**South Carolina General Assembly**

122nd Session, 2017-2018

**A87, R34, S415**

**STATUS INFORMATION**

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Companion/Similar bill(s): 3511

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Passed by the General Assembly on April 27, 2017

Governor's Action: May 9, 2017, Signed

Summary: Probate Court

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

2/14/2017 Senate Introduced and read first time ([Senate Journal‑page 11](file:///h:\sj\20170214.docx))

2/14/2017 Senate Referred to Committee on **Judiciary** ([Senate Journal‑page 11](file:///h:\sj\20170214.docx))

2/16/2017 Senate Referred to Subcommittee: Malloy (ch), Johnson, Turner, Climer, Goldfinch

3/22/2017 Senate Committee report: Favorable **Judiciary** ([Senate Journal‑page 10](file:///h:\sj\20170322.docx))

4/5/2017 Senate Read second time ([Senate Journal‑page 35](file:///h:\sj\20170405.docx))

4/5/2017 Senate Roll call Ayes‑41 Nays‑0 ([Senate Journal‑page 35](file:///h:\sj\20170405.docx))

4/6/2017 Senate Read third time and sent to House ([Senate Journal‑page 114](file:///h:\sj\20170406.docx))

4/18/2017 House Introduced and read first time ([House Journal‑page 7](file:///h:\hj\20170418.docx))

4/18/2017 House Referred to Committee on **Judiciary** ([House Journal‑page 7](file:///h:\hj\20170418.docx))

4/25/2017 House Recalled from Committee on **Judiciary** ([House Journal‑page 14](file:///h:\hj\20170425.docx))

4/26/2017 House Read second time ([House Journal‑page 67](file:///h:\hj\20170426.docx))

4/26/2017 House Roll call Yeas‑100 Nays‑0 ([House Journal‑page 68](file:///h:\hj\20170426.docx))

4/27/2017 House Read third time and enrolled ([House Journal‑page 12](file:///h:\hj\20170427.docx))

5/4/2017 Ratified R 34

5/9/2017 Signed By Governor

5/30/2017 Effective date See Act

5/31/2017 Act No. 87

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**VERSIONS OF THIS BILL**

[2/14/2017](file:///p:\pprever\2017-18\415_20170214.docx)

[3/22/2017](file:///p:\pprever\2017-18\415_20170322.docx)

[4/25/2017](file:///p:\pprever\2017-18\415_20170425.docx)

(A87, R34, S415)

**AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 62‑1‑112 SO AS TO CLARIFY THE PROBATE COURT’S AUTHORITY TO IMPOSE PENALTIES FOR CONTEMPT AND TO GRANT A MOTION FOR A PARTY TO PROCEED IN FORMA PAUPERIS; TO AMEND SECTION 8‑21‑800, RELATING TO RELIEF FROM FILING FEES, COURT COSTS, AND PROBATE COSTS, SO AS TO CLARIFY THAT THE PROBATE JUDGE MAY WAIVE FILING FEES FOR INDIGENT PERSONS IN THE SAME MANNER AS OTHER CIVIL CASES; TO AMEND SECTION 62‑1‑302, AS AMENDED, RELATING TO SUBJECT MATTER JURISDICTION AND CONCURRENT JURISDICTION WITH FAMILY COURT, SO AS TO CLARIFY THE COURT’S JURISDICTION IN MATTERS INVOLVING THE ESTABLISHMENT, ADMINISTRATION, OR TERMINATION OF A SPECIAL NEEDS TRUST FOR DISABLED INDIVIDUALS AND TO REVISE OUTDATED TERMINOLOGY; TO AMEND SECTION 62‑1‑401, AS AMENDED, RELATING TO NOTICE, SO AS TO AUTHORIZE NOTICE TO BE MADE BY A QUALIFYING COMMERCIAL DELIVERY SERVICE AND IS SIMILAR TO NOTICE BY REGISTERED MAIL OR CERTIFIED MAIL; TO STRIKE PARTS 1, 2, 3, 4, AND 7, ARTICLE 5, TITLE 62, AND TO ADD NEW AND REVISED PROVISIONS RELATING TO THE PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY, SO AS TO PROMOTE UNIFORMITY AMONG THE STATE’S FORTY‑SIX PROBATE COURTS, TO SAFEGUARD ADEQUATE DUE PROCESS PROTECTIONS FOR THE STATE’S ALLEGED INCAPACITATED INDIVIDUALS, TO ELIMINATE OVERRELIANCE UPON RESTRICTIVE FULL OR PLENARY GUARDIANSHIPS, TO REDUCE THE COSTS OF PROCEEDINGS, TO ESTABLISH CONSISTENCY BETWEEN GUARDIANSHIP AND CONSERVATORSHIP PROCEEDINGS, AND TO CREATE AN ADEQUATE SYSTEM FOR MONITORING GUARDIANS AND CONSERVATORS.**

Be it enacted by the General Assembly of the State of South Carolina:

**Probate Court’s authority to impose penalties for contempt and to allow a party to proceed in forma pauperis**

SECTION 1. Part 1, Article 1, Title 62 of the 1976 Code is amended by adding:

“Section 62‑1‑112. The inherent power of the court to impose penalties for contempt extends to all filing requirements, proceedings, judgments, and orders of the court. The court has the power to grant a motion to proceed in forma pauperis.”

REPORTER’S COMMENTS

This section was enacted in 2017 to clarify the probate court’s authority to impose penalties for contempt and to grant a motion for a party to proceed in forma pauperis.

**Probate Court may waive filing fees for indigent persons in the same manner as other civil cases**

SECTION 2. Section 8‑21‑800 of the 1976 Code is amended to read:

“Section 8‑21‑800. The Probate Judge may relieve any party to a proceeding in the Probate Court from court costs in the manner provided in Section 8‑21‑140, but relief from filing fees and other probate costs is prohibited, except as provided in Section 8‑21‑810.

(1) The Probate Judge pursuant to Rule 3(b), SCRCP and Section 62‑1‑112, shall grant waivers of filing fees for indigent persons in the same manner as other civil cases.

(2) The Probate Judge may relieve any party to a proceeding in the Probate Court from court costs related to fees of a notary public as provided in Section 8‑21‑140.

(3) The Probate Judge is prohibited from waiving fees or court costs associated with the value of an estate or conservatorship as provided in Section 8‑21‑770(B), except as provided in Section 8‑21‑810.”

REPORTER’S COMMENTS

The 2017 amendment to this section clarifies that the Probate Judge may waive filing fees for indigent persons, the same as in other civil cases. While much of the jurisdiction of the Probate Court involves estates or protective orders, where waiving of filing fees would be inappropriate. However, in actions for guardianship, the litigants may be indigent and should have access to the courts and the Probate Court should be able to waive the fees upon a showing of indigency.

**Subject matter jurisdiction of Probate Court**

SECTION 3. Section 62‑1‑302 of the 1976 Code, as last amended by Act 100 of 2013, is further amended to read:

“Section 62‑1‑302. (a) To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to:

(1) estates of decedents, including the contest of wills, construction of wills, determination of property in which the estate of a decedent or a protected person has an interest, and determination of heirs and successors of decedents and estates of protected persons, except that the circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court;

(2) subject to Part 7, Article 5:

(i) protective proceedings and guardianship proceedings under Article 5;

(ii) gifts made pursuant to the South Carolina Uniform Gifts to Minors Act under Article 5, Chapter 5, Title 63;

(iii) matters involving the establishment, administration, or termination of a special needs trust for disabled individuals;

(3) trusts, inter vivos or testamentary, including the appointment of successor trustees;

(4) the issuance of marriage licenses, in form as provided by the Bureau of Vital Statistics of the Department of Health and Environmental Control; record, index, and dispose of copies of marriage certificates; and issue certified copies of the licenses and certificates;

(5) the performance of the duties of the clerk of the circuit and family courts of the county in which the probate court is held when there is a vacancy in the office of clerk of court and in proceedings in eminent domain for the acquisition of rights of way by railway companies, canal companies, governmental entities, or public utilities when the clerk is disqualified by reason of ownership of or interest in lands over which it is sought to obtain the rights of way; and

(6) the involuntary commitment of persons suffering from mental illness, intellectual disability, alcoholism, drug addiction, and active pulmonary tuberculosis.

(b) The court’s jurisdiction over matters involving wrongful death or actions under the survival statute is concurrent with that of the circuit court and extends only to the approval of settlements as provided in Sections 15‑51‑41 and 15‑51‑42 and to the allocation of settlement proceeds among the parties involved in the estate.

(c) The probate court has jurisdiction to hear and determine issues relating to paternity, common‑law marriage, and interpretation of marital agreements in connection with estate, trust, guardianship, and conservatorship actions pending before it, concurrent with that of the family court pursuant to Section 63‑3‑530.

(d) Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo:

(1) formal proceedings for the probate of wills and for the appointment of general personal representatives;

(2) construction of wills;

(3) actions to try title concerning property in which the estate of a decedent or protected person asserts an interest;

(4) matters involving the internal or external affairs of trusts as provided in Section 62‑7‑201, excluding matters involving the establishment of a ‘special needs trust’ as described in Article 7;

(5) actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value; and

(6) actions concerning gifts made pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63.

(e) The removal to the circuit court of an action or proceeding within the exclusive jurisdiction of the probate court applies only to the particular action or proceeding removed, and the probate court otherwise retains continuing exclusive jurisdiction.

(f) Notwithstanding the exclusive jurisdiction of the probate court over the matters set forth in subsections (a) through (c), if an action described in subsection (d) is removed to the circuit court by motion of a party, or by the probate court on its own motion, the probate court may, in its discretion, remove any other related matter or matters which are before the probate court to the circuit court if the probate court finds that the removal of such related matter or matters would be in the best interest of the estate or in the interest of judicial economy. For any matter removed by the probate court to the circuit court pursuant to this subsection, the circuit court shall proceed upon the matter de novo.”

REPORTER’S COMMENTS

This section clearly states the subject matter jurisdiction of the probate court. It should be noted that the probate court has ‘exclusive original jurisdiction’ over the matters enumerated in this section. This means, when read with the other Code provisions (such as subsection (c) of this section and Section 62‑3‑105), that matters within the original jurisdiction of the probate court must be brought in that court, subject to certain provisions made for removal to the circuit court by the probate court or on motion of any party.

Concurrent jurisdiction has been granted to the probate court to hear and determine issues relating to paternity, common‑law marriage, and interpretation of marital agreements in connection with estate, trust, guardianship, and conservatorship actions pending before it, concurrent with that of the family court, pursuant to Section 63‑3‑530, but no concurrent jurisdiction exists which allows the family court to decide issues regarding the care, custody, and control of an adult.

Section 63‑1‑40(1) of the South Carolina Children’s Code defines a “child” as a person under the age of eighteen. Section 63‑1‑40(2) of the Children’s Code defines a “Guardian” as a person who legally has the care and management of a child. Section 62‑5‑101(1) of the S.C. Probate Code defines an “adult” as an individual who has attained the age of eighteen or who, if under eighteen, is married or has been emancipated by a court of competent jurisdiction.

Therefore, the exclusive jurisdiction to appoint a guardian and/or conservator for an adult rests with the probate court, pursuant to Section 62‑1‑302(a)(2)(i). Accordingly, when a parent or other individual was granted custody of an incapacitated individual in a family court order entered during minority, the family court does not have any continuing jurisdiction to enter further orders regarding the care, custody, or control of that person beyond the age of eighteen. (The family court’s authority over the custody and care of adults is pursuant to the Omnibus Adult Protection Act, Section 43‑35‑5 et seq.) In such a situation, the parent or custodial guardian wishing to retain or gain custody of an incapacitated young adult must file a guardianship action pursuant to Section 62‑5‑303 of the South Carolina Probate Code.

However, if the family court issued an order during the minority of an adult which directs an individual to pay child support pursuant to Section 63‑3‑530(17), the family court retains exclusive jurisdiction to make decisions regarding support beyond the age of eighteen when there are physical or mental disabilities of the child, as long as those mental or physical disabilities continue. So, even if a parent or custodial guardian was granted support for an incapacitated adult during his minority, even though a guardianship action has been filed in the probate court, the parent or custodial guardian can still go before a judge of the family court to seek modification or other redress regarding the issue of child support for the incapacitated adult. Any support paid to an individual beyond the age of eighteen, as a result of a family court order entered pursuant to Section 63‑5‑503(17), is the property of the conservatorship, and it should be paid to and managed by the conservator.

The language of this section is similar to Section 14‑23‑1150 of the 1976 Code, which in item (a) provides that probate judges are to have jurisdiction as provided in Sections 62‑1‑301 and 62‑1‑302, and other applicable sections of this South Carolina Probate Code.

The 2013 amendments added “determination of property in which the estate of a decedent or protected person has an interest” to subsection (a)(1), substantially rewrote subsections (a)(2), (d)(3), and (d)(4), and added subsection (f) which allows the probate court to remove any pending matter to circuit court in the event a party or the court removes a related matter pursuant to subsection (d), even if that pending matter is not otherwise covered by the removal provisions of (d).

The 2017 amendments re‑wrote the introductory sentence of (a)(2) and removed “subject to” in order to make the language more clear. In addition, (a)(2)(iii) was added, which deals with the probate court’s exclusive jurisdiction in matters involving special needs trusts for disabled individuals.

**Petitioner’s notice requirements**

SECTION 4. Section 62‑1‑401 of the 1976 Code is amended to read:

“Section 62‑1‑401. (a) If notice of a hearing on a petition is required and, except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of a petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice must be given:

(1) by mailing a copy of the notice at least twenty days before the time set for the hearing by certified, registered, or ordinary first class mail, or by a commercial delivery service that meets the requirements to be considered a designated delivery service in accordance with 26 U.S.C. Section 7502(f)(2) addressed to the person being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known;

(2) by delivering a copy of the notice to the person being notified personally at least twenty days before the time set for the hearing; or

(3) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence by publishing a copy of the notice in the same manner as required by law in the case of the publication of a summons for an absent defendant in the court of common pleas.

(b) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(c) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

(d) Notwithstanding a provision to the contrary, the notice provisions in this section do not, and are not intended to, constitute a summons that is required for a petition.”

REPORTER’S COMMENTS

This section provides that, where notice of hearing on a petition is required, the petitioner shall give notice to any interested person or his attorney (1) by mailing or commercial delivery at least twenty days in advance of the hearing, or (2) by personal delivery at least twenty days in advance of the hearing, or (3) if the person’s address or identity is not known and cannot be ascertained, by publication as in the court of common pleas.

Under this Code, when a petition is filed with the court, the court is to fix a time and place of hearing and it is then the responsibility of the petitioner to give notice as provided in Section 62‑1‑401. See, for example, Sections 62‑3‑402 and 62‑3‑403.

The 2010 amendment added subsection (d) to clarify and avoid confusion that previously existed regarding the notice provisions in this section. The effect of the 2010 amendment was intended to make it clear that the notice provisions in this section are not intended to and do not constitute a summons, which is required for a petition in formal proceedings. See 2010 amendments to certain definitions in S.C. Code Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP.

The 2017 amendment authorizes notice to be made by a qualifying commercial delivery service and is similar to notice by registered mail or certified mail.

**Protected persons and their property**

SECTION 5. A. Parts 1, 2, 3, 4, Article 5, Title 62 of the 1976 Code are amended to read:

“Former Section Recodified Section

62‑5‑101 62‑5‑101

62‑5‑102(a) 62‑5‑201

62‑5‑102(b) 62‑5‑102

62‑5‑103 62‑5‑103

62‑5‑104 62‑5‑309(c)

62‑5‑105 62‑5‑104

62‑5‑105 (new)

62‑5‑106 (A) 62‑5‑101

62‑5‑106 (B) 62‑5‑306, 62‑5‑307 (A), 62‑5‑428

62‑5‑106 (new)

62‑5‑107 (new)

62‑5‑201 62‑5‑201

62‑5‑301 62‑5‑301

62‑5‑302 62‑5‑302

62‑5‑303 62‑5‑303, 62‑5‑303A, 62‑5‑303B, 62‑5‑303C,

62‑5‑303D

62‑5‑304 62‑5‑304

62‑5‑304A (new)

62‑5‑305 62‑5‑305

62‑5‑306 62‑5‑306

62‑5‑307 62‑5‑307, 62‑5‑307A

62‑5‑308 removed

62‑5‑309(A) 62‑5‑303A

62‑5‑309(B) 62‑5‑303C

62‑5‑310 62‑5‑108

62‑5‑311 62‑5‑308

62‑5‑312 62‑5‑309

62‑5‑313 62‑5‑310

62‑5‑401(1) 62‑5‑402

62‑5‑401(2) 62‑5‑403

62‑5‑402 62‑5‑426, see also 62‑5‑201

62‑5‑403 62‑5‑401

62‑5‑404 62‑5‑403

62‑5‑405 62‑5‑403A, 62‑5‑403C

62‑5‑406 62‑5‑403C

62‑5‑407(a) 62‑5‑402

62‑5‑407(b) 62‑5‑403B, 62‑5‑403C, 62‑5‑403D

62‑5‑407 (new)

62‑5‑408 62‑5‑107,62‑5‑108, 62‑5‑404, 62‑5‑405,

62‑5‑414, 62‑5‑422, 62‑5‑423

62‑5‑409 62‑5‑405

62‑5‑410 62‑5‑408

62‑5‑411 62‑5‑409

62‑5‑412 62‑5‑410

62‑5‑413 62‑5‑411

62‑5‑413 (new)

62‑5‑414 62‑5‑105, 62‑5‑412

62‑5‑415 62‑5‑428

62‑5‑416 62‑5‑428

62‑5‑417 62‑5‑414

62‑5‑418 62‑5‑415

62‑5‑419 62‑5‑416

62‑5‑420 62‑5‑417

62‑5‑421 62‑5‑418

62‑5‑422 62‑5‑419

62‑5‑423 62‑5‑420

62‑5‑421 (new)

62‑5‑424 62‑5‑422

62‑5‑425 62‑5‑423

62‑5‑426 62‑5‑404, 62‑5‑428

62‑5‑427 62‑5‑425

62‑5‑428 62‑5‑426

62‑5‑429 62‑5‑427

62‑5‑430 62‑5‑428

62‑5‑431 62‑5‑429

62‑5‑432 62‑5‑430

62‑5‑432 (new)

62‑5‑433 62‑5‑433

62‑5‑434 removed

62‑5‑435 removed

62‑5‑436 62‑5‑431

Part 1

General Provisions

GENERAL COMMENT

The 2017 amendments to the conservatorship and guardianship sections of Article 5 of the Probate Code were drafted and proposed during a time when the Uniform Law Commission was in the process of amending the Uniform Guardianship and Protective Proceedings Act. Many of the changes are based not only upon the 1997 Uniform Guardianship and Protective Proceedings Act, but also by the study and research being done in anticipation of a new version of the Uniform Act, anticipated to be proposed by the Uniform Law Commission sometime in 2017. Some of the anticipated revisions to the Uniform Act are included in these revisions.

The goals of the 2017 amendments, specific to this South Carolina version of the Uniform Act, include promoting uniformity among forty‑six probate courts in the state, ensuring adequate due process protections for the alleged incapacitated individual, eliminating overreliance upon restrictive full or plenary guardianships, reducing costs of proceedings, establishing more consistency between guardianship and conservatorship proceedings, and creating a sufficient system for monitoring guardians and conservators.

The 2017 amendments made no significant changes to Part 5 or Part 7 of Article 5, Title 62.

Section 62‑5‑101. Unless otherwise apparent from the context, in this article:

(1) ‘Adult’ means an individual who has attained the age of eighteen or who, if under eighteen, is married or has been emancipated by a court of competent jurisdiction.

(2) ‘Alleged incapacitated individual’ means:

(a) an adult for whom a protective order is sought;

(b) an adult for whom the appointment of a guardian is sought; or

(c) an adult for whom a determination of incapacity is sought.

(3) ‘Conservator’ means a person appointed by the court to manage the estate of a protected person.

(4) ‘Counsel for alleged incapacitated individual’ means a person authorized to practice law in the State of South Carolina who represents the alleged incapacitated individual in a guardianship proceeding or a protective proceeding. Counsel shall represent the expressed wishes of the alleged incapacitated individual to the extent consistent with the rules regulating the practice of law in the State of South Carolina.

(5) ‘Court’ means the probate court.

(6) ‘Disabled’ means the medically determinable physical or mental impairment of a minor or an adult as defined by 42 U.S.C. Section 1382c, as amended.

(7) ‘Emergency’ means circumstances that are likely to result in substantial harm to the alleged incapacitated individual’s health, safety, or welfare or in substantial economic loss to the alleged incapacitated individual.

(8) ‘Foreign conservator’ means a conservator or a person with the powers of a conservator of another jurisdiction.

(9) ‘Guardian’ means a person appointed by the court as guardian, but excludes one who is a guardian ad litem. A guardian shall make decisions regarding the ward’s health, education, maintenance, and support.

(10) ‘Guardian ad litem’ means a person licensed in the State of South Carolina in law, social work, nursing, medicine, or psychology, or who has completed training to the satisfaction of the court, and who has been appointed by the court to advocate for the best interests of the alleged incapacitated individual.

(11) ‘Guardianship proceeding’ means a formal proceeding to determine if an adult is an incapacitated individual or in which an order for the appointment of a guardian for an adult is sought or has been issued.

(12) ‘Incapacitated individual’ means an individual who, for reasons other than minority, has been adjudicated as incapacitated.

(13) ‘Incapacity’ means the inability to effectively receive, evaluate, and respond to information or make or communicate decisions such that a person, even with appropriate, reasonably available support and assistance cannot:

(a) meet the essential requirements for his physical health, safety, or self‑care, necessitating the need for a guardian; or

(b) manage his property or financial affairs or provide for his support or for the support of his legal dependents, necessitating the need for a protective order.

(14) ‘Less restrictive alternative’ means the provision of support and assistance as defined in this section which maximizes the alleged incapacitated individual’s capacity for self‑determination and autonomy in lieu of a guardianship or conservatorship.

(15) ‘Net aggregate amount’ means the total sum of payments due to a minor or incapacitated individual after subtracting all outstanding reimbursements and relevant deductions.

(16) ‘Party’ means the alleged incapacitated individual, ward, protected person, petitioner, guardian, conservator, or any other person allowed by the court to be a party in a guardianship proceeding or protective proceeding, including those listed in Section 62‑5‑303, Section 62‑5‑402, and Section 62‑5‑403.

(17) ‘Person’ means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(18) ‘Protected person’ means an individual for whom a conservator has been appointed or other protective order has been issued.

(19) ‘Protective order’ means an order appointing a conservator or relating to the management of the property of:

(a) an incapacitated individual;

(b) a minor;

(c) a person who is confined, detained by a foreign power, or who has disappeared; or

(d) a person who is disabled and in need of a court order to create and establish a special needs trust for such person’s benefit.

(20) ‘Protective proceeding’ means a judicial proceeding in which a protective order is sought or has been issued.

