ARTICLE 5

Protection of Persons Under Disability and Their Property

DISPOSITION TABLE

Showing where the sections in Parts 1, 2, 3, 4, Article 5, Title 62 were recodified.

|  |  |
| --- | --- |
|  |  |
| FormerSection | NewSection |
| 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 |

Editor’s Note

2017 Act No. 87, Section 6, provides as follows:

“(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 statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or suspended.”

CROSS REFERENCES

Adult Students with Disabilities Educational Rights Consent Act, delegation of right to make educational decisions, see Section 59‑33‑330.

Adult Students with Disabilities Educational Rights Consent Act, identification of eligible adult student as incapable of communicating educational program wishes, interests, or preferences, procedures, designation of educational representative, see Section 59‑33‑340.

Disclosure of digital assets to conservator of protected person, see Section 62‑2‑1070.

Subject matter jurisdiction, concurrent jurisdiction with family court, see Section 62‑1‑302.

Part 1

General Provisions [Effective until January 1, 2019]

**SECTION 62‑5‑101.** Definitions and use of terms.

Section effective until January 1, 2019. See, also, Section 62‑5‑101 effective January 1, 2019.

 Unless otherwise apparent from the context, in this Code:

 (1) “Incapacitated person” means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property;

 (2) A “protective proceeding” is a proceeding under the provisions of Section 62‑5‑401 to determine if a person is an incapacitated person, or to secure the administration of the estates of incapacitated persons or minors;

 (3) A “protected person” is a minor or incapacitated person for whom a conservator has been appointed or other protective order has been made;

 (4) A “ward” is a person for whom a guardian has been appointed;

 (5) A “guardianship proceeding” is a formal proceeding under the provisions of Part 3 of Article 5 (Section 62‑5‑301, et seq.) to determine if a person is an incapacitated person, or to appoint a guardian for an incapacitated person.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 81; 2010 Act No. 244, Section 24, eff June 7, 2010.

**SECTION 62‑5‑102.** Jurisdiction of subject matter; consolidation of proceedings.

Section effective until January 1, 2019. See, also, Sections 62‑5‑102 and 62‑5‑201 effective January 1, 2019.

 (a) The probate court has jurisdiction over protective proceedings and guardianship proceedings.

 (b) When both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 5.

**SECTION 62‑5‑103.** Facility of payment or delivery.

Section effective until January 1, 2019. See, also, Section 62‑5‑103 effective January 1, 2019.

 A person under a duty to pay or deliver money or personal property to a minor or incapacitated person may perform this duty in amounts not exceeding ten thousand dollars each year, by paying or delivering the money or property to:

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

 (2) a guardian of the minor or incapacitated person; 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.

 This section does not apply if the person making payment or delivery has actual knowledge that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor or incapacitated person are pending. The persons, other than the minor or incapacitated person or a financial institution under (3) above, receiving money or property for a minor or incapacitated person, are obligated to apply the money for the benefit of the minor or incapacitated person with due regard to (i) the size of the estate, the probable duration of the minority or incapacity, and the likelihood that the minor or incapacitated person, at some future time, may be able fully to manage his affairs and his estate; (ii) the accustomed standard of living of the minor or incapacitated person and members of his household; and (iii) other funds or sources used for the support of the minor or incapacitated person, but 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 person’s support. Money or other property received on behalf of a minor or incapacitated person 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 person. Excess sums must be preserved for future benefit of the minor or incapacitated person, and a balance not used and property received for the minor or incapacitated person must be turned over to the minor when he attains majority or to the incapacitated person when he is no longer incapacitated. Persons who pay or deliver in accordance with provisions of this section are not responsible for the proper application of it.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 20; 1990 Act No. 521, Section 82; 1997 Act No. 152, Section 20.

**SECTION 62‑5‑104.** Delegation of guardian’s powers.

Section effective until January 1, 2019. See, also, Section 62‑5‑309 effective January 1, 2019.

 A guardian of an incapacitated person, by a properly executed power of attorney, may delegate to another person, for not more than thirty days, any of his powers regarding care and custody of the incapacitated person.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 65; 1997 Act No. 152, Section 21.

**SECTION 62‑5‑105.** Director of Department of Mental Health or his designee may act as conservator.

Section effective until January 1, 2019. See, also, Section 62‑5‑104 effective January 1, 2019.

