filed in the Estate file for the current guardianship.

For Minors

Because minors are incompetent as a matter of law, there is no need to adjudicate them to be incompetent. Instead, for a minor who is in need of a single transaction or arrangement, an application for guardianship (AOC-E-208) must be filed. Similar to AOC-SP-200, there is no box to check or place to indicate that Section 1121 relief is being sought. Instead, the practitioner will need to make note of this at the time the application is filed. For clarity, consider adding language below or to the side of the box on page one entitled APPLICATION FOR APPOINTMENT OF, such as

Single Transaction Relief (N.C.G.S. § 35A-1121)

If a temporary guardian is desired, consider checking the box on page one for GUARDIAN OF THE ESTATE and adding “(Temporary)” immediately to the right so it reads as follows:

GUARDIAN OF THE ESTATE (Temporary)

An addendum should be added to AOC-E-208 explaining the relief requested and why the relief is appropriate under Section 1121. To do this, consider using Box 5 on page one to state the following:

Applicant seeks relief via single transaction/arrangement pursuant to N.C.G.S. § 35A-1121 for the reasons attached hereto (see Addendum 1 incorporated herein by reference).

When is Section 1121 Relief Appropriate?

Single transaction guardianship vests a great deal of discretionary authority in the clerk of superior court. Under Section 1121, the clerk determines the tasks to be completed, the scope of the authority, the nature of the tasks authorized, whether a special fiduciary or temporary guardian should be appointed to carry out the tasks, and what if any additional requirements will be imposed. Because of the broad discretion inherent in a single transaction guardianship, it will be important to demonstrate that the statute properly applies to each situation where the relief is sought.

Evaluating each case from the outset will be key in demonstrating why Section 1121 is appropriate in a given set of circumstances. Consider using the following decision framework to analyze a particular case:

1. Does the individual have:

- a. A specific “person-centric” need for services, care, or safety? Common examples include:
 - i. Securing a safe residence with an appropriate level of care, such as an assisted living or skilled nursing facility;

- ii. Maintaining continued eligibility for SSI and Medicaid by ensuring that assets are considered non-countable resources; or
- iii. Entering into a contract or other agreement to provide services to the individual.

b. A specific “property-centric” need to address certain financial or business affairs? Common examples include:

- i. The need to execute a contract;
- ii. The need to authorize a sale of real or personal property; or
- iii. The need to take action to protect a business, financial, or property interest of another.

If NO to both a. and b., a general guardianship or guardian of the estate is appropriate.

If YES to a. or b., keep going...

2. Can the necessary tasks be accomplished at roughly the same time or within a limited period of time?

- If NO, a general guardianship or guardian of the estate is appropriate.
- If YES, keep going...

3. Are there other assets that will need continual management in a guardianship, even after the above-referenced tasks are completed?

- If YES, then a general guardianship or guardian of the estate is appropriate.
- If NO, *a single transaction guardianship is appropriate.*

In determining whether a single transaction or protective arrangement is appropriate, the clerk is required to review what is in the best interest of the individual and whether he or she needs the ongoing protection of a guardian. The clerk must also consider the interests of any creditors or dependents and how those interests might be affected by the proposed transaction or arrangement. For the practitioner, consideration should be given to addressing each of these issues, taking care to explain in the petition, motion, or application why single transaction guardianship is appropriate for a given situation.

Practice Tips

To assist in implementing the single transaction statute, consider the following:

- If a single transaction or protective arrangement is advisable, clearly indicate that Section 1121 relief is being requested.

- Be specific about why the relief is being requested, why it is in the individual's best interest, and how the relief impacts the interests of the individual's creditors and/or dependents.
- Specify why the continued protection of a guardian is not appropriate or necessary in this particular case. Remember that it may be likely that an individual needs the ongoing protection of a guardianship of the *person* but may not need the ongoing management of a guardian of the *estate* (in which case, a single transaction guardianship is ideal).
- Be specific in the order as to the powers and duties of the special fiduciary or temporary guardian.
- Consider including a time limitation for the order or identifying the point at which the order shall no longer be effective, such as upon completion of the tasks of the transaction or protective arrangement.
- When possible, volunteer to write the order to ensure that it contains all necessary authority for the special fiduciary or temporary guardian.
- If the court will require further reporting, especially in the case of a temporary guardian, have the order specify this so that the order can be all encompassing and contain the complete start-to-finish process for the single transaction guardianship.
- Consider whether a pending guardianship action might benefit from single transaction relief. As there is no requirement that the request for single transaction guardianship be in writing, the court has the freedom to consider the matter at various stages of the guardianship process — for example, upon the recommendation of a petitioner or guardian ad litem prior to the appointment of a guardian, or upon oral motion to the court after evidence has been presented.

Conclusion

While single transaction guardianship presents new procedural considerations, simplifying the guardianship process to accomplish a specific goal is a welcome change. For the right situations, single transaction guardianship should be incredibly effective, saving both time and money for clients, and producing a more tailored result for persons who need to utilize only a portion of the guardianship framework.

Catherine L. Wilson is a partner at McPherson, Rocamora, Nicholson, Wilson & Hinkle, PLLC in Durham. Her practice centers on estate planning for persons with special needs, guardianships, fiduciary litigation, and complex estate administration issues.

Visit
ncbar.org/members/benefits
 to access valuable
 NCBA Member Discounts.