(21) ‘Record’ means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(22) ‘State’ means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(23) ‘Supports and assistance’ includes:

(a) systems in place for the alleged incapacitated individual to make decisions in advance or to have another person to act on his behalf, including, but not limited to, having an agent under a durable power of attorney, a health care power of attorney, a trustee under a trust, a representative payee to manage social security funds, a Declaration of Desire for Natural Death (living will), a designated health care decision maker under Section 44‑66‑30, or an educational representative designated under Section 55‑33‑310 to Section 55‑33‑370; and

(b) reasonable accommodations that enable the alleged incapacitated individual to act as the principal decision‑maker, including, but not limited to, using technology and devices; receiving assistance with communication; having additional time and focused discussion to process information; providing tailored information oriented to the comprehension level of the alleged incapacitated individual; and accessing services from community organizations and governmental agencies.

(24) ‘Ward’ means an adult for whom a guardian has been appointed.

REPORTER’S COMMENTS

Section 62‑5‑101 defines certain terms which are used in Article 5. However, in 2017 the definition section of Article 5 was revised to add definitions to clarify the code to promote consistency. Some of the definitions were to clarify some of the most significant changes in the guardianship and conservatorship sections of Article V, including separating the role of the guardian ad litem from the role of the attorney, ensuring that rights are only removed as a last resort to protect an incapacitated individual or his property, and establishing consistency between the guardianship sections and conservatorship sections.

‘Counsel for the alleged incapacitated individual’ is an attorney who represents the wishes of the alleged incapacitated individual, whether or not those wishes may be in his best interests. In the event counsel cannot communicate with his client with or without supports and assistance in order to determine what the client wishes, counsel may move the court to allow him to withdraw from representation, as set forth in Section 62‑5‑303B(C).

A definition of ‘disabled’ was added to allow for the court to create a special needs trust for an individual who is disabled, but not incapacitated.

The 2017 amendments added a definition of ‘emergency’ to clarify that an emergency petition should only be granted when there is a substantial risk to the alleged incapacitated individual’s life or property. The 2017 definition acknowledges that an emergency petition for a protective order is appropriate.

The definition of ‘guardian ad litem’ is expanded to include nonattorneys and clarify that the guardian ad litem will not be acting as counsel for the alleged incapacitated individual. The role and duties of the guardian ad litem are expanded in the revisions to ensure that an adequate investigation happens prior to appointment; therefore, the guardian ad litem must have training that satisfies the court.

The definition of ‘incapacity’ and ‘incapacitated individual’ have changed significantly. These definitions are modified versions of the definition contained in the Uniform Guardianship and Protective Proceedings Act (1997) drafted by the Uniform Law Commission. The requirement that the person be unable to make ‘responsible’ decisions is deleted, as is the requirement that the person have an impairment by reason of a specified disability or other cause, a requirement which may have led the trier of fact to focus unduly on the nature of the respondent’s disabling condition, as opposed to the respondent’s actual ability to effectively receive and evaluate information. The 2017 definition is based upon an individual’s ability to understand and evaluate choices rather than the individual’s disability. The definition of incapacity acknowledges that many individuals need both accommodations and supports and assistance in order to make a decision. Therefore, an individual is not incapacitated even though he may need help with making decisions, take longer to make decisions, require more explanation to make decisions, or have difficulty communicating the decision. If the individual can make his own decisions with supports and assistance, then the individual is not incapacitated. A finding that an individual displays poor judgment alone shall not be considered sufficient evidence that the individual is incapacitated within the meaning of this definition. In addition, the definition acknowledges that the capacity must be limited to the extent the individual cannot adequately provide for his health or safety necessitating the need for a guardian or cannot adequately manage his financial affairs necessitating a need for a protective order. Under this definition, a guardianship would not be necessary for an individual whose health, safety, well‑being, or property is not at risk of harm.

‘Less restrictive alternatives’ are to be explored and considered, and guardianship is appropriate only when the alternatives are not available or appropriate, as noted by Sections 62‑5‑303(B)(6) and 62‑5‑403(B)(6). For example, an individual may have access to a representative payee to manage his social security funds. This would be a less restrictive alternative to a conservatorship to manage those funds. Likewise, an individual may be able to make his own decisions regarding health care by having a relative attend doctor’s appointments and assist him in understanding the information being presented at those appointments. This support is a less restrictive alternative to guardianship. Those alternatives which maximize the alleged incapacitated individual’s self‑determination must be ruled out prior to appointment of a guardian or conservator.

‘Supports and assistance’ are defined to acknowledge that any person may have planned in advance for their incapacity or have a system already in place to address his need to rely upon another to make decisions. These systems are listed, and they are all considered less restrictive alternatives which maximize the individual’s self‑determination, whether planned in advance or relied upon as an alternative to guardianship or conservatorship. The definition also acknowledges that reasonable accommodations must be made for people who are alleged to be incapacitated, but who in fact have the means to independently make decisions if they are able to access accommodations that assist them in making decisions.

‘Net aggregate amount’ was defined to clarify how calculations are to be made in Sections 62‑5‑103, 62‑5‑104, 62‑5‑423, and 62‑5‑428. For example, the facility of payment provision, Section 62‑5‑103, could be used to distribute sixteen thousand dollars to the minor in income, if after deducting taxes, the amount actually distributed was less than fifteen thousand dollars. Payments can be spread throughout the year, but dividing more than fifteen thousand dollars into multiple payments does not eliminate the need for a protective order.

A ‘party’ in the action includes not only the petitioner and the alleged incapacitated individual, but may also include a person who is allowed by the court to intervene in the proceeding.

Sections 62‑5‑433, 62‑5‑504, and 62‑5‑431 contain definitions that relate only to those sections. Section 62‑5‑702 contains additional definitions that relate only to Part 7.

Section 62‑5‑102. When both guardianship proceedings and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

REPORTER’S COMMENTS

The 2017 amendments to this section moved the jurisdiction provisions to Section 62‑5‑201. The 2017 amendments kept the provision which allows guardianship and conservatorship proceedings to be consolidated when they involve the same alleged incapacitated individual and are in the same court.

Section 62‑5‑103. (A) A person under a duty to pay or deliver money or personal property to a minor or incapacitated individual may perform this duty in amounts not exceeding a net aggregate amount of fifteen thousand dollars each year by paying or delivering the money or property to the conservator for the minor or incapacitated person, if the person under a duty to pay or deliver money or personal property has actual knowledge that a conservator has been appointed or an appointment is pending. If the person under a duty to pay or deliver money or personal property to a minor or incapacitated person does not have actual knowledge that a conservator has been appointed or that appointment of a conservator is pending, the person may pay or deliver the money or property in amounts not exceeding a net aggregate of fifteen thousand dollars each year to:

(1) a person having the care and custody of the minor or incapacitated individual with whom the minor or incapacitated individual resides;

(2) a guardian of the minor or an incapacitated individual; or

(3) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor or for the minor under the Uniform Gifts to Minors Act and giving notice of the deposit to the minor.

(B) The persons, other than a financial institution under subsection (A)(3) above, receiving money or property for a minor or incapacitated individual, serve as fiduciaries subject to fiduciary duties, and are obligated to apply the money for the benefit of the minor or incapacitated individual with due regard to:

(1) the size of the estate, the probable duration of the minority or incapacity, and the likelihood that the minor or incapacitated individual, at some future time, may be able to manage his affairs and his estate;

(2) the accustomed standard of living of the minor or incapacitated individual and members of his household; and

(3) other funds or resources used or available for the support or any obligation to provide support for the minor or incapacitated individual.

(C) The persons may not pay themselves except by way of reimbursement for out‑of‑pocket expenses for goods and services necessary for the minor’s or incapacitated individual’s support. Money or other property received on behalf of a minor or incapacitated individual may not be used by a person to discharge a legal or customary obligation of support that may exist between that person and the minor or incapacitated individual. Excess sums must be preserved for future benefit of the minor or incapacitated individual, and any balance not used and property received for the minor or incapacitated individual must be turned over to the minor when he attains majority or is emancipated by court order; or, to the incapacitated individual when he has been readjudicated as no longer incapacitated. Persons who pay or deliver in accordance with provisions of this section are not responsible for the proper application of the money or personal property. If the net aggregate amount exceeds fifteen thousand dollars, a conservatorship shall be required.

(D) An employer may fulfill his duties to a minor or incapacitated individual by delivering a check to or depositing payment into an account in the name of the minor or incapacitated employee.

REPORTER’S COMMENTS

The 2017 amendments changed this section in the following ways:

(1) The structure of the section was changed to make it more organized by breaking the information down into smaller subsections.

(2) The amendments clarified when a person under a duty to pay money or deliver personal property to a minor or incapacitated individual must do so to a conservator. If an appointment of a conservator is pending, the person under a duty to pay or deliver with actual knowledge of the pending appointment should notify the court of its duty or hold the money or property until the order appointing a conservator is issued. The amendments further specify what persons or institutions other than a conservator may accept the money or property;

(3) The amount that can be paid to a minor or incapacitated individual by a person under a duty to pay money or deliver personal property to a minor or incapacitated individual was increased from ten thousand dollars to fifteen thousand dollars to reflect changes in the cost of living and present‑day value of money versus when this section was enacted in 1986;

(4) Subsection (C) was created, which included language from the previous version of this section, and a sentence was added to the end of the paragraph that specifically states that if the net aggregate amount exceeds fifteen thousand dollars a conservatorship is required; and

(5) Subsection (D) was created, which includes language that makes it clear that any employer may fulfill his duty to a minor or incapacitated individual by delivering or depositing payment into an account in the name of the minor or incapacitated employee.

Section 62‑5‑104. If a patient of a state mental health facility has no legally appointed conservator, the Director of the Department of Mental Health or his designee, may receive and accept, for the use and benefit of the patient, assets which may be due the patient by inheritance, gift, pension, or otherwise with a net aggregate amount not exceeding fifteen thousand dollars in one calendar year. The director or his designee may act as conservator for the patient and his endorsement or receipt discharges the obligor for any assets received. Upon receipt, the director or his designee shall apply the assets for the proper maintenance, use, and benefit of the patient. In the event the patient dies leaving an unexpended balance of assets in the hands of the director or his designee, the director or his designee shall apply the balance first to the funeral expenses of the patient, and any balance remaining must be held by the director or his designee for a period of six months; if within that period, the director or his designee is not contacted by the personal representative of the deceased patient, the balance of the assets may be applied to the maintenance and medical care account of the deceased patient. The director or his designee must, within thirty days following the death of the patient, notify the court in the county in which the patient resided at the time of admission to the department’s facility of the death of the patient and provide a list of any property belonging to the patient and held by the department. Upon appointment of a conservator for a patient of a state mental health facility, the director shall deliver any assets of the protected person to the conservator and provide an accounting of the management of those assets.

REPORTER’S COMMENTS

The 2017 amendment increased the amount that the S.C. Department of Mental Health can receive on behalf of a patient from $10,000.00 to $15,000.00, consistent with the increase in the amount in Section 62‑5‑103.

Section 62‑5‑105. (A) In a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the assets of a ward or protected person who is the subject of a formal proceeding.

(B) If not otherwise compensated for services rendered, the court‑appointed guardian ad litem, counsel for the alleged incapacitated individual, counsel for the minor, and designated examiner are entitled to reasonable compensation, as determined by the court.

(C) Unless the court issues an order stating otherwise, petitioners are responsible for their own attorney’s fees and costs, as well as the other costs and expenses of the action.

REPORTER’S COMMENTS

The 2017 amendment added Section 62‑5‑105 and was created to not only address the allocation of fees, but to incorporate language that was previously included in Section 62‑5‑414 regarding compensation and expenses.

Prior to the 2017 amendment, the only section in the Probate Code that specifically granted authority to the court to award fees and costs was Section 62‑1‑111, which was enacted in 2013, effective January 2014. The language in this section makes it clear that the court also has the authority to award fees and costs in guardianship and conservatorship matters. See Section 62‑7‑1004 for a similar provision in the S.C. Trust Code.

This section, consistent with South Carolina case law, clarifies that the petitioner is responsible for his own fees and costs in an action, unless there is a contractual agreement dictating who pays or there is a court order stating who is responsible for payment. In addition, in a guardianship and/or conservatorship matter there are other costs and expenses that must be paid. Dowaliby v. Chambless, 344 S.C. 558, 544 S.E.2d 646 (Ct. App. 2001) allows payment of certain costs and expenses from the funds of the incapacitated individual, other than those that are statutorily permitted, if the action brought results in a finding of incapacity and the bringing of the action has benefitted the incapacitated individual. However, if the court did not find it appropriate to order that such costs and expenses be paid from the funds of the incapacitated individual, there was a need for specific statutory language and clarity as to who was responsible for such payment.

Section 62‑5‑106. (A) Once a guardian ad litem is appointed by the court, pursuant to Section 62‑5‑303B or Section 62‑5‑403B, the responsibilities and duties of the guardian ad litem include, but are not limited to:

(1) acting in the best interest of the alleged incapacitated individual;

(2) conducting an independent investigation to determine relevant facts and filing a written report with recommendations at least forty‑eight hours prior to the hearing, unless excused or required earlier by the court. The investigation must include items listed in subitems (a) through (i) and also may include items listed in subitems (j) through (m), as appropriate or as ordered by the court:

(a) obtaining and reviewing relevant documents;

(b) meeting with the alleged incapacitated individual, at least once within thirty days following appointment, or within such time as the court may direct;

(c) investigating the residence or proposed residence of the alleged incapacitated individual;

(d) interviewing all parties;

(e) discerning the wishes of the alleged incapacitated individual;

(f) identifying less restrictive alternatives to guardianship and conservatorship;

(g) reviewing a criminal background check on the proposed guardian or conservator;

(h) reviewing a credit report on the proposed conservator;

(i) interviewing the person whose appointment is sought to ascertain the:

(i) proposed fiduciary’s knowledge of the fiduciary’s duties, requirements, and limitations; and

(ii) steps the proposed fiduciary intends to take or has taken to identify and meet the needs of the alleged incapacitated individual;

(j) consulting with persons who have a significant interest in the welfare of the alleged incapacitated individual or knowledge relevant to the case;

(k) contacting the Department of Social Services to investigate any action concerning the alleged incapacitated individual or the proposed fiduciary;

(l) determining the financial capabilities and integrity of the proposed conservator including, but not limited to:

(i) previous experience in managing assets similar to the type and value of the alleged incapacitated individual’s assets;

(ii) plans to manage the alleged incapacitated individual’s assets; and

(iii) whether the proposed conservator has previously borrowed funds or received financial assistance or benefits from the alleged incapacitated individual;

(m) interviewing any persons known to the guardian ad litem having knowledge of the alleged incapacitated individual’s financial circumstances or the integrity and financial capabilities of the conservator, or both, and reviewing pertinent documents;

(3) advocating for the best interests of the alleged incapacitated individual by making specific recommendations regarding resources as may be appropriate and available to benefit the alleged incapacitated individual, the appropriateness of the appointment of a guardian or conservator, and any limitations to be imposed;

(4) avoiding conflicts of interest, impropriety, or self‑dealing. A guardian ad litem shall not accept or maintain appointment if the performance of his duties may be materially limited by responsibilities to another person or by his own interests;

(5) participating in all court proceedings including discovery unless all parties waive the requirement to appear or the court otherwise excuses participation;

(6) filing with the court and delivering to each party a copy of the guardian ad litem’s report; and

(7) moving for any necessary temporary relief to protect the alleged incapacitated individual from abuse, neglect, abandonment, or exploitation, or to address other emergency needs of the alleged incapacitated individual.

(B) Notes of a guardian ad litem are discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

(C) The report of the guardian ad litem shall include all relevant information obtained in his investigation. The report shall contain facts including:

(1) the date and place of the meeting with the alleged incapacitated individual;

(2) a description of the alleged incapacitated individual;

(3) known medical diagnoses of the alleged incapacitated individual including the nature, cause, and degree of the incapacity and the basis for the findings;

(4) description of the condition of the alleged incapacitated individual’s current place of residence including address and factors affecting safety;

(5) identification of persons with significant interest in the welfare of the alleged incapacitated individual;

(6) any prior action by the Department of Social Services or law enforcement concerning the alleged incapacitated individual or the proposed fiduciary of which the guardian ad litem is aware;

(7) a statement as to any prior relationship between the guardian ad litem and the petitioner, alleged incapacitated individual, or other party to the action;

(8) a description of the current care and treatment needs of the alleged incapacitated individual; and

(9) any other information relevant to the matter.

(D) The report shall contain recommendations including:

(1) whether a guardian or conservator is needed;

(2) the propriety and suitability of the proposed fiduciary after consideration of his geographic location, his familial or other relationship, his ability to carry out the duties of the proposed fiduciary, his commitment to promoting the welfare of the alleged incapacitated individual, his financial capabilities and integrity , his potential conflicts of interests, the wishes of the alleged incapacitated individual, and the recommendations of the relatives of the alleged incapacitated individual;

(3) approval or disapproval by the alleged incapacitated individual of the proposed fiduciary;

(4) an evaluation of the future care and treatment needs of the alleged incapacitated individual;

(5) if there is a proposed residential plan for the alleged incapacitated individual, whether that plan is in the best interest of the alleged incapacitated individual;

(6) a recommendation regarding any rights in Section 62‑5‑304A, which should be retained by the alleged incapacitated individual;

(7) whether the matter should be heard in a formal hearing even if all parties are in agreement; and

(8) any other recommendations relevant to the matter.

(E) The court in its discretion may extend or limit the responsibilities or authority of the guardian ad litem.

REPORTER’S COMMENTS

The 2017 amendments were added this section to provide guidance with specificity for the responsibilities and duties of the guardian ad litem as part of the guardianship and conservatorship process to insure that the highest level of integrity and dignity was applied to the process. In doing so, the alleged incapacitated individual’s best interests would be protected to the maximum extent possible while establishing evidence of the alleged incapacitated individual’s capacity to manage his personal and financial matters and at what level he may require assistance or can manage using a less restrictive alternative. These provisions have incorporated some of the previous responsibilities of the visitor in these proceedings. The duties and responsibilities of the guardian ad litem as set forth also provide a paradigm for addressing potential legal issues which may arise in the course of the guardian ad litem’s appointment. Section 62‑5‑106 is also broad enough to allow the court to instruct the guardian ad litem on issues which have not been stated in any of the provisions of this section that could be unforeseen. This section further addresses how hearings should be treated whether in an informal or formal manner, and allows the court discretion in extending or limiting the express authority of a guardian ad litem in conformity with the authority originally granted to the guardian ad litem. The notes of the guardian ad litem are to be treated in the same manner as materials made in preparation for trial and are generally not discoverable unless the party seeking discovery can meet the test. For example, if the guardian ad litem interviewed a neighbor of the alleged incapacitated person, and that neighbor moved out of state before the party had a chance to conduct their own interview, then the party seeking the notes of the interview could potentially show a need for the notes and an inability to get that information except from the guardian ad litem.

Section 62‑5‑107. Unless an order of the court specifies otherwise, a finding of incapacity is not a determination that the protected person or ward lacks testamentary capacity or the capacity to create, amend, or revoke a revocable trust.

REPORTER’S COMMENTS

The 2017 amendments to this section expand former Section 62‑5‑408(4) to clarify that an adjudication of incapacity is not a determination of the protected person’s testamentary capacity and codifies the common law distinction between incapacity and testamentary capacity. See e.g., In re Estate of Weeks, 329 S.C. 251, 495 S.E. 2d 454 (Ct. App. 1997).

In addition, this section authorizes the court to make a specific determination regarding testamentary capacity, but does not address the process for making such a finding. For guidance in application of this section to determinations of capacity relating to wills or trusts see South Carolina Probate Code Sections 62‑2‑501 and 62‑7‑601.

Section 62‑5‑108. (A) The process for emergency orders without notice, emergency hearings, duration, and security is as follows:

(1) Emergency orders without notice must not be issued unless the moving party files a summons, motion for emergency order with supporting affidavit(s), verified pleading, notice of emergency hearing, and any other document required by the court. The verified pleading, motions, and affidavits shall set forth specific facts supporting the allegation that an immediate and irreparable injury, loss, or damage will result before notice can be served on adverse parties and a hearing held pursuant to subsection (B).

(a) If emergency relief is required to protect the welfare of an alleged incapacitated individual, the moving party must present an affidavit from a physician who has performed an examination within thirty days prior to the filing of the action, a motion for the appointment of counsel if counsel has not been retained, and a motion for the appointment of a proposed qualified individual to serve as guardian ad litem.

(b) If the emergency relief requested is an order for:

(i) appointment of a temporary guardian, conservator, guardian ad litem, or other fiduciary; or

(ii) the removal of an existing guardian, conservator, or other fiduciary, and the appointment of a substitute, then the moving party must submit evidence of the suitability and creditworthiness of the proposed fiduciary.

(2) If the motion for an emergency order is not granted, the moving party may seek temporary relief after notice pursuant to subsection (B) or proceed to a final hearing.

(3) If the motion for an emergency order is granted, the date and hour of its issuance must be endorsed on the order. The date and time for the emergency hearing must be entered on the notice of hearing and it must be no later than ten days from the date of the order or as the court determines is reasonable for good cause shown.

(4) The moving party shall serve all pleadings on the alleged incapacitated individual, ward or protected person and other adverse parties immediately after issuance of the emergency order.

(5) If the moving party does not appear at the emergency hearing, the court may dissolve the emergency order without notice.

(6) Evidence admitted at the hearing may be limited to pleadings and supporting affidavits. Upon good cause shown or at the court’s direction, additional evidence may be admitted.

(7) On two days’ notice to the party who obtained the emergency order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move for the emergency order’s dissolution or modification, and in that event, the court shall proceed to hear and determine the motion as expeditiously as possible and may consolidate motions.

(8) No emergency order for conservatorship must be issued except upon the court receiving adequate assurances the assets will be protected, which may include providing of security by the moving party in a sum the court deems proper for costs and damages incurred by any party who without just cause is aggrieved as a result of the emergency order. A surety upon a bond or undertaking submits to the jurisdiction of the court.

(9) The court may take whatever actions it deems necessary to protect assets, including, but not limited to, issuing an order to freeze accounts.

(B) The process for temporary orders and temporary hearings with notice is as follows:

(1) A temporary order must not be issued without notice to the adverse party.

(2) An order for a temporary hearing must not be issued unless the moving party files a summons, motion for temporary hearing with supporting affidavits, and a petition or other appropriate pleading setting forth specific facts supporting the allegation that immediate relief is needed during the pendency of the action, and an affidavit of service of the notice of the temporary hearing to adverse parties.

(a) If temporary relief is required to protect the welfare of an alleged incapacitated individual, in addition to the requirements set forth above in subsection (B)(2), the moving party shall present an affidavit from a physician who has performed an examination within forty‑five days prior to the filing of the action, a motion for the appointment of counsel if counsel has not been retained, and a motion for appointment of a proposed qualified individual to serve as guardian ad litem.

(b) If the temporary relief requested is an order for:

(i) appointment of a temporary guardian, conservator, guardian ad litem, or other fiduciary; or

(ii) removal of an existing guardian, conservator or other fiduciary, and the appointment of a substitute, in addition to the requirements set forth in subsection (B)(2) and (a), as applicable, the moving party shall submit evidence of the suitability and creditworthiness of the proposed fiduciary.

(3) If the motion for temporary relief is not granted, the action will remain on the court docket for a final hearing.

(4) If the motion for temporary relief is granted, the court shall enter a date and time for the temporary hearing on the notice of hearing.

(5) The moving party shall serve pleadings on the alleged incapacitated individual, ward or protected person, and other adverse parties. Service must be made no later than ten days prior to the temporary hearing or as the court determines is reasonable for good cause shown.