 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 that patient a sum of money, not in excess of the sum of ten thousand dollars in one calendar year, which may be due the patient or trainee by inheritance, gift, pension, or otherwise. The director or his designee may act as conservator for the patient and his endorsement or receipt discharges the obligor for the sum received. Upon receipt of these funds the director or his designee shall use it for the proper maintenance, use, and benefit of the patient or as much of the fund as may be necessary for these purposes. In the event the patient dies leaving an unexpended balance of these funds in the hands of the director or his designee, he shall apply the balance first to the funeral expenses of the patient or trainee, and any balance remaining must be held by the director or his designee for a period of six months, and if he is not within this period, contacted by the personal representative of the deceased patient, the balance in the personal fund account must be applied to the maintenance and medical care account of the deceased patient.

HISTORY: 1986 Act No. 539, Section 1; 1993 Act No. 83, Section 1; 1993 Act No. 181, Section 1611.

**SECTION 62‑5‑106.** Termination of conservatorship.

Section effective until January 1, 2019. See, also, Sections 62‑5‑101, 62‑5‑306, 62‑5‑307, and 62‑5‑428 effective January 1, 2019.

 (A) For purposes of this section, “incapacitated person” has the meaning set forth in Sections 62‑5‑101(1) and 62‑5‑401(2) and does not include a person protected only by reason of his minority.

 (B) Notwithstanding another provision of law, neither a guardianship of an incapacitated person established pursuant to Part 3 of this article or a conservatorship or other protective order for an incapacitated person established pursuant to Part 4 of this article terminates only because the ward or protected person attains the age of majority or other benchmark age.

HISTORY: 2008 Act No. 303, Section 1, eff June 11, 2008.

Part 1

General Provisions [Effective January 1, 2019]

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.

CROSS REFERENCES

South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act, definitions, see Section 62‑5‑702.

**SECTION 62‑5‑101.** Definitions and use of terms.

Section effective January 1, 2019. See, also, Sections 62‑5‑101 and 62‑5‑106 effective until January 1, 2019.

 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 59‑33‑310 to Section 59‑33‑370; 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.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 81; 2008 Act No. 303, Section 1, eff June 11, 2008; 2010 Act No. 244, Section 24, eff June 7, 2010. Formerly Code 1976 Sections 62‑5‑101 and 62‑5‑106, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Sections 62‑5‑101 and 62‑1‑201 define certain terms which are used in Article 5. This Code uses the term guardian to refer to a fiduciary who has custody of a minor or mentally incompetent adult. See Section 62‑1‑201(16).

Under this Code, a fiduciary appointed to manage the assets of any person under disability is referred to as a conservator. See Section 62‑1‑201(6).

Any person for whom a guardian has been appointed for reasons other than solely minority is referred to as a ward, and any person for whom a guardian has been appointed solely by reason of minority is referred to as a minor ward. See Section 62‑5‑101(4).

An incapacitated person is a person under disability for reasons other than minority. See Section 62‑5‑101(1). A protected person is any person under disability, including a person under disability by reason of minority, for whom a conservator has been appointed or for whose benefit any protective order has been issued. See Section 62‑5‑101(3). A protective proceeding is a proceeding under Part 4 relating to the appointment of a conservator or issuance of some other protective order. See Section 62‑5‑101(2).

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment revised subsection (5) to add “formal” before proceeding to clarify that a guardianship proceeding is a formal proceeding as referred to in Section 62‑1‑201(15). (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Code Commissioner’s Note

At the direction of the Code Commissioner, in (23)(a), “Section 59‑33‑310 to Section 59‑33‑370” was substituted for “Section 55‑33‑310 to Section 55‑33‑370” to correct a scrivener’s error.

CROSS REFERENCES

Definitions of terms for purposes of the South Carolina Probate Code, generally, see Section 62‑1‑201.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Divorce Section 74, Action for Divorce on Behalf of Incompetent Person.

S.C. Jur. Guardian and Conservator Section 2, Definitions.

S.C. Jur. Guardian and Conservator Section 6, Definitions.

S.C. Jur. Guardian and Conservator Section 16, Protective Proceedings.

S.C. Jur. Guardian and Conservator Section 45, Termination of Conservatorship.

S.C. Jur. Mental Health Section 3, Definitions‑ Statutory Terms.

S.C. Jur. Wills Section 206, Exercise of Right of Election by Surviving Spouse.

LAW REVIEW AND JOURNAL COMMENTARIES

Selected Substantive Provisions of the South Carolina Probate Code: a Comparison with Previous South Carolina Law. 38 S.C. L. Rev. 611.