(6) Temporary orders resulting from the hearing shall expire six months from the date of issuance unless otherwise specified in the order.

(C) In an emergency, the court may exercise the power of a guardian with or without notice if the court makes emergency findings as required by the Adult Health Care Consent Act, Section 44‑66‑30.

(D) After preliminary hearing upon such notice as the court deems reasonable, and if the petition requests temporary relief, the court has the power to preserve and apply the property of the alleged incapacitated individual as may be required for his benefit or the benefit of his dependents. Notice of the court’s actions shall be given to interested parties as soon thereafter as possible.

(E) A hearing concerning the need for appointment of a permanent guardian must be a hearing de novo as to all issues before the court.

REPORTER’S COMMENTS

The 2017 amendment added this section and was patterned after South Carolina Rule of Civil Procedure 65 and is in Part 1 of Article 5 because it applies to both guardianship and protective proceedings. It distinguishes between the requirements for emergency vis‑à‑vis temporary relief and expands prior statutory counterparts, Section 62‑5‑310 (temporary guardians) and Section 62‑5‑408(1) (permissible court orders for conservatorships). The distinction between the two forms of relief is whether there is a true emergency that supports the issuance of an ex parte order. Such an emergency in the guardianship context might consist of an urgently needed medical procedure where there is no ability for an individual to give informed consent and there is no health care power of attorney in place. In a protective proceeding, it could be needed because of alleged financial malfeasance likely to result in immediate loss of assets.

Both emergency and temporary procedures require the filing of a motion, a summons and petition, and other documents such as a physician’s affidavit. A hearing is also required in both proceedings.

Section 62‑5‑108(A) outlines the procedure to obtain emergency relief without notice to adverse parties. The phrase ‘any other document required by the court’ may include a proposed ex parte order. The moving party must allege specific facts showing the existence of an emergency as defined in Section 62‑5‑101(7), and the pleadings must be served in accordance with the SCRCP immediately after issuance of the ex parte order. An emergency hearing must be held within ten days of issuance of the order or it automatically dissolves absent a showing by the moving party of good cause for its continuation.

Section 62‑5‑108(B) outlines the procedure to obtain temporary relief in a nonemergency and with notice to adverse parties. A temporary order may be required in cases where there is no imminent risk of substantial harm to a person or of substantial economic loss, but action should be taken on an expedited basis. The need may arise if incapacity is expected to be of limited duration, or a currently serving guardian is not adequately performing his duties. The same documents are required as for emergency relief, but the pleadings must be served at least ten days prior to a temporary hearing. A temporary order expires in six months.

In both emergency and temporary situations, the moving party must provide evidence of the creditworthiness of a proposed fiduciary, and the court may take measures it deems appropriate to protect assets, including freezing accounts or requiring bond.

Section 62‑5‑108(C) clarifies that the court may exercise its authority to act as a temporary guardian pursuant to the Adult Health Care Consent Act in an emergency and with or without notice.

Section 62‑5‑108(D) permits certain financial actions on the part of a court‑appointed fiduciary when authorized by the court. When exercising financial powers, the fiduciary should take into account (i) the size of the estate, if known; (ii) the probable duration of the temporary appointment; (iii) the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been protected for him; (iv) the income and reasonable expenses of the protected person and his dependents; and (v) other funds or sources for support of the protected person.

Section 62‑5‑108(E) clarifies that a hearing for a permanent guardian is de novo as to all issues before the court, requiring the same quantum of proof as if no emergency or temporary guardian had been appointed.

Part 2

Jurisdiction

Section 62‑5‑201. Exclusive jurisdiction of the court is set forth in Sections 62‑1‑302 and 62‑5‑701 as to appointment of a guardian or issuance of a protective order. Pursuant to the court’s authority to appoint a guardian, and Section 62‑5‑309, the guardian has the authority to maintain custody of the person of the ward and to establish the ward’s place of abode, unless otherwise specified in the court’s order. The court does not have jurisdiction over the care, custody, and control of the person of a minor, but does have jurisdiction over the property of a minor if the court determines that the minor owns property that requires management or protection.

REPORTER’S COMMENTS

The 2017 amendments revised this section to make the reference to exclusive jurisdiction consistent with Section 62‑1‑302, and as a foundation for distinguishing the probate court’s authority regarding incapacitated adults versus the authority of any other court to make decisions regarding a guardianship for an incapacitated adult, even if that court previously entered a decision regarding the care, custody, and control of the same individual when he was a minor.

Part 3

Guardians of Incapacitated Individuals

Section 62‑5‑301. (A) The parent of an alleged incapacitated individual may by will nominate a guardian for an alleged incapacitated individual. A testamentary nomination by a parent gives the nominee priority pursuant to Section 62‑5‑308 in any proceeding to determine incapacity and appoint a guardian. A testamentary nomination by a parent gives priority to the nominee to make health care decisions for the alleged incapacitated individual pursuant to Section 44‑66‑30. Such nomination creates priority under Sections 62‑5‑308 and 44‑66‑30 when the will is informally or formally probated, if prior to the will being probated, both parents are deceased or the surviving parent is adjudged incapacitated. If both parents are deceased, the nomination by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

(B) The spouse of an alleged incapacitated individual may by will nominate a guardian for an alleged incapacitated individual. A testamentary nomination by a spouse gives the nominee priority pursuant to Section 62‑5‑308 in any proceeding to determine incapacity and appoint a guardian. A testamentary nomination by a spouse gives priority to the nominee to make health care decisions for the alleged incapacitated individual pursuant to Section 44‑66‑30. Such nomination creates priority under Sections 62‑5‑308 and 44‑66‑30 when the will is informally or formally probated. An effective nomination by a spouse has priority over a nomination by a parent unless the nomination is terminated by the denial of probate in formal proceedings.

(C) This State shall recognize a testamentary nomination under a will probated at the testator’s domicile in another state.

REPORTER’S COMMENTS

The 2017 amendments made significant changes to this section. This section now sets forth a procedure by which a testator may nominate a guardian for the testator’s alleged incapacitated adult child or spouse. (Prior law treated the naming of a guardian as an ‘appointment.’) The nominee has priority for appointment similar to priority bestowed on a nominee as personal representative; however, appointment is not automatic. The nominee must file a petition for appointment with the Court, and the Court will follow the usual procedures for vetting the nominee and determining incapacity. The nomination also gives the nominee tertiary priority to make decisions pursuant to the Adult Healthcare Consent Act as set forth in Section 44‑66‑30(A)(3). Based on the facts of the case and the filings of the parties, pursuant to Section 62‑1‑100 of the Probate Code, it is within the discretion of the court to determine whether a testamentary guardian designation in a will executed by a parent or spouse prior to the effective date of this article will fall under the processes and procedures of the 1987 Probate Code or under the process and procedures enacted by the 2017 amendments.

Section 62‑5‑302. Venue for guardianship proceedings is in the place where the alleged incapacitated individual or ward resides or is present. If the alleged incapacitated individual or ward is committed to an institution pursuant to an order of a court of competent jurisdiction, venue also is in the county in which that court sits.

REPORTER’S COMMENTS

No substantive changes were made to Section 62‑5‑302 in 2017. The 2017 amendments made the section consistent with changes in the definitions and choice of words throughout Part 3 and Part 4.

Section 62‑5‑303. (A) A person seeking a finding of incapacity, appointment of a guardian, or both, must file a summons and petition. When more than one petition is pending in the same court, the proceedings may be consolidated.

(B) The petition shall set forth, to the extent known or reasonably ascertainable, the following information:

(1) interest of the petitioner;

(2) name, age, current address, and contact information of the alleged incapacitated individual, who must be designated as a respondent;

(3) physical location of the alleged incapacitated individual during the six‑month period immediately preceding the filing of the summons and petition; and, if the alleged incapacitated individual was not physically present in South Carolina for that period, sufficient information upon which the court may make a determination that it has initial jurisdiction pursuant to Section 62‑5‑707;

(4) to the extent known and reasonably ascertainable, the names and addresses of the following persons, who must be designated as corespondents:

(a) the alleged incapacitated individual’s spouse and adult children; or, if none, his parents; or, if none, at least one of his adult relatives within the nearest degree of kinship;

(b) a person known to have been appointed as agent for the alleged incapacitated individual under a general durable power of attorney or health care power of attorney;

(c) a person who has equal or greater priority for appointment pursuant to Section 62‑5‑308 as the person whose appointment is sought in the petition; and

(d) a person, other than an unrelated employee or health care worker, who is known or reasonably ascertainable by the petitioner to have materially participated in caring for the alleged incapacitated individual within the six‑month period preceding the filing of the petition;

(5) name and address of the proposed guardian and the basis of his priority for appointment;

(6) reasons why a guardianship is necessary, including why less restrictive alternatives are not available or appropriate, and a brief description of the nature and extent of the alleged incapacity;

(7) a statement of any rights that a petitioner is requesting be removed from the alleged incapacitated individual, any restrictions to be placed on the alleged incapacitated individual, and any restrictions sought to be imposed on the guardian’s powers and duties; and

(8) to the extent known and reasonably ascertainable, a general statement of the alleged incapacitated individual’s assets, with an estimate of value, and the source and amount of any income of the alleged incapacitated individual.

REPORTER’S COMMENTS

In the 2017 amendments, Section 62‑5‑101 bases the definition of incapacity on functional abilities, recognizing a person may have the capacity to do some things while needing help with others. Sections 62‑5‑303 through 62‑5‑303D identify the procedural steps that must be followed so the court has an adequate basis for determining the extent of incapacity, the appropriate person to appoint, and what powers should be vested in or limitations placed upon the guardian.

Pursuant to Section 62‑5‑303(A), every petitioner requesting appointment must file a separate summons and petition and pay the filing fee; the filing of a counterclaim requesting appointment of a different person in response to a previously filed petition is not sufficient to effectuate an appointment. This is because a counterclaim typically seeks relief against an adverse party, and in a guardianship proceeding the relief sought is not solely against an adverse party, but also against an alleged incapacitated individual. This is analogous to Section 62‑3‑401 which requires the filing of a summons and petition and the payment of a filing fee by each person asking to be formally appointed as personal representative of an estate. See also Section 8‑21‑770(11).

In order to make an informed decision, the court must have as much information as possible. Section 62‑5‑303(B) specifies the data which must be included in each petition including the persons to be named as corespondents. The purpose of Section 62‑5‑303(B)(4)(d) is to provide notice to persons who may be likely to have an interest in protecting the alleged incapacitated individual even though they are not family members. The petition also must include a statement as to why less restrictive alternatives such as limited guardianships are or are not sufficient, and requires the enumeration of rights to be removed.

Section 62‑5‑303A. (A) As soon as reasonably possible after the filing of the summons and petition, the petitioner shall serve:

(1) a copy of the summons, petition, and a notice of right to counsel upon the alleged incapacitated individual;

(2) a copy of the summons and petition upon all corespondents and the petitioner in any pending guardianship proceeding; and

(3) any affidavits or physician’s reports filed with the petition.

(B) If service is not accomplished within one hundred twenty days after the filing of the action, the court may dismiss the action without prejudice.

(C) The notice of right to counsel shall advise the alleged incapacitated individual of the right to counsel of his choice and shall state that if the court has not received notice of appearance by counsel selected by the alleged incapacitated individual within fifteen days from the filing of proof of service, the court will appoint counsel. In appointing counsel, the court shall consider the expressed preferences of the alleged incapacitated individual.

(D) The date for the alleged incapacitated individual to file a responsive pleading shall run from the later of the date the court appoints counsel for the alleged incapacitated individual or from the date the court receives notice of appearance by counsel selected by the alleged incapacitated individual.

REPORTER’S COMMENTS

Sections 62‑5‑303A(A) and 62‑5‑303A(B) specify that the alleged incapacitated individual and the persons named as corespondents pursuant to Section 62‑5‑303(B)(4) must be served within one hundred twenty days of filing or the action may be dismissed without prejudice. SCRCP 5(d) requires the filing of proof of service of the summons and petition within ten days of service.

With the 2017 amendments, Section 62‑5‑303A(A) requires that the alleged incapacitated individual be served with notice that he has the right to hire counsel, and Section 62‑5‑303A(C) requires a lawyer to be appointed by the court within fifteen days of receipt of proof of service unless the court receives a notice of appearance from private counsel hired by the alleged incapacitated individual. An alleged incapacitated individual may have prior experience with an attorney who he prefers to retain, and this section specifies the privately retained attorney must enter an appearance within fifteen days of filing of the proof of service of the summons and petition.

The time for filing a responsive pleading runs from the later of the date the court appoints counsel or private counsel files a notice of appearance.

Personal service of the summons and petition on the alleged incapacitated individual is required, and failure to personally serve him is jurisdictional.

Section 62‑5‑303B. (A) Upon receipt by the court of proof of service of the summons, petition, and notice of right to counsel upon the alleged incapacitated individual, the court shall:

(1) upon the expiration of fifteen days from filing the proof of service on the alleged incapacitated individual, if no notice of appearance has been filed by counsel retained by the alleged incapacitated individual, appoint counsel;

(2) no later than thirty days from the filing of the proof of service on the alleged incapacitated individual, appoint:

(a) a guardian ad litem for the alleged incapacitated individual who shall have the duties and responsibilities set forth in Section 62‑5‑106; and

(b) one examiner, who must be a physician, to examine the alleged incapacitated individual and file a notarized report setting forth his evaluation of the condition of the alleged incapacitated individual in accordance with the provisions set forth in Section 62‑5‑303D. Unless the guardian ad litem or the alleged incapacitated individual objects, if a physician’s notarized report is filed with the petition and served upon the alleged incapacitated individual and all interested parties with the petition, then the court may appoint such physician as the examiner. Upon the court’s own motion or upon request of the initial examiner, the alleged incapacitated individual, or his guardian ad litem, the court may appoint a second examiner, who must be a physician, nurse, social worker, or psychologist.

(B) At any time during the proceeding, if requested by a guardian ad litem who is not an attorney, the court may appoint counsel for the guardian ad litem.

(C) At the attorney’s discretion, the attorney for the alleged incapacitated individual may file a motion requesting that the court relieve him as the attorney if the alleged incapacitated individual is incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences regarding the appointment of a guardian. The attorney must file an affidavit in support of the motion. If the court is satisfied that the alleged incapacitated individual is incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences regarding the appointment of a guardian, then the court may relieve the attorney from his duties as attorney for the alleged incapacitated individual. If the former attorney requests to be appointed as the guardian ad litem, the court may appoint him to serve as the guardian ad litem. An attorney cannot serve as both an attorney and as a guardian ad litem in a guardianship action.

REPORTER’S COMMENTS

The 2017 amendments combined the roles of the guardian ad litem and visitor, and the guardian ad litem is not required to be an attorney. The duties and reporting requirements for guardians ad litem are clarified in Section 62‑5‑106. Because the guardian ad litem is not necessarily an attorney and because of an inherent conflict between the duties of a guardian ad litem and those of an attorney advocating for his client, the 2017 amendments note that counsel appointed by the court, or private counsel hired by the alleged incapacitated individual in lieu of appointed counsel, were essential to insure due process. Alleged incapacitated individuals are often vulnerable and may not have an adequate understanding of the proceeding or its consequences.

The 2017 amendments are an important departure from the prior statute, Section 62‑5‑303(b), which required the appointment of a lawyer “who then has the powers and duties of a guardian ad litem.” Traditionally, a guardian ad litem not only has a duty to the alleged incapacitated individual but also a duty to the court to discern and report what is in the best interest of the individual regardless of the individual’s preferences, although by statute those preferences must be considered by the court. With the 2017 amendments, the alleged incapacitated individual must have a lawyer who argues for the individual’s expressed wishes regardless of what may be in his best interests, and a guardian ad litem who acts as the eyes and ears of the court to discern the best outcome for the alleged incapacitated individual and to advise the court thereof.

Sections 62‑5‑303B(A)(1) and (2) set forth specific time lines for appointments of counsel, guardians ad litem and an examiner. The appointment of counsel (or the hiring of counsel by the alleged incapacitated individual) must occur within fifteen days after filing of proof of service of the summons and petition with the court, and the guardian ad litem and examiner are to be appointed within thirty days after filing of the proof of service. A party may recommend a guardian ad litem and the court may accept or reject the recommendation, but best practices may require that the court independently select the guardian ad litem.

The imposition of a guardianship should be based on competent evidence of incapacity. Evidentiary rules must be enforced to insure due process. To obtain competent evidence, the court should allow the admission of evidence from professionals and experts whose training qualifies them to assess the physical and mental condition of the respondent.

The requirement of only one examiner is a departure from prior statute. Pursuant to Section 62‑5‑303B(A)(2)(b), the examiner must be a physician. Although a physician may provide valuable information, incapacity is a multifaceted issue and the court may consider using, in addition to the physician, other professionals whose expertise and training give them greater insight into incapacity. The court on its own motion or if requested by the initial examiner, the guardian ad litem, or the alleged incapacitated individual, may appoint a second examiner. The second examiner is not required to be a physician, but if not should be a nurse, social worker, or psychologist. A qualified examiner’s additional experience in physical and occupational therapy, developmental disabilities or habilitation and community mental health may also be helpful, though it is not required.

The purpose of the examiner’s evaluation is to provide the court with an expert opinion of the alleged incapacitated individual’s abilities and limitations, and will be crucial to the court in establishing a full or limited guardianship. The report should include as assessment of the alleged incapacitated individual’s treatment plan, if any, the date of the evaluation, and a summary of the information received and upon which the examiner relied.

Section 62‑5‑303B(C) contemplates situations where an alleged incapacitated individual is unable to communicate with counsel and, therefore, counsel is unable to advocate for the expressed wishes of the alleged incapacitated individual. The attorney must file an affidavit with the motion that documents the efforts made by the attorney to communicate with the alleged incapacitated individual and the basis for the attorney’s conclusion that the alleged incapacitated individual is incapable of communicating. The court must independently determine whether the interests of the respondent are adequately represented, and may require independent counsel for the alleged incapacitated individual at any time in the proceedings.

Section 62‑5‑303C. (A) As soon as the interests of justice may allow, but after the time for filing a response to the petition has elapsed as to all parties, the court shall hold a hearing on the merits of the petition. The alleged incapacitated individual, all parties, and any person who has filed a demand for notice, shall be given notice of the hearing. The alleged incapacitated individual is entitled to be present at the hearing, to conduct discovery, and to review all evidence bearing upon his condition. The hearing may be closed at the request of the alleged incapacitated individual or his guardian ad litem. The alleged incapacitated individual may waive notice of a hearing and his presence at the hearing. If there is an agreement among all the parties and the guardian ad litem’s report indicates that a hearing would not further the interests of justice, the alleged incapacitated individual may waive his right to a hearing. If the alleged incapacitated individual waives his right to a hearing, the court may:

(1) require a formal hearing;

(2) require an informal proceeding as the court shall direct; or

(3) proceed without a hearing.

(B) If no formal hearing is held, the court shall issue a temporary consent order, which shall expire in thirty days. A ward, under a temporary order, may request a formal hearing at any time during the thirty‑day period. At the end of the thirty‑day period, if the ward has not requested a formal hearing, the court shall issue an order upon such terms agreed to by the parties and the guardian ad litem.

REPORTER’S COMMENTS

The 2017 amendments to Section 62‑5 ‑303C expands upon former Section 62‑5‑309(B) which specified to whom notice of hearing should be given. As in the prior statute, notice of hearing shall be given or waived in accordance with Sections 62‑1‑401 and 62‑1‑402.

Section 62‑5‑303C(A) states that a hearing must be held after the time for all parties to file responsive pleadings has elapsed. Unlike previous law, the term ‘party’ is now defined in Section 62‑5‑101(16) and the court may allow certain designated individuals, and any person or party it deems appropriate, to participate in the proceedings. The alleged incapacitated individual and the proposed guardian should attend the hearing unless excused by the court for good cause. The hearing may be closed at the request of counsel for the alleged incapacitated individual or his guardian ad litem.

Section 62‑5‑303C(A) also states that any person who has filed a demand for notice must be given notice of hearing. In the estate context, Section 62‑3‑204 allows ‘interested persons’ to file demands for notice so by analogy, a person must fit within that definition in order to have standing to file a demand for notice pursuant to Article 5.

The alleged incapacitated individual is entitled to receive notice and be present at the hearing. The notice to the alleged incapacitated individual should be given in plain language, and should state the time and place of the hearing, the nature and possible consequences of the hearing, and the respondent’s rights.

Subsection 62‑5‑303C(A) also provides the alleged incapacitated individual may waive the notice of hearing, attendance at the hearing, and if the parties all agree and the guardian ad litem’s report indicates a hearing would not further the interests of justice, the requirement of a hearing. Even if the hearing is waived, however, the court may schedule either an informal or a formal hearing. The hearing, whether informal or formal, should be recorded.

Subsection 62‑5‑303C(B) provides that if no hearing is held, a thirty‑day temporary consent order may be issued. The purpose of the thirty‑day delay is to give the ward an opportunity to request a formal hearing and if none is requested, the court shall issue a permanent consent order.

The purpose of the language allowing waivers of hearing and the issuance of thirty‑day consent orders is to reduce costs, but only where possible to do so fairly and without jeopardizing the due process rights of the alleged incapacitated individual. The court should scrutinize any waivers of notice and hearing closely to insure that they are willingly and voluntarily given.

Section 62‑5‑303D. (A) Each examiner shall complete a notarized report setting forth an evaluation of the condition of the alleged incapacitated individual. The original report must be filed with the court by the court’s deadline, but not less than forty‑eight hours prior to any hearing in which the report is introduced as evidence. For good cause, the court may admit an examiner’s report filed less than forty‑eight hours prior to the hearing. All parties are entitled to review the reports after filing, which must be admissible as evidence. The evaluation shall contain, to the best of the examiner’s knowledge and belief:

(1) a description of the nature and extent of the incapacity, including specific functional impairments;

(2) a diagnosis and assessment of the alleged incapacitated individual’s mental and physical condition, including whether he is taking any medications that may affect his actions;

(3) an evaluation of the alleged incapacitated individual’s ability to exercise the rights set forth in Section 62‑5‑304A;

(4) when consistent with the scope of the examiner’s license, an evaluation of the alleged incapacitated individual’s ability to learn self‑care skills, adaptive behavior, and social skills, and a prognosis for improvement;

(5) the date of all examinations and assessments upon which the report is based;

(6) the identity of the persons with whom the examiner met or consulted regarding the alleged incapacitated individual’s mental or physical condition; and

(7) the signature and designation of the professional license held by the examiner.

(B) Unless otherwise directed by the court, the examiner may rely upon an examination conducted within the ninety‑day period immediately preceding the filing of the petition. In the absence of bad faith, an examiner appointed by the court pursuant to Section 62‑5‑303B, is immune from civil liability for breach of patient confidentiality made in furtherance of his duties.

REPORTER’S COMMENTS

The 2017 amendments to this section expand upon former Section 62‑5‑303 in regard to the examiner’s duties, the content and timing of the examiner’s report, and the immunity of the examiner from civil liability.

Section 62‑5‑303D(A) provides for the prompt submission of the report to the court, and clarifies that the report should be made available to all parties. The court need not base its findings and order on the oral testimony of the professionals in every case, but has discretion to require the examiner to appear. In particular, where a party objects to the examiners’ opinions, the professional should appear to testify and be available for cross‑examination because the South Carolina Rules of Evidence may limit the fact finder’s ability to rely on a written report.

Subsection (A) also prescribes the content of the examiner’s report, the purpose of which is to evaluate the functional limitations of the alleged incapacitated individual. Among the factors to be addressed are a diagnosis of the level of functioning and assessment of the alleged incapacitated individual’s current condition and prognosis, the degree of personal care the alleged incapacitated individual can manage alone, an evaluation of the individual’s ability to exercise the rights outlined in Section 62‑5‑304A, and whether current medication affects the individual’s demeanor or ability to participate in the proceedings. It should include the dates of all examinations.

Section 62‑5‑303D(B) requires the report or reports to be completed based upon examinations that occurred within the preceding ninety days prior to the filing of the petition, unless otherwise ordered by the court, and explicitly protects the examiner from civil liability for breach of the duty of patient confidentiality.

Section 62‑5‑304. (A) The court shall exercise its authority to encourage maximum self‑reliance and independence of the incapacitated individual and issue orders only to the extent necessitated by the incapacity of the individual.

(B) The court may appoint a guardian if clear and convincing evidence shows that the individual is incapacitated and the appointment of a guardian is necessary to provide continuing care and supervision of the incapacitated individual. The court may:

(1) enter an appropriate order;

(2) treat the petition as one for a protective order and proceed accordingly; or

(3) dismiss the proceeding.

(C) The court may appoint co‑guardians if the appointment is in the best interest of the incapacitated individual. The compensation of co‑guardians in the aggregate shall not exceed the compensation that would have been allowed to a sole guardian. Unless the order of appointment provides otherwise:

(1) each co‑guardian has authority to act independently; and

(2) if a co‑guardian dies, the other co‑guardian has continuing authority to act alone.

(D) The court, on its own motion or on the petition or motion of the incapacitated individual or other interested person, may limit the powers of a guardian and create a limited guardianship. A limitation on the statutory power of a guardian of an incapacitated individual shall be endorsed on the guardian’s letters. A limitation may be removed, modified, or restored pursuant to Sections 62‑5‑307 and 62‑5‑307A.

(E) Unless the court order specifies otherwise:

(1) appointment of a guardian terminates an agent’s powers under a health care power of attorney or durable power of attorney for matters within the scope of the guardianship; and

(2) the guardian shall act consistently with the most recent advance directive executed by the ward prior to an adjudication of incapacity.

REPORTER’S COMMENTS

Consistent with the former version of this section, the 2017 amendments require that guardianship be limited to ensure maximum independence of the alleged incapacitated individual. However, the 2017 amendments made multiple changes to provide the tools needed to ensure that the only rights that are removed from the ward are those that are justified by the ward’s incapacity and necessary for the ward’s health, safety, and welfare. Therefore, a guardianship should be limited to address the ward’s incapacity, which is defined in Section 62‑5‑101(13). An individual with supports and assistance reasonably available to ensure health, safety, and welfare and to manage property would not need those rights removed which have already been addressed. Supports and assistance, defined in Section 62‑5‑101(23), includes both advance planning and reasonable accommodations that allow the individual to act on their own behalf. For example, an individual who has addressed end of life decisions in advance of his incapacity through a duly executed Declaration of Desire for Natural Death, living will, or an agent named under a health care power of attorney, does not need a guardian to be appointed for the purpose of end of life decisions. End of life decisions made by the individual in advance should not be overruled through the guardianship process. In contrast, if an individual has a Health Care Power of Attorney, but the agent is unavailable or unable to act on the individual’s behalf, then that support is unavailable, and if the individual is incapacitated, guardianship would be appropriate to address health care needs.

Sections 62‑5‑304 and 62‑5‑404 both establish a clear and convincing evidence burden of proof, which is on the petitioner. Only if the evidence demonstrates that the alleged incapacitated individual is incapacitated and that the appointment is necessary for the alleged incapacitated individual to receive needed care, should the court move forward with an appointment. In this section, the court may “enter an appropriate order,” which may be a single transaction order, similar to the type of single transaction order that was previously only available in protective proceedings.

The appointment of a single guardian is traditional and will be the most appropriate result for most incapacitated individuals. However, there are circumstances in which co‑guardianship may be preferable. In those cases, unless the order specifies otherwise, each co‑guardian can act independently and a surviving co‑guardian will be the successor guardian. As an alternative, a primary decision maker may be agreed upon by the co‑guardians and recognized by the court. The decision of a primary decision maker, if one has been designated, shall control in the event of a conflict between co‑guardians.

The ability for the court to create a limited guardianship not only continues, but is required if it is the less restrictive alternative to maximize self‑reliance and independence.

Unless the order states otherwise, the appointment of a guardian terminates an agent’s powers under a power of attorney for matters within the scope of the guardianship. However, the guardian is to act consistently with any expressed wishes in the ward’s most recent advance directive, executed prior to adjudication of incapacity.

Section 62‑5‑304A. (A) The court shall set forth the rights and powers removed from the ward. To the extent rights are not removed, they are retained by the ward. Such rights and powers include the rights and powers to:

(1) marry or divorce;

(2) reside in a place of the ward’s choosing, and consent or withhold consent to any residential or custodial placement;

(3) travel without the consent of the guardian;

(4) give, withhold, or withdraw consent and make other informed decisions relative to medical, mental, and physical examinations, care, treatment and therapies;

(5) make end‑of‑life decisions including, but not limited to, a ‘do not resuscitate’ order or the application of any medical procedures intended solely to sustain life, and consent or withhold consent to artificial nutrition and hydration;

(6) consent or refuse to consent to hospitalization and discharge or transfer to a residential setting, group home, or other facility for additional care and treatment;

(7) authorize disclosures of confidential information;

(8) operate a vehicle;

(9) vote;

(10) be employed without the consent of a guardian;

(11) consent to or refuse educational services;

(12) participate in social, religious or political activities;

(13) buy, sell, or transfer real or personal property or transact business of any type including, but not limited to, those powers conferred upon the conservator under Section 62‑5‑422;

(14) make, modify, or terminate contracts;

(15) bring or defend any action at law or equity; and

(16) any other rights and powers that the court finds necessary to address.

(B) The court shall set forth the rights and powers vested in the guardian. These rights and powers include, but are not limited to, the rights and powers to:

(1) determine the place where the ward shall reside and consent or withhold consent to any residential or custodial placement;

(2) consent to travel;

(3) consent or refuse to consent to visitation with family, friends and others;

(4) give, withhold, or withdraw consent and make other informed decisions relative to medical, mental, and physical examinations, care, treatment and therapies;

(5) make end‑of‑life decisions, including, but not limited, to a ‘do not resuscitate’ order or the application of any medical procedures intended solely to sustain life, and consent or withhold consent to artificial nutrition and hydration;

(6) consent or refuse to consent to hospitalization and discharge or transfer to a residential setting, group home, or other facility for additional care and treatment;

(7) authorize disclosures of confidential information;

(8) consent to or refuse educational services;

(9) consent to employment;

(10) make, modify, or terminate contracts related to the duties of the guardian;

(11) bring or defend any action at law or equity; and

(12) exercise any other rights and powers that the court finds necessary to address.

(C) Nothing in this section must be construed as removing any rights guaranteed by the Bill of Rights for Residents of Long‑Term Care Facilities under Chapter 81, Title 44.

(D) The attorney‑client privilege between the ward and the ward’s counsel must not be removed by the appointment of a guardian.

REPORTER’S COMMENTS

In order to ensure due process, the rights which may be removed from the ward as outlined in the code, must be included in the petition (Section 62‑5‑303(B)(7)), evaluated by the designed examiner (Section 62‑5‑303D), and listed in the report of the guardian ad litem (Section 62‑5‑106(D)(6)). Each guardianship order should be tailored based upon the list of rights in this section. The court should remove only those rights which the ward is incapable of exercising, with or without supports and assistance, and which must be removed for the well‑being of the ward. If the ward is capable of exercising any of the rights, then they should not be removed. The right to vote is fundamental to our democracy and should not be removed unless clear and convincing evidence establishes that the individual is unable to exercise a choice, with or without supports and assistance. If end of life decisions have been made by the ward through a duly executed Declaration of Desire for Natural Death, or living will, then that right should not be removed from the ward or vested in the guardian.

The 2017 amendments require the court to set forth the rights removed from the ward, and among those rights removed, which rights are vested in the guardian. Some rights can be removed, but should not be vested in the guardian. For example, a ward may lose the right to vote, but the guardian cannot be vested with that right and vote on behalf of the ward. In that situation, the right is simply removed.

With regard to end‑of‑life decisions, if that right is vested in the guardian, the guardian must act consistently with the most recent advance directive executed by the ward prior to the adjudication of incapacity, pursuant to Section 62‑5‑304A.

The 2017 amendments added a reference to the Bill of Rights for Residents of Long‑Term Care Facilities to clarify that the rights guaranteed in those sections of the code cannot be removed by the guardian, such as the right to participate in social and religious activities.

Section 62‑5‑304A(D) specifies that the appointment of a guardian does not remove the ward’s right to have confidences be kept by the ward’s counsel.

Section 62‑5‑305. By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding must be given or waived pursuant to Sections 62‑1‑401 and 62‑1‑402.

REPORTER’S COMMENTS

The 2017 amendment revised this section by adopting the notice and waiver requirements in Sections 62‑1‑401 and 62‑1‑402.

Section 62‑5‑306. (A) Upon the death of the ward, the guardian shall notify the court and file a death certificate confirming the ward’s death. The court may then issue an order terminating the guardianship and the appointment of the guardian.

(B) If there is no conservatorship for the ward, the guardian may file an application for specific authority to use the ward’s funds for the final disposition of the ward’s remains. If the application is granted by the court, the guardian shall file an accounting of those funds within ten days from the date of approval, along with a proof of delivery showing he has delivered a copy of the accounting to the last known address of the person named as Personal Representative in the ward’s will. If the guardian cannot locate the will after reasonable effort, he shall send a copy of the accounting to the last known address for at least one of the ward’s closest adult relatives. Upon approval of the accounting, the court will issue an order terminating the guardianship and the appointment.

(C) Termination of the appointment does not affect the guardian’s liability for prior acts nor his obligation to account for any funds or assets of the ward.

REPORTER’S COMMENTS

The 2017 amendments clarify the procedure for terminating a guardianship upon the death of the ward. The guardian must notify the court of the ward’s death and file a death certificate with the court. Subsection (B) has been added to give the guardian the ability to seek approval of use of the ward’s funds for final disposition of the ward’s remains when no conservator has been appointed.

Section 62‑5‑307. (A) The ward or another person interested in his welfare, may make an informal request for relief by submitting a written request to the court. The court may take such action as considered reasonable and appropriate to protect the ward.

(B) A person making an informal request submits personally to the jurisdiction of the court.

REPORTER’S COMMENTS

This section was added in 2017 to allow the court to respond to concerns of the ward or another person interested in his welfare without requiring filing of a formal action. It mirrors Section 62‑5‑413. The court may dismiss an informal request for relief. If readjudication is requested informally and the court denies the request, a formal petition for readjudication must be heard pursuant to Section 62‑5‑307A. The 2017 amendment reflects a change from the 2010 revision, which required the court to hear an informal request made by the ward.

Section 62‑5‑307A. (A) Upon filing of a summons and petition with the appointing court, the ward or any person interested in his welfare may, for good cause, request an order to:

(1) prove by a preponderance of the evidence that the ward is no longer incapacitated. The petition may request a court order limiting the scope of the guardianship and the authority of the guardian or a termination of the guardianship and the appointment of the guardian. The court may specify a minimum period, not exceeding one year, during which no application or petition for readjudication may be filed without leave of court;

(2) appoint a successor guardian due to death, incapacity, resignation, or dereliction of duty of the guardian. The appointment of a successor guardian does not affect the guardian’s liability for prior acts nor his obligation to account for any funds or assets of the ward. The petition shall name a willing and qualified person to serve as successor guardian in the petition or set forth why no such successor is available; or

(3) modify the provisions of an existing court order.

(B) After filing and service of the summons and petition, the court may appoint a guardian ad litem and may appoint counsel for the ward, unless the ward has private counsel, and such examiners as are needed to evaluate and confirm the allegations of the petition.

(C) On its own motion, the court may initiate appropriate proceedings under this section as considered necessary to promote the best interests of the ward.

(D) An attorney who has been asked by the ward to represent him in an action under this section may file a motion with the court for permission to represent the ward.

REPORTER’S COMMENTS

The 2017 amendments expand upon former Section 62‑5‑307 to set forth specific procedures for requesting relief subsequent to the appointment of a guardian. In an action to have a ward determined to have regained capacity, the petitioner has the burden to prove by a preponderance of the evidence that the ward has regained capacity such that a guardian is no longer needed or that a limited guardianship is appropriate. In contrast, the evidentiary standard for the initial adjudication of incapacity is by clear and convincing evidence, thus giving more protection to the individual’s liberty rights.

Prior to the 2017 amendments, the law required that a visitor be appointed before the court could act on a petition or request; this section now gives the court discretion to appoint counsel and a guardian ad litem. In exercising its discretion to appoint counsel or a guardian ad litem, the court should consider the type of relief requested in the petition, the facts of the case, and the likelihood that the ward’s rights may not be represented or protected. Additionally, the ward may retain his own counsel, and that attorney may file a motion for the court to represent the ward.

When the court is evaluating capacity, the court may exercise its discretion in appointing examiners to provide opinions regarding the ward’s abilities.

The court may allow any of the actions under Section 62‑5‑307A to be treated as an informal request as set forth in Section 62‑5‑307.

Section 62‑5‑308. (A) In appointing a guardian, the court shall consider persons who are otherwise qualified in the following order of priority:

(1) a person previously appointed guardian, other than a temporary or emergency guardian, currently acting for the ward in this State or elsewhere;

(2) a person nominated to serve as guardian by the alleged incapacitated individual if he has sufficient mental capacity to make a reasoned choice;

(3) an agent designated in a power of attorney by the alleged incapacitated individual, whose authority includes powers relating to the care of the alleged incapacitated individual;

(4) the spouse of the alleged incapacitated individual or a person nominated as testamentary guardian in the will of the alleged incapacitated individual’s deceased spouse;

(5) an adult child of the alleged incapacitated individual;

(6) a parent of the alleged incapacitated individual or a person nominated as testamentary guardian in the will of the alleged incapacitated individual’s deceased parent;

(7) the person nearest in kinship to the alleged incapacitated individual who is willing to accept the appointment;

(8) a person with whom the alleged incapacitated individual resides outside of a health care facility, group home, homeless shelter, or prison;

(9) a person nominated by a health care facility caring for the alleged incapacitated individual; and

(10) any other person considered suitable by the court.

(B) A person whose priority is based upon his status under subsections (A)(1), (3), (4), (5), (6), or (7) may nominate in writing a person to serve in his or her stead. With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian. The court, acting in the best interest of the alleged incapacitated individual, may decline to appoint a person having higher priority and appoint a person having lesser priority or no priority.

(C) Other than as provided in Section 62‑5‑108, a probate judge or an employee of the court shall not serve as a guardian of a ward; except, a probate judge or an employee of the court may serve as a guardian of a family member if such service does not interfere with the proper performance of the probate judge’s or the employee’s official duties. For purposes of this subsection, ‘family member’ means a spouse, parent, child, brother, sister, niece, nephew, mother‑in‑law, father‑in‑law, son‑in‑law, daughter‑in‑law, grandparent, or grandchild.

REPORTER’S COMMENTS

This section sets forth the priority of who may be appointed guardian and provides the standards to be utilized in appointing those of equal or lesser priority. A ‘person’ is defined in Section 62‑5‑101(17), and may include a suitable entity as noted.

Section 62‑5‑309. (A) Subject to the rights and powers retained by the ward and except as modified by order of the court, the guardian has the following duties, rights, and powers:

(1) to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, maintaining custody of the ward and the ability to establish the ward’s place of abode within or without this State;

(2) if entitled to custody of his ward, providing for the care, comfort, and maintenance of the ward; the guardian is entitled to receive reasonable compensation for his services and for room and board furnished to the ward as approved by the court;

(3) arranging for appropriate habilitation and rehabilitation services and educational, social, and vocational services to assist the ward in the development of maximum self‑reliance and independence;

(4) taking reasonable care of his ward’s clothing, furniture, vehicles, and other personal effects, and commencing protective proceedings if other property of his ward is in need of protection;

(5) providing any consents, denials, or approvals necessary to enable the ward to receive or refuse to receive medical or other professional care, counsel, treatment, or service, including institutional care. If there is no conservator and placement or care of the ward requires the execution of an admission agreement or other documents for the ward’s placement in a facility, the guardian may execute such documents on behalf of the ward, without incurring personal liability;

(6) if no conservator for the estate of the ward is appointed or if the guardian is also conservator:

(a) instituting proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;

(b) receiving money and tangible property deliverable to the ward and applying the money and property for support, care, and education of the ward; however, he may not use funds from his ward’s estate for room and board or services that he, his spouse, parent, or child have furnished the ward unless a charge for the services or room and board is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. He must exercise care to conserve any excess for the ward’s needs; and

(c) exercising the ward’s rights as trust beneficiary to the extent provided in Article 7, Title 62;

(7) reporting the condition of his ward and of the estate that has been subject to his possession or control to the court, as required by the court or court rule, but at least on an annual basis;

(8) if a conservator has been appointed:

(a) paying over to the conservator all of the ward’s estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward and accounting to the conservator for funds expended; and

(b) requesting the conservator to expend the ward’s estate by payment to the guardian or to third persons or institutions for the ward’s care and maintenance;

(9) if co‑guardians have been appointed, keeping the other co‑guardian informed of all relevant information regarding the care and custody of the ward, including, but not limited to, the identity of the ward’s care providers, medical providers, or similar professionals and informing the other co‑guardian when scheduling medical appointments for the ward; and

(10) exercising any other power, right, or duty ordered by the court.

(B) A guardian, within thirty days of his appointment, shall file a plan of care. The plan must be based on the actual needs of the ward, taking into consideration the best interest of the ward. The guardian shall revise the plan as the needs and circumstances of the ward require. The guardian shall include in the plan a statement of the extent to which the ward may be able to develop or recover ability for independent decision making and any proposed steps to develop or restore the ward’s ability for independent decision making. The court shall approve, disapprove, or modify the plan in informal or formal proceedings, as the court deems appropriate. Nothing herein shall require the court to oversee the plan of care.

(C) A guardian, by a properly executed special power of attorney, may delegate to another person, for a period not to exceed sixty days, any of his powers regarding the care and custody of the ward. The original power of attorney must be filed with the court having jurisdiction over the guardianship.

(D) A guardian is not legally obligated to provide for the ward from the guardian’s funds solely by reason of his appointment as guardian.

(E) A guardian is not liable to a third person for acts of the ward solely by reason of the guardianship relationship and is not liable for injury to the ward resulting from the wrongful conduct of a third person providing medical or other care, treatment or service for the ward except to the extent that the guardian failed to exercise reasonable care in choosing the provider.

REPORTER’S COMMENTS

The 2017 amendments expand upon former Sections 62‑5‑104 and 62‑5‑312.

Section 62‑5‑309(A)(2) allows for compensation to the guardian pursuant to Uniform Guardianship and Protective Proceedings Act (UGPPA) 5‑316(a) (1997). Subsection 62‑5‑316(a) supports the proposition that a guardian has a right to reasonable compensation. If there is a conservator appointed, the conservator, without the necessity of prior court approval, may pay the guardian reasonable compensation as well as reimburse the guardian for room, board and clothing the guardian has provided to the ward. However, if the court determines that the compensation paid to the guardian is excessive or the expenses reimbursed were inappropriate, the court may order the guardian to repay the excessive or inappropriate amount to the estate. If there is no conservator, the guardian must file a fee petition.

Section 62‑5‑309(A)(3) authorizes and encourages the guardian to facilitate the ward in taking steps toward self‑reliance and independence.

Section 62‑5‑309(A)(4) addresses the guardian’s duties to take reasonable care of the ward’s personal effects.

Section 62‑5‑309(A)(5) expands the guardian’s authority to execute documents on behalf of the ward if no conservator is in place.

Section 62‑5‑309(A)(6)(c) allows the guardian to exercise the ward’s rights as trust beneficiary to the extent provided in Article 7, Title 62.

Section 62‑5‑309(A)(8)(a) and (b) replaces former Section 62‑5‑312(a)(6) and (b).

Section 62‑5‑309(A)(9) is new to the 2017 amendments.

Section 62‑5‑309(A)(10) is new to the 2017 amendments and allows authorization for the guardian which the court deems appropriate that is not otherwise specified in 62‑5‑309.

Section 62‑5‑309(B) is new to the 2017 amendments and addresses the requirements for filing a plan of care within thirty days after appointment as guardian. (UGPPA 5‑317(2010).

Emphasizing the importance of limited guardianship, subsection (B) requires the guardian to report information regarding the ward’s ability to develop or recover independent decision making and the proposed steps to restore the ward’s ability for independent decision making.

An independent monitoring system is crucial for a court to adequately safeguard against abuses in guardianship cases. Monitors can be paid court personnel, court appointees, or volunteers. For a comprehensive discussion of the various methods for monitoring guardianships, see Sally Balch Hurme, Steps to Enhance Guardianship Monitoring (A.B.A. 1991). The National Probate Court Standards also provide for the filing of reports and procedures for monitoring guardianships. See National Probate Court Standards, Standards 3.3.14 ‘Reports by the Guardian,’ and 3.3.15 ‘Monitoring of the Guardian’ (1993). The National Probate Court Standards additionally contain recommendations relating to the need for periodic review of guardianships and sanctions for failures of guardians to comply with reporting requirements. See National Probate Court Standards, Standards 3.3.16 ‘Revaluation of Necessity for Guardianship,’ and 3.3.17 ‘Enforcement.’ UGPPA Section 5‑317 (2010).

Section 62‑5‑309(C) provides for temporary delegation of powers by the parent or guardian to another person and replaces former Section 62‑5‑104. The period for delegation of these powers has increased to sixty days.

Section 62‑5‑309(D) is new to the 2017 amendments. A guardian is not legally obligated to provide for the ward from the guardian’s funds solely by reason of his appointment as guardian. UGPPA 5‑316(b)(2010). Under subsection (b), the guardian has no duty to use the guardian’s personal funds for the ward.

Section 62‑5‑309(E) is partially new to the 2017 amendments. With the exception of a guardian failing to exercise reasonable care, this subsection provides immunity of a guardian from liability premised on former Section 62‑5‑312(a). The guardian is not liable, just by reason of being guardian, if the ward harms a third person. A guardian is not liable for the acts of a third person, including negligent medical care, treatment or service provided to the ward, except if a parent would be liable in the same circumstances.

Section 62‑5‑310. (A) The court that appointed the guardian shall maintain jurisdiction over the guardianship until such time as:

(1) the proceeding is terminated following the death of the ward;

(2) the proceeding is terminated pursuant to a readjudication of incapacity;

(3) the court transfers the proceeding to another county’s jurisdiction;

(4) the court transfers the proceedings to another state.