**SECTION 62‑5‑102.** Consolidation of proceedings.

Section effective January 1, 2019. See, also, Section 62‑5‑102 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 5; 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Under Section 62‑5‑102, the probate courts are given subject matter jurisdiction over the appointment of fiduciaries who will have custody of or manage assets of persons under disability. When proceedings relating to the appointment of a fiduciary who will have custody and proceedings relating to the appointment of a fiduciary who will manage assets are commenced in the same probate court, such proceedings may be consolidated.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

CROSS REFERENCES

Appointment of guardian ad litem under South Carolina Rules of Civil Procedure, see Rule 17, SCRCP.

Code provisions applicable to both mentally ill and mentally retarded persons, see Section 44‑23‑10 et seq.

Exclusive original jurisdiction of family court, see Section 63‑3‑510.

Jurisdiction in matters pertaining to minors and persons mentally incompetent, see SC Const, Art V, Section 12.

Jurisdiction of probate judges, generally, see Section 14‑23‑1150.

Probate courts, generally, see Section 14‑23‑30 et seq.

Prohibition against collateral attack on court’s jurisdiction, see Section 14‑23‑260.

Protective services for developmentally disabled and senile persons, see Section 43‑35‑5 et seq.

Library References

Guardian and Ward 8.

Mental Health 108.

Westlaw Topic Nos. 196, 257A.

C.J.S. Guardian and Ward Sections 8, 13 to 16.

C.J.S. Mental Health Section 117.

**SECTION 62‑5‑103.** Facility of payment or delivery.

Section effective January 1, 2019. See, also, Section 62‑5‑103 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 20; 1990 Act No. 521, Section 82; 1997 Act No. 152, Section 20; 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Section 62‑5‑103 only applies to the property of minors. This section does not require a court order. The payment may be made directly to the minor only if he is married. The payment may be deposited in a federally insured savings account in the minor’s name.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

CROSS REFERENCES

Application of this section to the procedures for settlement of claims in favor of or against minors or incapacitated persons, see Section 62‑5‑433.

Appointment of guardian ad litem under South Carolina Rules of Civil Procedure, see Rule 17.

Distributive duties and powers of conservator, see Section 62‑5‑423.

Gifts of securities or money to minors, see Article 5, Chapter 5, Title 63.

Jurisdiction in matters pertaining to minors and persons mentally incompetent, see SC Const, Art V, Section 12.

Legal capacity of minors, see Article 3, Chapter 5, Title 63.

Limitation of actions with respect to persons under disability, see Section 15‑3‑370.

Payment to minors, see Section 62‑6‑305.

Receipt of deposits or trusts after knowledge of insolvency, see Section 34‑11‑30.

Library References

Guardian and Ward 28.

Mental Health 179.

Payment 5.

Westlaw Topic Nos. 196, 257A, 294.

C.J.S. Guardian and Ward Sections 70 to 76, 100.

C.J.S. Mental Health Sections 158 to 159.

C.J.S. Payment Section 6.

C.J.S. Right to Die Sections 5, 8.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Children and Families Section 73, Rights Under the South Carolina Probate Code (SCPC).

S.C. Jur. Compromise and Settlement Section 10, Minors’ Settlements‑ Appropriate Procedure for Approval.

S.C. Jur. Compromise and Settlement Section 11, Minors’ Settlements‑The Law Today‑ 1988 and 1990 Amendments to South Carolina Probate Code (SCPC).

S.C. Jur. Guardian and Conservator Section 40, Procedure for Settlement of Claims.

**SECTION 62‑5‑104.** Director of Department of Mental Health or his designee may act as conservator.

Section effective January 1, 2019. See, also, Section 62‑5‑105 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1; 1993 Act No. 83, Section 1; 1993 Act No. 181, Section 1611. Formerly Code 1976 Section 62‑5‑105, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑104 was titled Delegation of guardian’s powers, and had the following history: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 65; 1997 Act No. 152, Section 21. See now, Code 1976 Section 62‑5‑309.

CROSS REFERENCES

Appointment of guardian ad litem under South Carolina Rules of Civil Procedure, see Rule 17, SCRCP.

Commitment of tuberculosis patients, see Sections 44‑31‑110 et seq.

Detention, confinement and transfer of confined persons, see Sections 44‑23‑210 et seq.

Gifts of securities or money to minors, see Article 5, Chapter 5, Title 63.