(B) If the court with competent jurisdiction determines that venue would be more appropriate:

(1) in another county of this State, the court shall notify the court in the other county and, after consultation with that court, determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever is in the best interest of the ward. A copy of an order accepting a resignation or removing a guardian must be sent to the court in which acceptance of appointment is filed; or

(2) in another state, the first court shall follow the procedures set forth in Section 62‑5‑714.

REPORTER’S COMMENTS

The 2017 amendment provided consistency with the South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act (Part 7). A case may be transferred if it is in the ward’s best interest to do so.

Part 4

Protection of Property of Persons Under

Disability and Minors

Section 62‑5‑401. Subject to the provisions of Section 62‑5‑701, et seq., venue for proceedings under this part is:

(1) in the county where the alleged incapacitated individual resides; or

(2) if the alleged incapacitated individual does not reside in this State, in any county in the state where the alleged incapacitated individual has property or has the right to take legal action.

REPORTER’S COMMENTS

The 2017 amendment revised Section 62‑5‑401 because of changes in the definitions and choice of words throughout Part 3 and Part 4. For an individual who does not reside in this State, venue is permissible in any county where the alleged incapacitated individual has property or in any county where he has the right to take legal action, broadening the options for venue from the previous version of the section.

Section 62‑5‑402. (A) The appointment of a conservator or issuance of a protective order may be made in relation to the estate and affairs of a minor if:

(1) a minor owns real or personal property that requires management or protection;

(2) a minor has or may have business affairs that may be adversely affected by a lack of effective management; or

(3) it is necessary to obtain and administer funds for the health, education, maintenance, and support of the minor.

(B) The appointment of a conservator or issuance of a protective order for a minor may be made in the following manner:

(1) By filing a verified application setting forth the following information:

(a) the interest of the applicant;

(b) the name, age, current address, and contact information for the minor;

(c) physical location of the minor during the six‑month period immediately preceding the filing of the application and if the minor was not present in South Carolina for that period, sufficient information upon which the court may determine it has initial jurisdiction;

(d) the name and address of the non‑applicant parent of the minor, the person with whom the minor resides, and other persons as the court directs;

(e) any person who has equal or greater priority for appointment as the person whose appointment is sought pursuant to Section 62‑5‑408;

(f) the name and address of the person whose appointment is sought and the basis of priority for appointment;

(g) the reason why the appointment is necessary; and

(h) an estimate of the value of the minor’s assets and the source of the minor’s income, if any.

(2) Upon consideration of the application and in the court’s discretion, with or without a hearing, if the court concludes it is in the best interests of the minor, the court shall issue its order of appointment or protective order.

(C) The court may at any time require the filing of a summons and petition for the appointment of a conservator or for issuance of a protective order, and the appointment or order must be made in the following manner:

(1) the petition shall set forth the information required in subsection (B);

(2) the summons and petition must be served on the minor, the minor’s parents whose identity and whereabouts are known or reasonably ascertainable, the person or persons having custody of the minor, and other persons the court directs; and

(3) after the time has elapsed for the filing of a response to the petition and a hearing, if the court concludes it is in the best interests of the minor, the court shall issue its order of appointment or a protective order.

(D) Except upon a finding of good cause, the court shall require the conservator to furnish bond, or establish a restricted account, or both pursuant to Section 62‑5‑409.

(E) If a minor is receiving needs‑based government benefits the court may limit access to the minor’s funds to prohibit payments that would disqualify the minor from receipt of benefits.

(F) At any time and in any proceeding if the court determines the interests of the minor are not or may not be adequately represented, it may appoint a guardian ad litem to represent the minor.

REPORTER’S COMMENTS

This section was substantially amended in 2017 to provide an informal procedure for the appointment of a minor’s conservator or for the issuance of a protective order for a minor where the court determines the informal procedure is adequate to protect the minor’s interests while eliminating any unnecessary depletion of the minor’s assets. The cases where this is appropriate are typically uncontested and interested persons are in agreement as to the person to be appointed or the order to be issued. Section 62‑5‑402(C), however, clarifies that the court may require formal proceedings at any time including after the informal application is made, and as in the prior statute the court may appoint a guardian ad litem for the minor in any proceeding pursuant to Section 62‑5‑402(F) if it deems the interests of the minor are not adequately protected.

Section 62‑5‑402(A) describes the circumstances under which a minor might need a conservator or a protective order.

Section 62‑5‑402(B) outlines the informal application process and information which must be provided to the court, including a statement of priority for appointment as described in Section 62‑5‑408, so the court may make an appropriate selection of a conservator or issue a protective order without the filing and service of a summons and petition. The court may also dispense with a hearing if it determines it unnecessary to protect the interests of the minor.

Section 62‑5‑402(D) requires the conservator to post a bond or establish a restricted account from which funds may be disbursed only by court order, or both, absent good cause.

Section 62‑5‑402(E) specifically authorizes the court to limit access to the conservatorship funds if there is a risk that receipt may disqualify the minor from ongoing public assistance.

Section 62‑5‑403. (A) A person seeking a finding of incapacity, appointment of a conservator, or issuance of a protective order must file a summons and petition if:

(1) the individual is unable to manage his property or affairs effectively for reasons of incapacity, confinement, detention by a foreign power, or disappearance; and

(a) the individual has an agent pursuant to a durable power of attorney and the actions necessary to prevent waste or dissipation of the individual’s property are not being adequately performed by or are beyond the authority of the agent; or

(b) the individual has no agent under a durable power of attorney and owns property that will be wasted or dissipated or which is needed for the health, education, maintenance, or support of the individual or those entitled to his support, and protection is necessary to obtain or administer the funds.

(2) a protective order is necessary to create a special needs trust for an individual who is disabled in accordance with Social Security Administration guidelines.

(B) The petition shall set forth, to the extent known or reasonably ascertainable, the following information:

(1) interest of the petitioner;

(2) name, age, current address, and contact information of the alleged incapacitated individual, who must be designated as the respondent;

(3) physical location of the alleged incapacitated individual during the six‑month period immediately preceding the filing of the summons and petition; and, if the alleged incapacitated individual was not physically present in South Carolina for that period, sufficient information upon which the court may make a determination that it has initial jurisdiction pursuant to Section 62‑5‑707;

(4) to the extent known and reasonably ascertainable, the names and addresses of the following persons, who must be designated corespondents:

(a) the alleged incapacitated individual’s spouse and any adult children; or if none, his parents; or if none, at least one of his adult relatives with the nearest degree of kinship;

(b) a person known to have been appointed as agent under a general durable power of attorney or health care power of attorney;

(c) a person who has equal or greater priority for appointment pursuant to Section 62‑5‑408 as the person whose appointment is sought in the petition;

(d) a person other than an unrelated employee or health care worker who is known or reasonably ascertainable by the petitioner to have materially participated in the caring for the alleged incapacitated individual within the six‑month period preceding the filing of the petition; and

(e) the person entitled to notice on behalf of the VA, if the alleged incapacitated individual is receiving VA benefits;

(5) name and address of the proposed conservator and the basis of his priority for appointment;

(6) reason why conservatorship is necessary, including why less restrictive alternatives are not available and appropriate, and a brief description of the nature and extent of the alleged incapacity;

(7) a statement of any rights the petitioner is requesting be removed from the alleged incapacitated individual, any restrictions to be placed on the alleged incapacitated individual, and any restrictions sought to be imposed on the conservator’s powers and duties;

(8) a general statement of the alleged incapacitated individual’s assets, with an estimated value, and the source and amount of any income of the alleged incapacitated individual; and

(9) whether the alleged incapacitated individual has been rated incapable of handling his estate and monies on examination by the VA and, if so, shall state the name and address of the person to be notified on behalf of the VA.

(C) An alleged incapacitated individual seeking the appointment of a conservator or issuance of a protective order may file a summons and petition with the information specified in subsection (B).

(D) When more than one petition is pending in the same court, the proceedings may be consolidated.

REPORTER’S COMMENTS

This section addresses the appointment of a conservator or issuance of a protective order for an adult. The 2017 amendments incorporate prior statutes which described the reasons for the establishment of a conservatorship or issuance of a protective order, identified the person who could petition for appointment, and listed what information must be included in the petition. There is no equivalent informal application process available for adults because the establishment of a conservatorship for an adult will result in diminished access to his property and may have critical implications for his standard of living.

Pursuant to Section 62‑5‑403(A), every petitioner who requests appointment must file a separate summons and petition and pay the filing fee; the filing of a counterclaim requesting appointment of a different person in response to a previously filed petition is not sufficient to effectuate an appointment. This is because a counterclaim typically seeks relief against an adverse party, and in a protective proceeding the relief sought is not solely against an adverse party, but also against an alleged incapacitated individual. This is analogous to Section 62‑3‑401 that requires the filing of a summons and petition and the payment of a filing fee by each person asking to be formally appointed as personal representative of an estate. See also Section 8‑21‑770(11).

Section 62‑5‑403(A)(1) describes the circumstances under which a conservator may be needed, and Section 62‑5‑403(A)(2) is new to the 2017 amendments and is an express authorization for the court to create a special needs trust for a disabled individual.

In order to make an informed decision, the court must have as much information as possible. Section 62‑5‑403(B) specifies the data which must be included in each petition including the persons to be named as co‑respondents. The purpose of Section 62‑5‑403(B)(4)(d) is to provide notice to persons who may be likely to have an interest in protecting the alleged incapacitated individual even though they are not family members. The petition also must include a statement as to why less restrictive alternatives such as limited conservatorship are or are not sufficient, and requires the enumeration of rights to be removed.

With the repeal of Part 6 of Article 5, the Uniform Veterans’ Guardianship Act, the requirement contained in former Section 62‑5‑605 that the petition show that the ward has been rated incompetent by the VA is now included in the contents of the initial conservatorship petition. Additionally, since the VA is entitled to notification of the proceeding, the name and address of the person to be notified on behalf of the VA is also to be included. If a conservatorship is for the purpose of receiving VA benefits, the petitioner must comply with the requirements of Sections 62‑5‑431(B), 62‑5‑431(H), and 62‑5‑431(I).

Section 62‑5‑403(C) clarifies that in some situations, an individual may recognize the need for a conservator or a protective proceeding and has the authority to file a summons and petition on his or her own behalf.

Section 62‑5‑403(D) allows consolidation of proceedings when more than one petition is filed, e.g., there are petitions for both a conservatorship and a guardianship.

Section 62‑5‑403A. (A) As soon as reasonably possible after the filing of the summons and petition, the petitioner shall serve:

(1) a copy of the summons, petition, and a notice of right to counsel upon the alleged incapacitated individual;

(2) a copy of the summons and petition upon all corespondents and the petitioner in any pending conservatorship or protective proceeding; and

(3) any affidavits or physicians’ reports filed with the petition.

(B) If service is not accomplished within one hundred twenty days after the filing of the action, the court may dismiss the action without prejudice.

(C) The notice of right to counsel shall advise the alleged incapacitated individual of the right to counsel of his choice and shall state that if the court has not received a notice of appearance by counsel selected by the alleged incapacitated individual within fifteen days from the filing of the proof of service, the court will appoint counsel. In appointing counsel, the court may consider the expressed preferences of the alleged incapacitated individual.

(D) The date for the alleged incapacitated individual to file a responsive pleading shall run from the later of the date the court appoints counsel for the alleged incapacitated individual or from the date the court receives notice of appearance by counsel selected by the alleged incapacitated individual.

REPORTER’S COMMENTS

Sections 62‑5‑403A(A) and 62‑5‑403A(B) specify that the alleged incapacitated individual and the persons named as co‑respondents pursuant to Section 62‑5‑403(B)(4) must be served within one hundred twenty days of filing or the action may be dismissed without prejudice. In cases governed by Section 62‑5‑431, relating to VA benefits, the VA will be named as a corespondent and will receive a copy of the summons and petition. SCRCP 5(d) requires the filing of proof of service of the summons and petition within ten days of service.

The 2017 amendments to Sections 62‑5‑403A(A) and 62‑5‑403A(C) require that the alleged incapacitated individual be served with notice that he has the right to hire counsel, and Section 62‑5‑403A(C) requires a lawyer to be appointed by the court within fifteen days of receipt of proof of service unless the court receives a notice of appearance from private counsel hired by the alleged incapacitated individual. An alleged incapacitated individual may have prior experience with an attorney who he prefers to retain, and this section specifies the privately retained attorney must enter an appearance within fifteen days of filing of the proof of service of the summons and petition.

The time for filing a responsive pleading runs from the later of the date the court appoints counsel or private counsel files a notice of appearance.

Personal service of the summons, petition and notice of right to counsel on the alleged incapacitated individual is required, and failure to personally serve him is jurisdictional.

Section 62‑5‑403B. (A) Except in cases governed by Section 62‑5‑431 relating to veterans benefits, upon receipt by the court of proof of service of the summons, petition, and notice of right to counsel upon the alleged incapacitated individual, the court shall:

(1) upon the expiration of fifteen days from the filing of the proof of service on the alleged incapacitated individual, if no notice of appearance has been filed by counsel retained by the alleged incapacitated individual, appoint counsel;

(2) no later than thirty days from the filing of the proof of service on the alleged incapacitated individual, appoint:

(a) a guardian ad litem for the alleged incapacitated individual who has the duties and responsibilities set forth in Section 62‑5‑106;

(b) except in cases governed by Section 62‑5‑431 relating to benefits from the VA, one examiner, who must be a physician, to examine the alleged incapacitated individual and file a notarized report setting forth his evaluation of the condition of the alleged incapacitated individual in accordance with the provisions set forth in Section 62‑5‑403D. Unless the guardian ad litem or the alleged incapacitated individual objects, if a physician’s notarized report is filed with the petition and served upon the alleged incapacitated individual and all interested parties with the petition, then the court may appoint that physician as the examiner. Upon the court’s own motion or upon request of the initial examiner, the alleged incapacitated individual, or his guardian ad litem, the court may appoint a second examiner, who must be a physician, nurse, social worker, or psychologist. No appointment of examiners is required when the basis for the petition is that the individual is confined, detained, or missing.

(B) At any time during the proceeding, if requested by a guardian ad litem who is not an attorney, the court may appoint counsel for the guardian ad litem.

(C) At the attorney’s discretion, the attorney for the alleged incapacitated individual may file a motion requesting that the court relieve him as the attorney if the alleged incapacitated individual is incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences regarding the appointment in a protective proceeding. The attorney must file an affidavit in support of the motion. If the court is satisfied that the alleged incapacitated individual is incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences regarding the appointment in a protective proceeding, then the court may relieve the attorney from his duties as attorney for the alleged incapacitated individual. If the former attorney requests to be appointed as the guardian ad litem, the court may appoint him to serve as the guardian ad litem. An attorney cannot serve as both an attorney and as a guardian ad litem in a protective proceeding.

REPORTER’S COMMENTS

Sections 62‑5‑403B(A)(1) and (2) set forth specific time lines for appointments of counsel, guardians ad litem, and an examiner. The appointment of counsel (or the hiring of counsel by the alleged incapacitated individual) must occur within fifteen days after filing of proof of service of the summons and petition with the court, and the guardian ad litem and examiner are to be appointed within thirty days after filing of the proof of service.

This is an important departure from former Section 62‑5‑409, which required the appointment of a lawyer ‘who then has the powers and duties of a guardian ad litem.’ Traditionally, a guardian ad litem not only has a duty to the alleged incapacitated individual, but also has a duty to the court to discern and report what is in the best interest of the individual regardless of the individual’s preferences, although by statute those preferences must be considered by the court. With the 2017 amendments, the alleged incapacitated individual must have a lawyer who argues for the individual’s expressed wishes regardless of what may be in his best interests, and a guardian ad litem who acts as the eyes and ears of the court to discern the best outcome for the alleged incapacitated individual and to advise the court thereof.

A party may recommend a guardian ad litem and the court may accept or reject the recommendation, but best practices may require that the court independently select the guardian ad litem.

The imposition of a protective proceeding must be based on competent evidence of incapacity. Evidentiary rules must be enforced to insure due process. To obtain competent evidence, the court should allow the admission of evidence from professionals and experts whose training qualifies them to assess the physical and mental condition of the respondent.

Pursuant to Section 62‑5‑403B(A)(2)(b), the examiner must be a physician. Although a physician may provide valuable information, incapacity is a multifaceted issue and the court may consider using, in addition to the physician, other professionals whose expertise and training give them greater insight into incapacity. The court on its own motion or if requested by the initial examiner, the guardian ad litem, or the alleged incapacitated individual, may appoint a second examiner. The second examiner is not required to be a physician, but if not, should be a nurse, social worker, or psychologist. A qualified examiner’s additional experience in physical and occupational therapy, developmental disabilities or habilitation and community mental health considerations may also be helpful, though is not required.

The purpose of the examiner’s evaluation is to provide the court with an expert opinion of the alleged incapacitated individual’s abilities and limitations, and will be crucial to the court in establishing a full or limited conservatorship. The report should include an assessment of the alleged incapacitated individual’s treatment plan, if any, the date of the evaluation, and a summary of the information received and upon which the examiner relies.

Section 62‑5‑403B(B) allows the court to appoint an attorney for a guardian ad litem if requested by a non‑attorney guardian ad litem. In a contested case, a guardian ad litem who is not an attorney may need the assistance of counsel. However, the guardian ad litem should make a request for counsel as a last resort to not cause needless expense to the proceedings. Whether a guardian ad litem is an attorney or not, the guardian ad litem is encouraged to go to the court for instructions regarding their role and duties as a guardian ad litem.

If a conservatorship is for the purpose of receiving VA benefits, the petitioner must comply with the requirements of Sections 62‑5‑431(B), 62‑5‑431(H), and 62‑5‑431(I).

Section 62‑5‑403B(C) contemplates situations where an alleged incapacitated individual is unable to communicate with counsel and, therefore, is unable to advocate for the expressed wishes of the alleged incapacitated individual. The attorney must file an affidavit with the motion that documents the efforts made by the attorney to communicate with the alleged incapacitated individual and the basis for the attorney’s conclusion that the alleged incapacitated individual is incapable of communicating. The court must independently determine whether the interests of the respondent are adequately represented, and may require independent counsel for the alleged incapacitated individual at any time in the proceedings.

Section 62‑5‑403C. (A) As soon as the interests of justice may allow, but after the time for filing a response to the petition has elapsed as to all parties, the court shall hold a hearing on the merits of the petition. The alleged incapacitated individual, all parties, and any person who has filed a request or demand for notice must be given notice of the hearing. The alleged incapacitated individual is entitled to be present at the hearing, to conduct discovery, and to review all evidence bearing upon his condition. The hearing may be closed at the request of the alleged incapacitated individual or his guardian ad litem. The alleged incapacitated individual may waive notice of a hearing and his presence at the hearing. If there is an agreement among all the parties and the guardian ad litem’s report indicates that a hearing would not further the interests of justice, the alleged incapacitated individual may waive his right to a hearing. If the alleged incapacitated individual waives his right to a hearing, the court may:

(1) require a formal hearing;

(2) require an informal proceeding as the court shall direct; or

(3) proceed without a hearing.

(B) If no formal hearing is held, the court shall issue a temporary consent order, which shall expire in thirty days. A protected person, under a temporary order, may request a formal hearing at any time during the thirty‑day period. At the end of the thirty‑day period, if the protected person has not requested a formal hearing, the court shall issue an order upon such terms agreed to by the parties and the guardian ad litem.

REPORTER’S COMMENTS

The 2017 amendments expand upon former Section 62‑5‑405, which specified to whom notice of hearing should be given. As in the prior statute, notice of hearing must be given or waived in accordance with Sections 62‑1‑401 and 62‑1‑402.

Section 62‑5‑403C(A) states that a hearing must be held after the time for all parties to file responsive pleadings has elapsed. Unlike previous law, the term ‘party’ is now defined in Section 62‑5‑101(16) and the court may allow certain designated individuals, and any person or party it deems appropriate to participate in the proceedings. The alleged incapacitated individual and the proposed guardian should attend the hearing unless excused by the court for good cause. The hearing may be closed at the request of counsel for the alleged incapacitated individual or his guardian ad litem.

Section 62‑5‑403C(A) also states that any person who has filed a demand for notice must be given notice of hearing. In the estate context, Section 62‑3‑204 allows ‘interested persons’ to file demands for notice so by analogy, a person must fit within that definition in order to have standing to file a demand for notice pursuant to Article 5.

The alleged incapacitated individual is entitled to receive notice and be present at the hearing. The notice to the alleged incapacitated individual should be given in plain language, and should state the time and place of the hearing, the nature and possible consequences of the hearing, and the alleged incapacitated individual’s rights.

Section 62‑5‑403C(A) also provides the alleged incapacitated individual may waive the notice of hearing, attendance at the hearing, and if the parties all agree and the guardian ad litem’s report indicates a hearing would not further the interests of justice, the requirement of a hearing. If the hearing is waived, the court may proceed without a hearing or may schedule either an informal or a formal hearing. The hearing, whether informal or formal, should be recorded.

Section 62‑5‑403C(B) provides that if no hearing is held, a thirty day temporary consent order may be issued. The purpose of the thirty day delay is to give the alleged incapacitated individual an opportunity to request a formal hearing and if none is requested, the court shall issue a permanent consent order.

The purpose of the language allowing waivers of hearing and the issuance of thirty day consent orders is to reduce costs, but only where possible to do so fairly and without jeopardizing the due process rights of the alleged incapacitated individual. The court should scrutinize any waivers of notice and hearing closely to insure that they are willingly and voluntarily given.

Section 62‑5‑403D. (A) Each examiner shall complete a notarized report setting forth an evaluation of the condition of the alleged incapacitated individual. The original report must be filed with the court by the court’s deadline, but not less than forty‑eight hours prior to any hearing in which the report will be introduced as evidence. For good cause, the court may admit an examiner’s report filed less than forty‑eight hours prior to the hearing. All parties are entitled to review the reports, which are admissible as evidence. The evaluation shall contain, to the best of the examiner’s knowledge and belief:

(1) a description of the nature and extent of the incapacity, including specific functional impairments;

(2) a diagnosis and assessment of the alleged incapacitated individual’s mental and physical condition, including whether he is taking any medications that may affect his actions;

(3) an evaluation of the alleged incapacitated individual’s ability to exercise the rights set forth in Section 62‑5‑407;

(4) when consistent with the scope of the examiner’s license, an evaluation of the alleged incapacitated individual’s ability to learn self‑care skills, adaptive behavior, and social skills, and a prognosis for improvement;

(5) the date of all examinations and assessments upon which the report is based;

(6) the identity of the persons with whom the examiner met or consulted regarding the alleged incapacitated individual’s mental or physical condition; and

(7) the signature and designation of the professional license held by the examiner.

(B) Unless otherwise directed by the court, the examiner may rely upon an examination conducted within the ninety‑day period immediately preceding the filing of the petition. In the absence of bad faith, an examiner appointed by the court pursuant to Section 62‑5‑403B is immune from civil liability for any breach of patient confidentiality made in furtherance of his duties.

REPORTER’S COMMENTS

The 2017 amendments to this section expand upon former Section 62‑5‑407 in regard to the examiner’s duties, the content and timing of the examiner’s report, and the immunity of the examiner from civil liability.

Section 62‑5‑403D(A) provides for the prompt submission of the report to the court and clarifies that the report should be made available to all parties. The court need not base its findings and order on the oral testimony of the professionals in every case, but has discretion to require the examiner to appear. In particular, where a party objects to the examiners’ opinions, the professional should appear to testify and be available for cross‑examination as the South Carolina Rules of Evidence may limit the fact finder’s ability to rely on a written report.

Subsection (A) also prescribes content of the examiner’s report, the purpose of which is to evaluate the functional limitations of the alleged incapacitated individual. Among the factors to be addressed are a diagnosis of the level of functioning and assessment of the alleged incapacitated individual’s current condition and prognosis, the degree of personal care the alleged incapacitated individual can manage alone, an evaluation of the individual’s ability to exercise the rights outlined in Section 62‑5‑407, and whether current medication affects the individual’s demeanor or ability to participate in the proceedings. It should include the dates of all examinations.

Section 62‑5‑403D(B) requires the report or reports to be completed based upon examinations that occurred within the preceding ninety days prior to the filing of the petition, unless otherwise ordered by the court, and explicitly protects the examiner from civil liability for breach of the duty of patient confidentiality.

Section 62‑5‑404. (A) Upon a finding by clear and convincing evidence that a basis for an appointment or protective order exists with respect to a minor, the court has all those powers over the estate and affairs of the minor that are necessary for the best interests of the minor and members of his household.

(B) Upon finding by clear and convincing evidence that a basis for an appointment or protective order exists for reasons other than minority, the court has the powers over the incapacitated individual’s real and personal property and financial affairs which the incapacitated individual could exercise if not under disability, except the power to make a will or amend a revocable trust.

(C) The court, on its own motion or on the petition or motion of the incapacitated individual or any other person, may limit the powers of a conservator. A limitation on the statutory power of a conservator must be endorsed upon the conservator’s letters. A limitation may be removed, modified, or restored pursuant to Section 62‑5‑428. Notwithstanding the foregoing, the failure to endorse any limitation upon the conservator’s letters shall not relieve the conservator of the limitation imposed by order of the court.

REPORTER’S COMMENTS

Sections 62‑5‑304 and 62‑5‑404 both establish a clear and convincing evidence burden of proof, which is on the petitioner.

The ability for the court to create a limited conservatorship is new to the 2017 amendments. For example, a limited conservatorship might be appropriate for an individual who is capable of managing his income and day to day expenses, but who is susceptible to fraud if he has access to the bulk of his estate. The conservatorship may be granted control over savings accounts and other large assets, while the protected person remains in control of his earned income and checking account. The scenario assumes that there is not an available or appropriate less restrictive means to protect the estate.

Section 62‑5‑405. (A) When it is established in a formal proceeding that a basis exists for affecting a protective arrangement that concerns the property and affairs of a minor or an incapacitated individual, the court may:

(1) without appointing a conservator, authorize, direct, or ratify any provision within a protective arrangement that is in the best interest of the minor or incapacitated individual. A protective arrangement includes, but is not limited to, the payment, delivery, deposit, or retention of funds or property; the sale, mortgage, lease, or other transfer of property; the entry into an annuity contract, a contract for life care, a deposit contract, or a contract for training and education; or the addition to or establishment of a suitable trust.

(2) authorize a conservator or a special conservator to exercise the power to perform the following acts:

(a) make gifts as the court, in its discretion, believes would be made by the protected person;

(b) convey or release the protected person’s contingent and expectant interests in property including material property rights and any right of survivorship incident to joint tenancy;

(c) create or amend revocable trusts or create irrevocable trusts of property of the protected person’s estate that may extend beyond the protected person’s disability or life, including the creation or funding of a special needs trust or a pooled fund trust for disabled individuals;

(d) fund trusts;

(e) exercise the protected person’s right to elect options and change beneficiaries under insurance and annuity policies and to surrender policies for their cash value;

(f) exercise the protected person’s right to an elective share in the estate of a deceased spouse;

(g) renounce any interest by testate or intestate succession or by inter vivos transfer;

(h) ratify any such actions taken on behalf of the protected person.

(B) When acting as conservator or when approving a conservator’s or special conservator’s action, the court may consider the:

(1) wishes of the protected person;

(2) financial needs and legal obligations of the protected person and those who are dependent upon him for support;

(3) tax consequences;

(4) protected person’s eligibility or potential eligibility for governmental assistance;

(5) protected person’s previous pattern of giving or level of support;

(6) protected person’s gifting and estate plan; and

(7) protected person’s life expectancy and the probable duration of incapacity.

(C) Prior to issuing a protective order, the court shall consider whether appointment of a conservator is necessary. The court shall set forth specific findings upon which the court bases its order authorizing a protective arrangement. For purposes of issuing a consent order, counsel may consent on behalf of the protected person.

(D) The petitioner shall serve all heirs and devisees of the incapacitated individual whose identity and whereabouts are reasonably ascertainable with the petition seeking a protective order to perform one or more actions set forth in subsection (A)(2).

REPORTER’S COMMENTS

This section gives specific powers to the court to take action with respect to the estate and affairs of a minor or incapacitated individual, when there has been a formal proceeding and a protective arrangement has been offered to or ordered by the court. The court has broad authority to authorize protective arrangements which benefit the minor or incapacitated individual. In addition, the court may authorize a conservator, or a special conservator, to exercise a broad range of acts. For any protective arrangement or action by a conservator, the court may consider the wishes of the protected person.

The action of the court should be based upon what is the less restrictive alternative, acting only as necessary.

Section 62‑5‑406. RESERVED.

Section 62‑5‑407. (A) The court shall exercise its authority to encourage maximum self‑reliance and independence of the protected person and issue orders only to the extent necessitated by the protected person’s mental and adaptive limitations.

(B) The court shall set forth the rights and powers removed from the protected person. To the extent rights are not removed, they are retained by the protected person. Such rights and powers include the rights and powers to:

(1) buy, sell, or transfer real or personal property or transact business of any type including, but not limited to, those powers conferred upon the conservator under Section 62‑5‑422;

(2) make, modify, or terminate contracts; or

(3) bring or defend any action at law or equity.

(C) Nothing in this section shall prevent the protected person from notifying the court that he is being unjustly denied a right or privilege or requesting removal of the conservator or termination of the conservatorship pursuant to Section 62‑5‑428.

(D) Unless a court order specifies otherwise, the appointment of a conservator terminates the parts of the power of attorney that relate to matters within the scope of the conservatorship. The authority of an agent to make health care decisions or authority granted by advance directives regarding health care is not altered or changed by the appointment of a conservator.

REPORTER’S COMMENTS

The 2017 amendments to Section 62‑5‑407 mirror the guardianship portions of Sections 62‑5‑304 and 62‑5‑304A.

A protective order is to be limited when necessary in order to ensure maximum independence of the protected person.

In order to ensure due process, the rights which may be removed from the protected person as outlined in the code, must be included in the petition (Section 62‑5‑403(B)(7)), evaluated by the designated examiner (Section 62‑5‑403D), and listed in the report of the guardian ad litem (Section 62‑5‑106(D)(6)). Each conservatorship order should be tailored based upon the abilities and needs of the protected person, and only those rights which must be removed based upon clear and convincing evidence that the removal of the right is necessary for the well‑being of the protected person should be removed. The rights and privileges removed from the protected person are vested in the conservator as authorized in Section 62‑5‑422.

Unless the order states otherwise, the appointment of a conservator terminates an agent’s powers under a power of attorney for matters within the scope of the protective order. The authority under advance directives involving health care is unaffected by the issuance of a protective order.

Section 62‑5‑408. (A) In appointing a conservator, the court shall consider persons who are otherwise qualified in the following order of priority:

(1) a person previously appointed conservator, other than a temporary or emergency conservator, a guardian of property, or other like fiduciary for the protected person by another court of competent jurisdiction;

(2) a person nominated to serve as conservator by the alleged incapacitated individual if made prior to his incapacity, or if he is fourteen or more years of age and has sufficient mental capacity to make a reasoned choice;

(3) an agent designated in a power of attorney relating to the management of the alleged incapacitated individual’s real or personal property, financial affairs, or assets;

(4) the spouse of the alleged incapacitated individual;

(5) an adult child of the alleged incapacitated individual;

(6) a parent of the alleged incapacitated individual;

(7) the person nearest in kinship to the alleged incapacitated individual who is willing to accept the appointment;

(8) a person with whom the alleged incapacitated individual resides outside of a health care facility, group home, homeless shelter, or prison;

(9) a person nominated by a health care facility caring for the alleged incapacitated individual; and

(10) any other person deemed suitable by the court.

(B) A person whose priority is based upon his status under subsections (A)(1), (3), (4), (5), (6), or (7) may nominate in writing a person to serve in his or her stead. With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as conservator. The court, acting in the best interest of the alleged incapacitated individual, may decline to appoint a person having higher priority and appoint a person having lesser priority or no priority.

(C) Except when authorizing, directing, or ratifying the implementations of provisions of protective arrangements, pursuant to Section 62‑5‑405, a probate judge or an employee of the court shall not serve as a conservator of an estate of a protected person; except, a probate judge or an employee of the court may serve as a conservator of the estate of a family member if such service does not interfere with the proper performance of the probate judge’s or the employee’s official duties. For purposes of this subsection, ‘family member’ means a spouse, parent, child, brother, sister, niece, nephew, mother‑in‑law, father‑in‑law, son‑in‑law, daughter‑in‑law, grandparent, or grandchild.

REPORTER’S COMMENTS

This section sets forth the priority of who may be appointed conservator and provides the standards to be utilized in appointing those of equal or lesser priority.

Section 62‑5‑409. Except upon a finding of good cause, the court shall require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the conservator according to law and the court must approve all sureties. When bond is required, the conservator shall file a statement under oath with the court indicating his best estimate of the value of the personal estate of the protected person and of the income expected from the personal estate during the next calendar year, and he shall execute and file a bond with the court, or give other suitable security, in an amount not less than the estimate. The court shall determine that the bond is duly executed by a corporate surety or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. The court may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution, as defined in Section 62‑6‑101, in a manner that prevents their unauthorized disposition. The court may authorize an unrestricted account to be used by the conservator for expenses on behalf of the protected person, and all activity in such an account must be reported by the conservator as required by the court. Upon application of the conservator or another interested person, or upon the court’s own motion, the court may:

(1) order the creation, modification, or termination of an account;

(2) increase or reduce the amount of the bond;

(3) release sureties;

(4) dispense with security or securities; or

(5) permit the substitution of another bond with the same or different sureties.

REPORTER’S COMMENTS

The language of this section has been revised for flow and clarity. In addition, it now contains specific language authorizing the use of a restricted account, while protecting the requirement that the activities of the conservator regarding such an account must be reported as required by the court.

The 2017 amendments include language allowing an application or upon the court’s own motion concerning actions regarding accounts, modification of bonds, release or dispensing of sureties, or permitting the substitution of another bond for the original bond.

Section 62‑5‑410. (A) The following requirements and provisions apply to any bond required under Section 62‑5‑409:

(1) Sureties must be jointly and severally liable with the conservator and with each other.

(2) By executing an approved bond of a conservator, the surety consents to the jurisdiction of the court in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party defendant. Notice of any proceeding must be delivered to the surety or mailed to him by registered or certified mail at his address that is listed with the court where the bond is filed or to his address as then known to the petitioner.

(3) After service of a summons and petition by a successor conservator, or upon the court’s own motion, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator.

(4) Subject to applicable statutes of limitation, the bond of the conservator is not void after the first recovery, but may be proceeded against from time to time until the whole penalty is exhausted.

(B) No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

REPORTER’S COMMENTS

Prior to the 2017 amendments, this section was previously Section 62‑5‑412, and it amplifies Section 62‑5‑409.

Section 62‑5‑411. By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the conservatorship estate. Notice of any proceeding must be given or waived pursuant to Sections 62‑1‑401 and 62‑1‑402.

REPORTER’S COMMENTS

The 2017 amendments to this section expand upon former Section 62‑5‑413 to specify that the jurisdiction of the court over a conservator who accepts appointment extends to any estate‑related proceeding. Also, this section adopts the notice and waiver provisions in Sections 62‑1‑401 and 62‑1‑402.

Section 62‑5‑412. Any conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the protected person’s estate, as determined by the court.

REPORTER’S COMMENTS

This section entitles the conservator or special conservator to reasonable compensation. Section 62‑5‑105 addresses compensation to all who may be entitled to compensation for service to the conservatorship estate.

Section 62‑5‑413. (A) The protected person or another person interested in his welfare, may make an informal request for relief by submitting a written request to the court. The court may take such action as considered reasonable and appropriate to protect the protected person.

(B) A person making an informal request submits personally to the jurisdiction of the court.

REPORTER’S COMMENTS

This section was added in 2017 to allow the court to respond to concerns of the protected person or another person interested in his welfare without requiring the filing of a formal action. It mirrors the 2017 amendments to Section 62‑5‑307. The court may dismiss an informal request for relief. If readjudication is requested informally and the court denies the request, a formal petition for readjudication may be heard pursuant to Section 62‑5‑428.

Section 62‑5‑414. (A) In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees.

(B) The court may require a conservator to file a financial plan for managing, expending, and distributing the assets of the protected person’s estate. The plan must be tailored for the protected person and the conservator shall revise the plan as the needs and circumstances of the protected person require. The court shall approve, disapprove, or modify the plan in any proceeding as the court determines is necessary based upon the qualifications of the fiduciary. Nothing herein shall require the court to oversee or approve the conservator’s investment choices. The conservator shall provide a copy of the plan to the protected person’s guardian, if any, or the protected person.

(C) The conservator shall include in the financial plan:

(1) a statement of the extent to which the protected person may be able to develop or restore his ability to manage his property;

(2) an estimate of whether the assets are sufficient to meet the current and future needs of the protected person;

(3) projections of expenses and resources; and

(4) an estimate of how the financial plan may alter the overall estate plan of the protected person, including assets titled with rights of survivorship.

(D) In investing an estate, selecting assets of the estate for distribution, and using powers of revocation or withdrawal available for the use and benefit of the protected person or his dependents and exercisable by the conservator, a conservator shall take into account any estate plan of the protected person known to the conservator and is entitled to examine the protected person’s will or revocable trust and any contract, transfer or joint ownership arrangement with the provisions for payment or transfer of benefits at his death to others which the protected person may have originated.

REPORTER’S COMMENTS

Subsection (A) is based on UGPPA (1982) Section 2‑316 (UGPPA Section 62‑5‑416 (1982)), and subsection (D) on UGPPA (1982) Section 62‑2‑326 (UGPPA Section 62‑5‑426 (1982)).

Subsections (B), (C) and (D) are based on UGPPA Section 62‑5‑418(b)(c) and (d) 1997, which reflect the dual roles of a conservator as fiduciary charged with management of another’s property with obligations directly to the protected person while observing the standard of care applicable to trustees as further stated in new Section 62‑5‑422(A)(1).

Under subsection (B), the conservator is not required to file a financial plan for managing, expending, and distributing the assets of the protected person’s estate. If the court orders the conservator to file a financial plan for managing, expending, and distributing the assets of the protected person’s estate, subsection C(1), (2), (3), and (4) provide guidance to satisfy that requirement.

In addition to plans for expenditures, investments, and distributions, the plan must list the steps that will be taken to develop or restore the protected person’s ability to manage the person’s property and an estimate of the length of the conservatorship. The filing of a plan will help the conservator perform more effectively and reduce the need to take action to recover improper expenditures.

When the conservator needs only to file a plan, subsection (B) requires that the conservator shall provide a copy of the plan to the protected person’s guardian or the protected person.

Subsection (C)(1) emphasizes the concept of limited conservatorship by limiting the exercise of the conservator’s authority and requiring the participation of the protected person in decision making. The conservator should encourage the participation of the protected person in decisions and assist the protected person to develop or regain the capacity to act without a conservator. Before making a decision, the conservator should learn the personal values of the protected person by inquiring about the protected person’s desires. If possible, the conservator should be aware of views expressed by the protected person prior to the conservator’s appointment.

Subsections (B) and (C)(1) are in substantial part specific applications of the fundamental responsibilities stated in subsections (b) and (c) of UGPPA Section 62‑5‑418 (2010), specifying subsidiary duties and the powers and immunities necessary to properly implement the conservator’s role. Subsection (c) of UGPPA Section 62‑5‑418 (2010) is derived from National Probate Court Standards, Standard 3.4.15 ‘Reports by the Conservator’ (1993).

Subsection (D) allows a conservator access to and the right to examine the protected person’s will and other documents comprising the protected person’s estate plan. Such access is essential for the conservator to carry out the obligation, as stated in subsection (B) and (C)(4), to consider the protected person’s views when making decisions. For example, by allowing the conservator access to the estate plan, the risk of inadvertent sales of specifically devised property and the difficult ademption problems that these types of sales often create may be avoided. Access to the estate plan also facilitates, where appropriate, the filing of a petition with respect to the protected person’s estate plan as authorized by Section 62‑5‑405 and preserves the protected person’s estate plan in accordance with the 2017 amendments to Section 62‑5‑425.

Section 62‑5‑415. Within thirty days of appointment, the conservator shall prepare and file with the court a complete inventory of the estate of the protected person, together with the conservator’s oath or affirmation that it is complete and accurate to the best of the conservator’s knowledge, information, and belief. The court may grant an extension to file the inventory. The conservator shall provide a copy of the inventory to the protected person’s guardian, if any, and any other persons the court may direct.

REPORTER’S COMMENTS

The 2017 amendments removed the requirement of providing a copy of the inventory to the protected person who may have attained fourteen years of age and has sufficient mental capacity to understand. The 2017 amendments provide that the conservator shall provide a copy of the inventory to any other persons whom the court may direct.

Section 62‑5‑416. (A) A conservator shall report to the court regarding his administration of the estate annually and upon the conservator’s resignation or removal, the termination of the protected person’s minority or disability, the death of the protected person, and at other times as the court directs.

(B) The report must include:

(1) an accounting of receipts and disbursements for the accounting period;

(2) a list of the assets of the estate under the conservator’s control and the location of the assets;

(3) any recommendations for changes in the financial plan; and

(4) the conservator’s opinion regarding the continued need for the conservatorship and the scope of the conservatorship.

(C) The conservator shall provide a copy of the report to the protected person if he has attained the age of fourteen years and has sufficient mental capacity to understand the report, and to any parent with whom the protected person resides or guardian of the protected person.

(D) The court may appoint a guardian ad litem to review a report or plan, interview the protected person or conservator, and make any other investigation the court directs.

(E) The court may order a conservator to submit the assets of the estate to an appropriate examination in any manner directed by the court.

(F) The conservator or the protected person may petition in formal proceedings pursuant to Section 62‑5‑428 for an order:

(1) allowing or requiring an intermediate or final report of a conservator and adjudicating liabilities disclosed in the accountings; or

(2) allowing or requiring a final report and adjudicating unsettled liabilities relating to the conservatorship.

REPORTER’S COMMENTS

The 2017 amendments outline the reporting requirements of the conservator and some the court’s options for monitoring the conservatorship. The conservator is required to report at least annually. The court may require a report to be issued at times other than those outlined in the section. The requirements of what the report must contain are outlined in the section. The conservator or protected person may petition in formal proceedings to allow or direct an intermediate or final report from the conservator and to adjudicate any unsettled liabilities relating to the conservatorship.

Section 62‑5‑417. The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property previously held by custodians or agents, unless otherwise provided in the court’s order. Neither the appointment of a conservator nor the establishment of a trust in accordance with Article 6, Chapter 6, Title 44 is a transfer or alienation by the protected person of his rights or interest, within the meaning of any federal or state statute or regulation, insurance policy, pension plan, contract, will, or trust instrument imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest.

REPORTER’S COMMENTS

This section, formerly Section 62‑5‑420, permits independent administration of the property of protected persons once the appointment of a conservator has been obtained. Any interested person may require the conservator to account in accordance with Section 62‑5‑416. As a trustee, a conservator holds title to the property of the protected person, unless otherwise stated in a court order. Once appointed, he is free to carry on his fiduciary responsibilities. If he should default in these in any way, he may be made to account to the court. This section provides protection with respect to transfers or alienations made by virtue of a conservatorship or protective order involving a Medicaid qualifying trust.

Section 62‑5‑418. (A) Fiduciary letters of conservatorship are evidence of transfer of all title of the assets of a protected person to the conservator unless otherwise provided in the court’s order. An order terminating a conservatorship transfers all assets of the estate from the conservator to the protected person or his successors. Fiduciary letters and terminations of appointment must be filed and recorded in the office where conveyances of real estate are recorded for the county in which the protected person resides and in the counties of this State or other jurisdictions where the protected person owns real estate.

(B) Conservators may file fiduciary letters of conservatorship with credit reporting agencies or other entities or persons, as appropriate.

REPORTER’S COMMENTS

The language has been revised in the 2017 amendments to specifically state that conservators may file their fiduciary letters with credit reporting agencies or other entities or persons, as appropriate. Prior to the 2017 amendments, the court might request that the conservator take such action, but it was not specifically codified so the conservator could take independent action when necessary.

Section 62‑5‑419. Pursuant to the procedures set forth in Section 62‑5‑428(B), the conservator shall obtain the court’s prior approval of any transaction that is affected by a conflict of interest, including, but not limited to, a sale or encumbrance of assets of the protected person to or in favor of a conservator; an immediate family member of a conservator; an agent or attorney of conservator; or any corporation, trust, or other entity in which the conservator has a substantial beneficial interest.

REPORTER’S COMMENTS

This section allows court authorized sales and purchases of protected property. The 2017 amendment added language that requires court approval of any transaction that is affected by a conflict of interest.

Section 62‑5‑420. A person, who in good faith either assists a conservator or deals with him for value in any transaction, other than those requiring a court order as required in this part is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in Section 62‑5‑424 are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator. This protection extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. This protection is not a substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

REPORTER’S COMMENTS

Section 62‑5‑420 carries Section 62‑5‑419 one step further by affording protection to bona fide purchasers for value of protected property.

Section 62‑5‑421. (A) Except as otherwise provided in subsections (B) and (C), the interest of a protected person in property vested in a conservator is not transferable or assignable by the protected person.

(B) A person without knowledge of the conservatorship who in good faith and for security or substantially equivalent value receives delivery from a protected person of tangible personal property of a type normally transferred by delivery of possession is protected.

(C) A third party who deals with the protected person in good faith with respect to property vested in a conservator is entitled to any protection provided by law.

REPORTER’S COMMENTS

This section was added in 2017. While Section 62‑5‑420 deals with the protection of persons dealing with the conservator, this section dovetails with that section by specifically discussing the protected person’s interest in property. The focus of this section is on the rights of the protected person in his personal property and affirms that the interest of a protected person in property vested in a conservator is not transferable or assignable by the protected person. However, pursuant to Section 62‑5‑407(B)(1) and subpart (A) of this section, an individual who in good faith purchases tangible personal property belonging to a conservatorship from the protected person for an amount substantially equivalent to the value of the property, is protected once delivery of possession takes place. This section also makes it clear that a third party who deals with the protected person regarding personal property vested in the conservator is entitled to any protection provided by law, which includes the protections in Section 62‑5‑420 and any other applicable laws.

Section 62‑5‑422. (A) Except as otherwise qualified or limited by court order, a conservator, acting reasonably in the best interest of the protected person and in efforts to accomplish the purpose for which he was appointed, may act without court approval to:

(1) invest and reinvest funds of the estate as would a trustee;

(2) collect, hold, and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made, and retain assets even though they include an asset in which the conservator personally is interested;

(3) receive additions to the estate;

(4) deposit estate funds in a financial institution including a financial institution operated by the conservator;

(5) make ordinary or extraordinary repairs or alterations to buildings or other structures, demolish, improve, raze or erect existing or new party walls or buildings;

(6) vote a security in person or by general or limited proxy;

(7) pay calls, assessments, and other sums chargeable or accruing against or on account of securities;

(8) sell or exercise stock subscription or conversion rights; consent directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise whose stock or shares are publicly held;

(9) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for an act of the nominee in connection with the stock so held;

(10) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(11) borrow money to be repaid from estate assets or otherwise; advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of estate assets; and the conservator shall have a lien on the estate as against the protected person for advances so made;

(12) pay or contest a claim except as limited by Section 62‑5‑433; settle a claim by or against the estate of the protected person by compromise, arbitration, or otherwise except as limited by Section 62‑5‑433; and release, in whole or in part, a claim belonging to the estate to the extent that the claim is uncollectible;

(13) pay taxes, assessments, and other expenses incurred in the collection, care, administration, and protection of the estate;

(14) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(15) pay a sum distributable to a protected person or his dependent without liability to the conservator, by paying the sum to the protected person or the distributee or by paying the sum for the use of the protected person or the distributee either to his guardian or, if none, to a relative or other person with custody of his person;

(16) employ persons including attorneys, auditors, investment advisors, or agents even though they are associated with the conservator to advise or assist the conservator in the performance of his administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one or more agents to perform an act of administration, whether or not discretionary;

(17) prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties;

(18) execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator;

(19) review the originals and obtain photocopies of the protected person’s fully executed estate planning documents, including those documents referenced in Section 62‑5‑425;

(20) enter into a lease of a residence for the protected person for a term not exceeding one year;

(21) access, monitor, suspend, or terminate the protected person’s digital assets and accounts in electronic format, including the power to obtain information as to the protected person’s account number, user name and agreement, online tools, addresses, or other unique subscriber or account identifiers, including passwords, and any catalogue of electronic communications considered necessary by the conservator for administration of the conservatorship, consistent with the provisions of Part 10, Article 2, Title 62; and

(22) exercise the protected person’s rights as trust beneficiary to the extent provided in Article 7, Title 62.

(B) A conservator acting reasonably and in the best interest of the protected person to accomplish the purpose for which he was appointed, may file an application with the court pursuant to Section 62‑5‑428(A) requesting authority to:

(1) continue or participate in the operation of any unincorporated business or other enterprise;

(2) acquire an undivided interest in an estate asset in which the conservator, in a fiduciary capacity, holds an undivided interest;

(3) buy and sell an estate asset, including land in this State or in another jurisdiction for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(4) subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration;

(5) enter into a lease as lessor or lessee, other than a residential lease described in Section 62‑5‑422(A);

(6) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(7) grant an option involving disposition of an estate asset or to take an option for the acquisition of any asset;

(8) undertake another act considered necessary or reasonable by the conservator and the court for the preservation and management of the estate;

(9) make charitable gifts pursuant to the protected person’s gifting and estate plan if the estate is sufficient to provide for the health, education, support, and maintenance of the protected person and his dependents;

(10) encumber, mortgage, or pledge an asset for a term extending within or beyond the term of the conservatorship;

(11) pay a reasonable fee to the conservator, special conservator, guardian ad litem, attorney, examiner, or physician for services rendered;

(12) adopt an appropriate budget for routine expenditures of the protected person;

(13) reimburse the conservator for monies paid to or on behalf of the protected person;

(14) exercise or release the protected person’s powers as personal representative, custodian for minors, conservator, or donee of a power of appointment; and

(15) exercise options to purchase securities or other property.

(C) A conservator may request instructions concerning his fiduciary responsibility and may file an application for ratification of actions taken in good faith or for the expenditure of funds of the protected person; the court may approve or deny an application pursuant to subsection (B) above, or may require the commencement of formal proceedings.

(D) The attorney‑client privilege between the protected person and the protected person’s counsel must not be removed by the appointment of a conservator.

REPORTER’S COMMENTS

The 2017 amendments to Section (A)(1) incorporates previous Section 62‑5‑424(A)(3).

Section (A)(4) replaced the word ‘bank’ with ‘financial institution’ in Section 62‑5‑424(A)(4) and UGPPA Section 62‑5‑425(b)(6)(2010).

Section (A)(19) allows the conservator access to all of the protected person’s fully executed estate planning and other protected documents.

Section (A)(20) amends the terms of the conservator entering into a residential lease agreement previously specified in Section 62‑5‑424(c)(5).

Section (A)(21) addresses a conservator’s authority regarding digital assets of the protected person.

Section (A)(22) authorizes a conservator to exercise a protected person’s rights as a trust beneficiary.

Section (B)(3) follows UGPPA Section 62‑5‑425(b)(7)(2010). The comment to the UGPPA section states that while this subsection authorizes a conservator to deal with real property located in another state, before disposing of the property in the other state, local law may require that the conservator have some contact with or supervision by a court in that state.

Section (B)(5) addresses leasing other than residential leases.

Section (B)(9) revises former Section 62‑5‑424(C)(9) and allows charitable gifting following the protected person’s estate plan, provided there are sufficient assets for the protected person and dependent’s support and has eliminated specific financial restrictions.

Section (B)(11) addresses payment of fees to identifiable parties from the protected person’s estate.

Section (B)(12) provides for budgeting for routine expenditures.

Section (B)(13) allows for reimbursements to the conservator.

Section (B)(14) authorizes the conservator to exercise or release protected person’s fiduciary and custodial powers.

Section (B)(15) authorizes the conservator to purchase options for securities or other property.

Section (C) allows the conservator to file for instructions to ratify certain expenditures.

Section (D) preserves the protected person’s attorney‑client relationship with his counsel.

Section 62‑5‑423. (A) A conservator may expend or distribute sums from the estate without further court authorization for the health, education, maintenance, and support of the protected person and his dependents in accordance with the following principles:

(1) The expenditures must be consistent with a prior court‑approved financial plan.

(2) The conservator shall consider recommendations relating to the appropriate standard of health, education, maintenance, and support for the protected person made by a parent or guardian. The conservator may not be surcharged for sums paid to persons or organizations furnishing health, education, maintenance, or support to the protected person pursuant to the recommendations of a parent or guardian unless the conservator has actual knowledge that the parent or guardian is deriving personal financial benefit from these payments, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person.

(3) The conservator shall consider:

(a) the size of the estate, the probable duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate that has been conserved for him;

(b) the accustomed standard of living of the protected person and members of his household; and

(c) other funds or sources used for the support of the protected person.

(4) Funds expended under this subsection may be paid by the conservator to any person, including the protected person, as reimbursement for expenditures or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(5) If the conservator determines that it is reasonably necessary to supply funds to the protected person, the conservator may provide these funds to the protected person through reasonable financial methods, including, but not limited to, checks, currency, debit card, or allowance. All funds so provided must be reported on the accountings as required by the court.

(B) After paying outstanding expenses of administration and any claims approved by the court, after meeting the requirements of Section 62‑5‑416, and after complying with any additional requirements established by the court, the conservator shall pay over and distribute all remaining funds and properties as follows:

(1) when a person who is incapacitated solely by reason of minority attains the age of eighteen or is emancipated by a court order, to the now‑adult or emancipated protected person as soon as practical, unless a:

(a) protective order has been issued because the protected person is incapacitated; or

(b) protective proceeding or other petition with regard to the protected person is pending; a protected person under the age of eighteen who is married shall remain a minor for purposes of this subsection until attaining the age of eighteen or being emancipated by court order;

(2) upon an adjudication restoring capacity, to the former protected person as soon as practical;

(3) upon a determination by the court that the protected person’s estate has a net aggregate amount of less than fifteen thousand dollars to or for the protected person as soon as practical pursuant to Section 62‑5‑103; or

(4) if a protected person dies, to the protected person’s duly appointed personal representative or as ordered by the court.

REPORTER’S COMMENTS

The introduction of Section 62‑5‑423(A) refers to the protected person’s dependents. UGPPA Section 62‑5‑427 (2010) clarifies the definition and authority to distribute to dependents. ‘Dependents’ is not limited to dependents whom the protected person is legally obligated to support, but refers to individuals who are in fact dependent on the protected person, such as children in college and adult children with developmental disabilities. Child and spousal support payments are now specifically included within permitted distributions to dependents. Former Section 62‑5‑425(3) is now incorporated within the introductory paragraph of Section 62‑5‑423.

The 2017 amendment added Section (A)(1) and pertains to expenditures relying on a court approved financial plan.

Section (A)(2) added ‘health’ and ‘maintenance,’ but deleted ‘care.’ This was based on UGPPA Section 62‑5‑427 (upon which that section was based on subsections (a) and (b) of UGPPA (1982) Section 62‑2‑324 (subsections (a) and (b) of UGPPA Section 62‑5‑424 (1982)) but with several changes.

Section (A)(5) is new and provides accepted methods of supplying funds to the protected person.

Section (B) addresses conservatorships established based on minority.

Section (B)(1)(a) and (b) provide exceptions for distributions to protected persons who do not fall within the category of a protected person simply on the basis of having been a minor.

Section (B)(2) extrapolates from former Section 62‑5‑425(c)(1).

Section (B)(3) increases the net distributive amount to $15,000.00 to be paid to the protected person upon a determination by the court that the estate consists of that amount in the net aggregate.

Former Section 62‑5‑425(d) that addresses conservator’s duties upon the death of the protected person has been removed from the revised section and moved to Section 62‑5‑428.

Section 62‑5‑423(B)(4) more directly states the identity of the protected person’s personal representative.

Section 62‑5‑424. RESERVED.

Section 62‑5‑425. In investment and distribution of estate assets or in the use or withdrawal of a power of revocation, and in titling accounts, the conservator and the court must consider any:

(A) known estate plan, including a revocable trust having the protected person as settlor; or

(B) instrument, including, but not limited to, a contract, transfer, or joint ownership arrangement originated by the protected person which provides a benefit at death to another as referenced in Section 62‑5‑422.

REPORTER’S COMMENTS

The 2017 amendments strengthen the requirement of the conservator and the court from ‘should consider’ to ‘must consider’ when taking into account any known estate plan of the protected person, in making investments, in distribution of assets, and in exercising certain other powers.

The amendment also adds language which requires that the conservator and the court must consider any contract, transfer, or joint ownership arrangement originated by the protected person that provides a benefit at death to another person as referenced in Section 62‑5‑422(A)(19).

Section 62‑5‑426. (A) The probate court has exclusive jurisdiction over claims against the protected person arising from the internal affairs of the conservatorship which may be commenced in the following manner:

(1) A claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed.

(2) A claim is considered presented on the receipt of the written statement of claim by the conservator.

(3) Every claim that is disallowed in whole or part by the conservator is barred so far as not allowed unless the claimant files and properly serves a summons and petition for allowance no later than thirty days after the mailing of the notice of disallowance or partial disallowance if the notice warns the claimant of the impending bar.

(B) Except as limited by Section 62‑5‑433, the probate court has jurisdiction concurrent with the circuit court in matters involving a request for a judicial determination as to the external affairs of a conservatorship, including actions by or against creditors or debtors of conservatorships and other actions or proceedings involving conservators and third parties. If a creditor has notice of the appointment of a conservator, all pleadings must be served by or on the conservator. Within thirty days after the conservator files, or becomes aware of, any court action in which the protected person is a party, the conservator must notify the court where the conservatorship is being administered if the outcome may constitute a claim against the estate. The conservator may request instructions from the court as necessary.

(C) If it appears that the conservatorship assets are likely to be exhausted before all existing claims are paid, preference must be given to prior claims for the care, maintenance, and education of the protected person or his dependents and existing claims for expenses of administration.

REPORTER’S COMMENTS

The 2017 amendment made substantial revisions from the prior statute, Section 62‑5‑428, which provided a procedure for the presentation and enforcement of claims against the estate of a protected person similar to claims procedures for decedents’ estates. With the 2017 revision, the procedures are differentiated depending on whether they relate to the internal or external affairs of the conservatorship. This is analogous to Article 7, the South Carolina Trust Code, which delineates the subject matter jurisdiction between the probate court and circuit court depending upon whether proceedings concern internal or external matters.

Subsection 62‑5‑426(A) addresses the procedure relative to the internal affairs of a conservatorship, and specifies that after the disallowance of a claim the claimant has thirty days to file and serve a summons and petition for allowance. This is the same requirement of filing and serving the pleadings within the thirty days as in the elective share, omitted spouse and pretermitted children statutes. Internal affairs of a conservatorship estate relate to how the estate of a protected person is managed, expended or distributed, and could include questions about the costs of housing for the protected person, payments to guardians or to advisors employed by the conservator, or conservator commissions. Subsection 62‑5‑426(C) gives priority to claims made by caregivers and expenses of administration.

Subsection 62‑5‑426(B) addresses the procedure relative to the external affairs of a conservatorship and its main purpose is to require the conservator to keep the probate court informed about actions in other courts which may affect the protected person’s assets, and allows the conservator to request instructions from the court. External affairs could include disputes between the conservator and third parties, family court proceedings involving a protected person, or other matters outside the day to day administration of a protected person’s estate.

Section 62‑5‑427. (A) Unless otherwise provided in a contract, a conservator is not individually liable on a contract properly entered into in his fiduciary capacity during the administration of the estate unless he fails to reveal his representative capacity and fails to identify the estate in the contract.

(B) The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed during the administration of the estate only if he is personally at fault.

(C) Claims based on contracts entered into by a conservator in his fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed during the administration of the estate may be asserted against the estate by proceeding against the conservator in his fiduciary capacity, whether or not the conservator is individually liable.

(D) A question of liability between the estate and the conservator individually may be determined in a proceeding for accounting, surcharge, indemnification, or other appropriate proceeding.

REPORTER’S COMMENTS

The 2017 amendments to this section retains the language from former Section 62‑5‑429.

Section 62‑5‑428. (A)(1) Upon filing of an application with the appointing court, the protected person, the conservator, or interested person may request an order:

(a) requiring, increasing, or reducing bond or security;

(b) requiring an accounting;

(c) terminating a conservatorship when the estate has a net aggregate amount of less than fifteen thousand dollars;

(d) terminating a conservatorship and approving a final accounting at the death of the protected person;

(e) terminating a conservatorship and approving a final accounting when a protected person who is incapacitated solely by reason of minority attains the age of eighteen or is emancipated by court order;

(f) approving payment of the protected person’s funeral expenses;

(g) accepting the resignation of or removing the conservator for good cause and appointing a temporary or successor conservator, if necessary;

(h) adjudicating the restoration of the protected person’s capacity.

(2) The court may approve or deny the application without notice, require notice to such persons as the court directs, or may require the commencement of a formal proceeding pursuant to Section 62‑5‑428(B).

(3) If the court determines that the protected person’s estate has a net aggregate amount of less than fifteen thousand dollars, the court may in its discretion, terminate the conservatorship.

(4) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into the conservator’s possession, inform the personal representative or a beneficiary named in the will of the delivery, and retain the estate for delivery to a duly appointed personal representative of the deceased protected person or other persons entitled to delivery. If, after thirty days from the death of the protected person, no person has been appointed personal representative and no application or petition for appointment is pending in the court, the conservator may apply for appointment as personal representative. A person must not be disqualified as a personal representative of a deceased protected person solely by reason of his having been appointed or acting as conservator for that protected person.

(B)(1) Upon filing of a summons and petition with the appointing court, the protected person, the conservator, or interested person may request an order:

(a) terminating a conservatorship;

(b) requiring distributions from the protected person’s estate after the conservator has denied the request;

(c) upon the death of a conservator, appointing a successor conservator, if necessary;

(d) limiting or expanding the conservatorship;

(e) authorizing a transaction involving a conflict of interest pursuant to Section 62‑5‑419;

(f) reviewing the denial of an application pursuant to Section 62‑5‑422(C); or

(g) granting other appropriate relief.

(2) The procedure for obtaining orders subsequent to appointment is as follows:

(a) The summons and petition shall state the relief sought and the reasons the relief is necessary and must be served upon the protected person; the conservator; the guardian, if any; the spouse; adult children; and parents of the protected person whose whereabouts are reasonably ascertainable; and, if there is no spouse, adult child, or parent, any person who has equal or greater priority for appointment; any person with whom the protected person resides outside of a health care facility, group home, homeless shelter, or prison; and the Secretary of the Department of Veterans Affairs if the conservatorship is for the purpose of receiving veterans benefits.

(b) After filing and service of the summons and petition, the court may appoint a guardian ad litem and may appoint counsel for the protected person, unless the protected person has private counsel, and such examiners as are needed to evaluate and confirm the allegations of the petition.

(c) As soon as the interests of justice may allow, but after the time for response to the petition has elapsed as to all parties served, the court shall hold a hearing on the merits of the petition. The protected person and all parties not in default must be given notice of the hearing. If all parties not in default waive a hearing, the court may issue a consent order.

(d) The court may issue interim orders, for a period not to exceed ninety days, until a hearing is held and a final order is issued.

(C) The court may specify a minimum period, not exceeding one year, during which no application or petition for readjudication may be filed without leave of court. Subject to this restriction, the protected person or the conservator may petition the court for a termination of incapacity or of the protective order, which must be proved by a preponderance of the evidence.

(D) An attorney who has been asked by the protected person to represent him in an action under this section may file a motion with the court for permission to represent the protected person.

REPORTER’S COMMENTS

The 2017 amendment to this section allows informal actions for requests subsequent to appointment and specifies the procedures for both informal and formal actions. Subsection (A)(3) allows the Court to terminate conservatorships when the assets are below $15,000.00 (previously $5,000.00).

While this section allows the filing of an application for various types of relief, the court has the discretion to require a formal action when it deems it appropriate. For example, if the matter is contested, the court may require the filing of a formal action.

In an action to have a protected person determined to have regained capacity, the petitioner has the burden to prove by a preponderance of the evidence that the protected person has regained capacity, such that a conservatorship is no longer needed or that a limited conservatorship or other protective order is appropriate. In contrast, the evidentiary standard for the initial adjudication of incapacity is by clear and convincing evidence, thus giving more protection to the individual’s rights.

The 2017 amendment gives the court discretion in appointing counsel and a guardian ad litem for requests for relief after the appointment of a conservator or issuance of another protective order. In exercising its discretion to appoint counsel or a guardian ad litem, the court should consider the type of relief requested in the petition, the facts of the case, and the likelihood that the protected person’s rights may not be represented or protected. Additionally, the protected person has the right to retain his own counsel, and that attorney may file a motion for the court to represent the protected person.

Section 62‑5‑429. (A) A person indebted to a protected person, or having possession of property of or an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate, or other like fiduciary appointed by a court of the state of residence of the protected person, upon being presented with proof of his appointment and an affidavit made by him or on his behalf stating that:

(1) no protective proceeding relating to the protected person is pending in this State; and

(2) the foreign conservator is entitled to payment or to receive delivery.

(B) If the person to whom the affidavit is presented is not aware of a protective proceeding pending in this State, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

REPORTER’S COMMENTS

Section 62‑5‑429 provides that any debtor (or person having possession of property) of a protected person may pay the debt (or deliver the property) to any conservator or other fiduciary appointed by a court of the state of residence of the protected person, upon presentation by the fiduciary of proof of appointment and his affidavit that there is no protective proceeding relating to the protected person pending in this State and that the foreign fiduciary is entitled to payment or receive delivery. The person making payment or delivery is then discharged.

Section 62‑5‑430. (A) If a conservator has not been appointed in this State and a petition for a protective order is not pending in this State, a conservator appointed in another state, after giving notice to the appointing court of an intent to register, may register the protective order in this State by filing as a foreign judgment in the court, in any appropriate county of this State certified copies of the order and letters of office, and any bond. The court shall treat this as the filing of authenticated or certified records and shall charge fees set forth in Section 8‑21‑770 for the filing of these documents. The court will then issue a certificate of filing as proof of the filing. The conservator shall file the certificate of filing, along with a copy of the letters of office, in the office of the register of deeds of that county.

(B) Upon registration of a protective order from another state, the conservator may exercise in this State all powers authorized in the order of appointment except as prohibited under the laws of this State, including maintaining actions and proceedings in this State and, if the guardian or conservator is not a resident of this State, subject to any conditions imposed upon nonresident parties.

(C) A court of this State may grant any relief available under this article and other laws of this State to enforce a registered order.

REPORTER’S COMMENTS

This section provides that a foreign conservator may file certified copies of his appointment in all counties where the protected person has property and exercise all powers of a local conservator, if no local conservator has been appointed and no petition is pending.

The 2017 amendment modifies former Section 62‑5‑432 to be consistent with Section 62‑5‑716.

Section 62‑5‑431. (A) For purposes of this section:

(1) ‘Estate’ and ‘income’ include only monies received from the VA, all real and personal property acquired in whole or in part with these monies, and all earnings, interest, and profits.

(2) ‘Benefits’ means all monies payable by the United States through the VA.

(3) ‘Secretary’ means the Secretary of the United States Department of Veterans Affairs (VA) or his successor.

(4) ‘Protected person’ means a beneficiary of the VA.

(5) ‘Conservator’ has the same meaning as provided in Section 62‑1‑201 but only as to benefits from the VA.

(B) Whenever, pursuant to a law of the United States or regulation of the VA, the Secretary requires that a conservator be appointed for a protected person before payment of benefits, the appointment must be made in the manner provided in this part, except to the extent this section requires otherwise. The petition shall show that the person to be protected has been rated incapable of handling his estate and monies on examination by the VA in accordance with the laws and regulations governing the VA.

(C) When a petition is filed for the appointment of a conservator and a certificate of the secretary or his representative is filed setting forth the fact that the appointment of a conservator is a condition precedent to the payment of benefits due the protected person by the VA, the certificate is prima facie evidence of the necessity for the appointment and no examiner’s report is required.

(D) Except as provided or as otherwise permitted by the VA, a person may not serve as conservator of a protected person if the proposed conservator at that time is acting simultaneously as conservator for five protected persons. Upon presentation of a petition by an attorney for the VA alleging that a person is serving simultaneously as a conservator for more than five protected persons and requesting that person’s termination as a conservator for that reason, upon proof substantiating the petition, the court shall restrain that person from acting as a conservator for the affected protected person and shall require a final accounting from the conservator. After the appointment of a successor conservator if one is warranted under the circumstances, the court shall terminate the appointment of the person as conservator in all requested cases. The limitations of this section do not apply when the conservator is a bank or trust company.

(E) The conservator shall file an inventory, accountings, exhibits or other pleadings with the court and with the VA as provided by law or VA regulation. The conservator is required to furnish the inventory and accountings to the VA.

(F) Every conservator shall invest the surplus funds in his protected person’s estate in securities, or otherwise, as allowed by law, and in which the conservator has no interest. These funds may be invested, without prior court authorization, in direct interest‑bearing obligations of this State or of the United States and in obligations in which the interest and principal are both unconditionally guaranteed by the United States Government.

(G) Whenever a copy of a public record is required by the VA to be used in determining the eligibility of a person to participate in benefits made available by the VA, the official charged with the custody of the public record shall provide a certified copy of the record, without charge, to an applicant for the benefits, a person acting on his behalf, or a representative of the VA.

(H) With regard to a minor or a mentally incompetent person to whom, or on whose behalf, benefits have been paid or are payable by the VA, the secretary is and must be a necessary party in a:

(1) proceeding brought for the appointment, confirmation, recognition, or removal of a conservator;

(2) suit or other proceeding, whether formal or informal, arising out of the administration of the person’s estate; and

(3) proceeding which is for the removal of the disability of minority or of mental incompetency of the person.

(I) In a case or proceeding involving property or funds of a protected person not derived from the VA, the VA is not a necessary party, but may be an interested party in the proceedings.

(J) For services as conservator of funds paid from the VA, a conservator may be paid an amount not to exceed five percent of the income of the protected person during any year. If extraordinary services are rendered by a conservator, the court may, upon application of the conservator and notice to the VA, authorize additional compensation payable from the estate of the protected person. No compensation is allowed on the corpus of an estate derived from payments from the VA. The conservator may be allowed reimbursement from the estate of the protected person for reasonable premiums paid to a corporate surety upon the bond furnished by the conservator.

REPORTER’S COMMENTS

This section was adopted in 2016 as Section 62‑5‑436 and was renumbered in the 2017 version. This section is a distillation of provisions of the Uniform Veterans’ Guardianship Act, which was formerly Part 6 of Title 62. This section should be considered whenever the minor or incapacitated individual is receiving or will receive benefits from the Veterans Administration. In general, the requirements for commencing the proceeding remain the same as with a person who is not receiving VA benefits except that a certificate of the Secretary or his representative that the appointment is necessary replaces the necessity for an examiner. Additionally, this section imposes a limit on the number of persons for whom an individual conservator may act, unless permitted by the VA. The VA is a necessary party in some proceedings and an interested party in other proceedings.

Section 62‑5‑432. (A) The court has authority to create and establish a special needs trust for an incapacitated individual in compliance with 42 U.S.C. Section 1396p(d)(4)(A), as amended, and to order the placement of the incapacitated individual’s funds into such a trust or into a pooled trust in compliance with 42 U.S.C. Section 1396p(d)(4)(C), as amended, for the benefit of incapacitated individuals under its authority to issue protective orders pursuant to the procedure set forth in Section 62‑5‑401, et seq.

(B) In the case of a disabled minor, the court has authority to create and establish a special needs trust in compliance with 42 U.S.C. Section 1396p(d)(4)(A), as amended, if the court determines it is in the disabled minor’s best interest. The court also has the authority to order the placement of the minor’s funds into a special needs trust or into a pooled trust in compliance with 42 U.S.C. Section 1396p(d)(4)(C), as amended, for the benefit of a minor under its authority to implement provisions of protective orders pursuant to the procedure set forth in Section 62‑5‑401, et seq., even though the terms of the trust extend beyond the age of majority.

REPORTER’S COMMENTS

Prior to the 2017 amendments to Article V, the court did not have specific jurisdiction to create a special needs trust. The 2017 amendments established jurisdiction for the creation of a special needs trust in S.C. Code Section 62‑1‑302(a)(2)(iii) and set forth a procedure for the creation of a special needs trust in this section. The authority of the court to create and establish a special needs trust for minors and incapacitated individuals pursuant to provisions of protective orders is now specifically established and set out in this section.

Section 62‑5‑433. (A)(1) For purposes of this section and for any claim exceeding twenty‑five thousand dollars in favor of or against any minor or incapacitated individual, ‘court’ means the circuit court of the county in which the minor or incapacitated individual resides or the circuit court in the county in which the suit is pending. For purposes of this section and for any claim not exceeding twenty‑five thousand dollars in favor of or against any minor or incapacitated individual, ‘court’ means either the circuit court or the probate court of the county in which the minor or incapacitated individual resides or the circuit court or probate court in the county in which the suit is pending.

(2) ‘Claim’ means the net or actual amount accruing to or paid by the minor or incapacitated individual as a result of the settlement.

(3) ‘Petitioner’ means either a conservator appointed by the court for the minor or incapacitated individual or the guardian or guardian ad litem of the minor or incapacitated individual if a conservator has not been appointed.

(B) The settlement of a claim over twenty‑five thousand dollars in favor of or against a minor or incapacitated individual for the payment of money or the possession of personal property must be effected on his behalf in the following manner:

(1) The petitioner must file with the court a verified petition setting forth all of the pertinent facts concerning the claim, payment, attorney’s fees, and expenses, if any, and the reasons why, in the opinion of the petitioner, the proposed settlement should be approved. For all claims that exceed twenty‑five thousand dollars, the verified petition must include a statement by the petitioner that, in his opinion, the proposed settlement is in the best interests of the minor or incapacitated individual.

(2) If, upon consideration of the petition and after hearing the testimony as it may require concerning the matter, the court concludes that the proposed settlement is proper and in the best interests of the minor or incapacitated individual, the court shall issue its order approving the settlement and authorizing the petitioner to consummate it and, if the settlement requires the payment of money or the delivery of personal property for the benefit of the minor or incapacitated individual, to receive the money or personal property and execute a proper receipt and release or covenant not to sue therefor, which is binding upon the minor or incapacitated individual.

(3) The order authorizing the settlement must require that payment or delivery of the money or personal property be made through the conservator. If a conservator has not been appointed, the petitioner, upon receiving the money or personal property, shall pay and deliver it to the court pending the appointment and qualification of a duly appointed conservator. If a party subject to the court order fails or refuses to pay the money or deliver the personal property as required by the order, he is liable and punishable as for contempt of court, but failure or refusal does not affect the validity or conclusiveness of the settlement.

(C) The settlement of a claim that does not exceed twenty‑five thousand dollars in favor of or against a minor or incapacitated individual for the payment of money or the possession of personal property may be effected in any of the following manners:

(1) If a conservator has been appointed, he may settle the claim without court authorization or confirmation, as provided in Section 62‑5‑424, or he may petition the court for approval, as provided in items (1), (2), and (3) of subsection (B). If the settlement requires the payment of money or the delivery of personal property for the benefit of the minor or incapacitated individual, the conservator shall receive the money or personal property and execute a proper receipt and release or covenant not to sue therefor, which is binding upon the minor or incapacitated individual.

(2) If a conservator has not been appointed, the guardian or guardian ad litem must petition the court for approval of the settlement, as provided in items (1) and (2) of subsection (B), and without the appointment of a conservator. The payment or delivery of money or personal property to or for a minor or incapacitated individual must be made in accordance with Section 62‑5‑103. If a party subject to the court order fails or refuses to pay the money or deliver the personal property, as required by the order and in accordance with Section 62‑5‑103, he is liable and punishable as for contempt of court, but failure or refusal does not affect the validity or conclusiveness of the settlement.

(D) The settlement of a claim that does not exceed two thousand five hundred dollars in favor of or against a minor or incapacitated individual for the payment of money or the possession of personal property may be effected by the parent or guardian of the minor or incapacitated individual without court approval of the settlement and without the appointment of a conservator. If the settlement requires the payment of money or the delivery of personal property for the benefit of the minor or incapacitated individual, the parent or guardian shall receive the money or personal property and execute a proper receipt and release or covenant not to sue therefor, which is binding upon the minor or incapacitated individual. The payment or delivery of money or personal property to or for a minor or incapacitated individual must be made in accordance with Section 62‑5‑103.

REPORTER’S COMMENTS

No substantive changes were made to this section in the 2017 amendments. The only changes involved changes in terms, like use of the term ‘incapacitated individual’ rather than ‘incapacitated person.’ Actions initiated by agents acting within the scope of authority granted in a properly executed durable power of attorney are not subject to the requirements of this section.”

B. Part 7, Article 5, Title 62 of the 1976 Code is amended to read:

“Part 7

South Carolina Adult Guardianship and Protective Proceedings

Jurisdiction Act

Section 62‑5‑700. This act may be cited as the ‘South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act’.

Section 62‑5‑701. Notwithstanding another provision of law, this part provides the exclusive jurisdictional basis for a court of this State to appoint a guardian or issue a protective order for an adult.

Section 62‑5‑702. In addition to the terms defined in Part 1, Article 5, Title 62, the following terms, as used in the part, apply:

(1) ‘Court’ means a probate court in this State or a court in another state with the same jurisdiction as a probate court in this State.

(2) ‘Guardianship order’ means an order appointing a guardian.

(3) ‘Home state’ means the state in which the alleged incapacitated individual was physically present, including a period of temporary absence, for at least six consecutive months immediately preceding the filing of a petition for the appointment of a guardian or protective order; or if none, the state in which the alleged incapacitated individual was physically present, including a period of temporary absence, for at least six consecutive months ending with the six months prior to the filing of the petition.

(4) ‘Significant‑connection state’ means a state, other than the home state, with which an alleged incapacitated individual has a significant connection other than mere physical presence and in which substantial evidence concerning the alleged incapacitated individual is available. In determining, pursuant to Sections 62‑5‑707 and 62‑5‑714, whether an alleged incapacitated individual has a significant connection with a particular state, the court shall consider the:

(a) location of the alleged incapacitated individual’s family and other persons required to be notified of the guardianship or protective proceeding;

(b) length of time the alleged incapacitated individual at any time was physically present in the state and the duration of any absence;

(c) location of the alleged incapacitated individual’s property; and

(d) extent to which the alleged incapacitated individual has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver’s license, social relationship, and receipt of services.

REPORTER’S COMMENT

The 2017 amendment incorporates the definition of ‘home state’ (9) from the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act adopted in modified form in South Carolina and included in Sections 62‑5‑700 through 716 and was derived from, but differs in a couple of respects from, the definition of the same term in Section 102 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997). First, unlike the definition in the UCCJEA, the definition clarifies that actual physical presence is necessary. The UCCJEA definition instead focuses on where the child has ‘lived’ for the prior six months. Basing the test on where someone has ‘lived’ may imply that the term ‘home state’ is similar to the concept of domicile. Domicile, in an adult guardianship context, is a vague concept that can easily lead to claims of jurisdiction by courts in more than one state. Second, under the UCCJEA, home state jurisdiction continues for six months following physical removal from the state and the state has ceased to be the actual home. Under this Act, the six‑month tail is incorporated directly into the definition of home state. The place where the alleged incapacitated individual was last physically present for six months continues as the home state for six months following physical removal from the state. This modification of the UCCJEA definition eliminates the need to refer to the six‑month tail each time home state jurisdiction is mentioned in the Act.

The definition of ‘significant‑connection state’ (17) is also from the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act adopted in modified form in South Carolina and included in Sections 62‑5‑700 through 716 and was similar to Section 201(a)(2) of the Uniform Child Custody Jurisdiction and Enforcement Act (1997). However, this definition adds a list of factors relevant to adult guardianship and protective proceedings to aid the court in deciding whether a particular place is a significant‑connection state. Under Section 301(e)(1), the significant connection factors listed in the definition are to be taken into account in determining whether a conservatorship may be transferred to another state.

Section 62‑5‑703. The court may treat a foreign country as if it were a state for the purpose of applying this part.

Section 62‑5‑704. (A) The court may communicate with a court in another state concerning a proceeding arising pursuant to this article. The court shall allow the parties to participate in a discussion between courts on the merits of a proceeding. Except as otherwise provided in subsection (B), the court shall make a record of the communication. When a discussion on the merits of a proceeding between courts is held, the record must show that the parties were given an opportunity to participate, must summarize the issues discussed, and must list the participants to the discussion. In all other matters except as provided in subsection (B), the record may be limited to the fact that the communication occurred.

(B) Courts may communicate concerning schedules, calendars, court records, and other administrative matters without making a record. A court may allow the parties to a proceeding to participate in any communications held pursuant to this subsection.

Section 62‑5‑705. (A) In a guardianship or protective proceeding in this State, the court may request the appropriate court of another state to do any of the following:

(1) hold an evidentiary hearing;

(2) order a person in that state to produce evidence or give testimony pursuant to procedures of that state;

(3) order that an evaluation or assessment be made of the alleged incapacitated individual;

(4) order an appropriate investigation of a person involved in a proceeding;

(5) forward to the court a certified copy of the transcript or other record of a hearing pursuant to item (1) or another proceeding, evidence otherwise produced pursuant to item (2), and an evaluation or assessment prepared in compliance with an order pursuant to item (3) or (4);

(6) issue an order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the alleged incapacitated individual or the ward or protected person; and

(7) issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information as defined in 45 C.F.R. Section 164.504.

(B) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subsection (A), the court has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

Section 62‑5‑706. (A) In a guardianship or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this State for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(B) In a guardianship or protective proceeding, a court in this State may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. The court shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

(C) Documentary evidence transmitted from another state to a court of this State by technological means that does not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

Section 62‑5‑707. The court has jurisdiction to appoint a guardian or issue a protective order for an alleged incapacitated individual if:

(A) this State is the alleged incapacitated individual’s home state;

(B) on the date the petition is filed, this State is a significant‑connection state; and

(1) the alleged incapacitated individual does not have a home state or a court of the alleged incapacitated individual’s home state has declined to exercise jurisdiction because this State is a more appropriate forum; or

(2) the alleged incapacitated individual has a home state, a petition for an appointment or order is not pending in a court of that state or another significant‑connection state and, before the court makes the appointment or issues the order:

(a) a petition for an appointment or order is not filed in the alleged incapacitated individual’s home state;

(b) an objection to the court’s jurisdiction is not filed by a person required to be notified of the proceeding; and

(c) the court concludes that it is an appropriate forum pursuant to the factors provided in Section 62‑5‑710(C);

(C) this State does not have jurisdiction pursuant to either subsections (A) or (B), the alleged incapacitated individual’s home state and all significant‑connection states have declined to exercise jurisdiction because this State is the more appropriate forum, and jurisdiction in this State is consistent with the constitutions of this State and the United States; or

(D) the requirements for special jurisdiction pursuant to Section 62‑5‑708 are met.

Section 62‑5‑708. (A) The court lacking jurisdiction pursuant to Sections 62‑5‑707 (A) through (C) has special jurisdiction to do any of the following:

(1) appoint a guardian in an emergency pursuant to this article for a term not exceeding ninety days for an alleged incapacitated individual who is physically present in this State;

(2) issue a protective order with respect to real or tangible personal property located in this State; or

(3) appoint a guardian or conservator for an incapacitated individual or protected person for whom a provisional order to transfer the proceeding from another state has been issued pursuant to procedures similar to Section 62‑5‑714.

(B) If a petition for the appointment of a guardian in an emergency is brought in this State pursuant to this article and this State was not the alleged incapacitated individual’s home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

Section 62‑5‑709. Except as otherwise provided in Section 62‑5‑708, a court that has appointed a guardian or issued a protective order consistent with this article has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order has expired by its own terms.

Section 62‑5‑710. (A) The court having jurisdiction pursuant to Section 62‑5‑707 to appoint a guardian or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(B) If the court declines to exercise its jurisdiction pursuant to subsection (A), it either shall dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

(C) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

(1) the expressed preference of the alleged incapacitated individual;

(2) whether abuse, neglect, or exploitation of the alleged incapacitated individual has occurred or is likely to occur and which state could best protect the alleged incapacitated individual from the abuse, neglect, or exploitation;

(3) the length of time the alleged incapacitated individual was physically present in or was a legal resident of this or another state;

(4) the distance of the alleged incapacitated individual from the court in each state;

(5) the financial circumstances of the alleged incapacitated individual’s estate;

(6) the nature and location of the evidence;

(7) the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;

(8) the familiarity of the court of each state with the facts and issues in the proceeding; and

(9) if an appointment is made, the court’s ability to monitor the conduct of the guardian or conservator.

Section 62‑5‑711. (A) If at any time the court determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may:

(1) decline to exercise jurisdiction;

(2) exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the alleged incapacitated individual or the protection of the alleged incapacitated individual’s property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction; or

(3) continue to exercise jurisdiction after considering:

(a) the extent to which the alleged incapacitated individual and all persons required to be notified of the proceedings have acquiesced in the exercise of the court’s jurisdiction;

(b) whether it is a more appropriate forum than the court of any other state pursuant to the factors provided in Section 62‑5‑710(C); and

(c) whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of Section 62‑5‑708.

(B) If the court determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney’s fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this State or a governmental subdivision, agency, or instrumentality of this State unless authorized by law other than this article.

Section 62‑5‑712. If a petition for the appointment of a guardian or issuance of a protective order is brought in this State and this State was not the alleged incapacitated individual’s home state on the date the petition was filed, in addition to complying with the notice requirements of this State, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the alleged incapacitated individual’s home state. The notice must be given in the same manner as notice is required to be given in this State.

Section 62‑5‑713. Except for a petition for the appointment of a guardian in an emergency or issuance of a protective order limited to property located in this State pursuant to Section 62‑5‑708(A)(1) or (2), if a petition for the appointment of a guardian or issuance of a protective order is filed in this State and in another state and neither petition has been dismissed or withdrawn, the following rules apply:

(A) if the court has jurisdiction pursuant to Section 62‑5‑707, it may proceed with the case unless a court in another state acquires jurisdiction under provisions similar to Section 62‑5‑707 before the appointment or issuance of the order; or

(B) if the court does not have jurisdiction pursuant to Section 62‑5‑707, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the court in this State shall dismiss the petition unless the court in the other state determines that the court in this State is a more appropriate forum.

Section 62‑5‑714. (A) A guardian or conservator appointed in this State may petition the court to transfer the guardianship or conservatorship to another state.

(B) Notice of a petition pursuant to subsection (A) must be given to the persons that would be entitled to notice of a petition in this State for the appointment of a guardian or conservator.

(C) On the court’s own motion or on request of the guardian or conservator, the ward or protected person, or other person required to be notified of the petition, the court shall hold a hearing on a petition filed pursuant to subsection (A), except that a hearing must not be required if a consent order is signed by all parties who have pled, defended, or otherwise participated in the proceeding, as provided by the South Carolina Rules of Civil Procedure.

(D) The court shall issue an order provisionally granting a petition to transfer a guardianship and shall direct the guardian to petition for guardianship in the other state if the court is satisfied that the guardianship will be accepted by the court in the other state and the court finds that:

(1) the ward is physically present in or is reasonably expected to move permanently to the other state;

(2) an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the ward; and

(3) plans for care and services for the ward in the other state are reasonable and sufficient.

(E) The court shall issue a provisional order granting a petition to transfer a conservatorship and shall direct the conservator to petition for conservatorship in the other state if the court is satisfied that the conservatorship will be accepted by the court of the other state and the court finds that:

(1) the protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state considering the factors provided in Section 62‑5‑707;

(2) an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and

(3) adequate arrangements will be made for management of the protected person’s property.

(F) The court shall issue a final order confirming the transfer and terminating the guardianship or conservatorship upon its receipt of:

(1) a provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to Section 62‑5‑715; and

(2) the documents required to terminate a guardianship or conservatorship in this State.

Section 62‑5‑715. (A) To confirm transfer of a guardianship or conservatorship to this State under provisions similar to Section 62‑5‑714, the guardian or conservator must petition the court in this State to accept the guardianship or conservatorship. The petition must include a certified copy of the other state’s provisional order of transfer.

(B) Notice of a petition pursuant to subsection (A) must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state and this State. The notice must be given in the same manner as notice is required to be given in this State.

(C) On the court’s own motion or on request of the guardian or conservator, the ward or protected person, or other person required to be notified of the proceeding, the court shall hold a hearing on a petition filed pursuant to subsection (A), except that a hearing must not be required if a consent order is signed by all parties who have pled, defended, or otherwise participated in the proceeding, as provided by the South Carolina Rules of Civil Procedure.

(D) The court shall issue an order provisionally granting a petition filed pursuant to subsection (A) unless:

(1) an objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the ward or protected person; or

(2) the guardian or conservator is ineligible for appointment in this State.

(E) The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in this State upon its receipt of a final order from the court from which the proceeding is being transferred, when that final order is issued pursuant to provisions similar to Section 62‑5‑714 transferring the proceeding to this State.

(F) Not later than ninety days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the laws of this State.

(G) In granting a petition pursuant to this section, the court shall recognize a guardianship or conservatorship order from the other state, including the determination of the ward or protected person’s incapacity and the appointment of the guardian or conservator.

(H) The denial by the court of a petition to accept a guardianship or conservatorship transferred from another state does not affect the ability of the guardian or conservator to seek appointment as guardian or conservator in this State pursuant to another provision of this article if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

REPORTER’S COMMENTS

The language in this section was amended in 2017 to include language that creates the option of not having a hearing in the matter of the transfer of a guardianship and/or conservatorship case from another state. Prior to the 2017 amendments, there was no such option, and this change was written to make Section 62‑5‑715(C) consistent with Section 62‑5‑714(C).

Section 62‑5‑716. (A) If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this State, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this State by filing as a foreign judgment in the court, in any appropriate county of this State, certified copies of the order and letters of office. The court shall treat this as the filing of authenticated or certified records and shall charge the fees set forth in Section 8‑21‑770. The court will then issue a certificate of registration. The guardian shall file the certificate, along with a copy of his fiduciary letters of office in county real estate records.

(B) If a conservator has been appointed in another state and a petition for a protective order is not pending in this State, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this State by filing as a foreign judgment in the Probate Court, in any county in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond. The court shall treat this as the filing of authenticated or certified records and shall charge the fees set forth in Section 8‑21‑770 for the filing of such documents. The court will then issue a certificate of registration. The conservator shall file the certificate, along with a copy of the fiduciary letters in the county real estate records.

(C)(1) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this State all powers authorized in the order of appointment except as prohibited under the laws of this State, including maintaining actions and proceedings in this State and, if the guardian or conservator is not a resident of this State, subject to any conditions imposed upon nonresident parties.

(2) A probate court of this State may grant any relief available pursuant to the provisions of this article and other laws of this State to enforce a registered order.

REPORTER’S COMMENTS

The purpose of this section is to describe the process for registration of orders from another state and the powers of the guardian or conservator in this State. The 2017 amendment adds language that provides direction to the court stating that the filing of the guardian or conservatorship order is to be treated the same as the filing of an authenticated or certified record. The guardian or conservator pays the required fee, and he is required to file the certificate issued by the court along with a copy of his fiduciary letters of office in the county office that keeps all real estate records. Prior to the 2017 amendments, the language did not provide enough clarity regarding these procedures and what powers the guardian or conservator could exercise in this State.”

**Time effective**

SECTION 6. (A) This act takes effect on January 1, 2019.

(B) Except as otherwise provided in this act, on the effective date of this act:

(1) this act applies to any conservatorships, guardianships, or protective orders for minors or persons under a disability created before, on, or after its effective date;

(2) this act applies to all judicial proceedings concerning conservatorships, guardianships, or protective orders for minors or persons under a disability commenced on or after its effective date;

(3) this act applies to judicial proceedings concerning conservatorships, guardianships, and protective orders for minors or persons under a disability commenced before its effective date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case that particular provision of this act does not apply and the superseded law applies;

(4) subject to item (B)(5) and subsection (C) of this SECTION, any rule of construction or presumption provided in this act applies to governing instruments executed before the effective date of this act unless there is a clear indication of a contrary intent in the terms of the governing instrument; and

(5) an act done and any right acquired or accrued before the effective date of the act is not affected by this act.

(C) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statue before the effective date of the act, that statute continues to apply to the right even if it has been repealed or suspended.

Ratified the 4th day of May, 2017.

Approved the 9th day of May, 2017.

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