Jurisdiction in matters pertaining to minors and persons mentally incompetent, see SC Const, Art V, Section 12.

Legal capacity of minors, see Article 3, Chapter 5, Title 63.

Limitation of actions with respect to persons under disability, see Section 15‑3‑370.

Release, discharge, and reconfinement of mentally ill persons, see Sections 44‑17‑810 et seq.

State Director of Mental Health, generally, see Section 44‑9‑40.

Library References

Mental Health 103, 116.1.

Westlaw Topic No. 257A.

C.J.S. Mental Health Section 123.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 7, State Commissioner of Mental Health.

Attorney General’s Opinions

Superintendent of State hospital, as statutory committee of a patient, may expend funds in his custody for payment of debt contracted by patient prior to his admission (interpreting former Section 44‑23‑770). 1964‑65 Op. Atty Gen, No 1864, p 128.

**SECTION 62‑5‑105.** Costs and expenses; attorney’s fees.

Section effective January 1, 2019.

 (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.

HISTORY: 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑105 was titled Director of Department of Mental Health or his designee may act as conservator, and had the following history: 1986 Act No. 539, Section 1; 1993 Act No. 83, Section 1; 1993 Act No. 181, Section 1611. See now, Code 1976 Section 62‑5‑104.

**SECTION 62‑5‑106.** Responsibilities and duties of guardian ad litem; reports.

Section effective January 1, 2019.

 (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.

HISTORY: 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

The 2017 amendments were added to 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.

Editor’s Note

Prior Laws: Former Section 62‑5‑106 was titled Termination of conservatorship, and had the following history: 2008 Act No. 303, Section 1, eff June 11, 2008. See now, Code 1976 Sections 62‑5‑101, 62‑5‑306, 62‑5‑307, and 62‑5‑428.

CROSS REFERENCES

Appointment of counsel and guardian ad litem, see Section 62‑5‑403B.

Procedure for court appointment of a guardian, appointments of counsel, guardians ad litem, and an examiner, see Section 62‑5‑303B.

**SECTION 62‑5‑107.** Finding of incapacity.

Section effective January 1, 2019.

 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.

HISTORY: 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.** Temporary orders and hearings.

Section effective January 1, 2019. See, also, Sections 62‑5‑310 and 62‑5‑408 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 3; 1997 Act No. 152, Section 22; 2000 Act No. 398, Section 10; 2010 Act No. 244, Section 29, eff June 7, 2010. Formerly Code 1976 Sections 62‑5‑310 and 62‑5‑408, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Section 62‑5‑310 allows the court to appoint a temporary guardian without petition and in effect could remove or appoint a temporary guardian without a formal hearing process.

This section [62‑5‑408] gives specific powers to the court to take action with respect to the estate and affairs of a person if necessary even if that person has not yet been judged incompetent.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑310] revised subsection (A)(3) and (B)(2) to add “petition or” before notice and add “petition and” in subsection (D). The intention of the 2010 amendment was to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for temporary guardianship. 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 2010 amendment also revised subsection (C) by deleting “If” at the beginning and replacing it with “The court may itself exercise the power of temporary guardian, with or without petition or notice, if,” deleting “then the court may itself exercise the power of a temporary guardian, with or without notice” from subsection (C)(4), and renumbering (C). The intention of the latter amendment was to allow the court, with or without petition or notice, to appoint and exercise the power of a temporary guardian, if the court makes certain emergency preliminary findings. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

CROSS REFERENCES

Acceptance and disbursement of deposits of minors, see Section 34‑11‑20.

Adoption, see Section 63‑9‑10.

Jurisdiction of family court in domestic matters, see Section 63‑3‑530.

Proceedings for judicial admission of mentally ill person to a hospital, see Section 44‑17‑510 et seq.

Protection of persons dealing in good faith with conservator, in transactions other than those requiring a court order, see Section 62‑5‑420.

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Mental Health 114.

Westlaw Topic No. 257A.

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C.J.S. Mental Health Section 121.

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Encyclopedias

S.C. Jur. Death and Right to Die Section 15, Overview.

S.C. Jur. Death and Right to Die Section 37, Actions Involving Incompetent Persons.

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Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.4, Capacity of a Minor to Make a Donative Transfer.

Restatement (2d) of Property, Don. Trans. Section 34.5, Donor Mentally Incompetent.

Part 2

Jurisdiction [Effective until January 1, 2019]

**SECTION 62‑5‑201.** Jurisdiction of family courts as to minors.

Section effective until January 1, 2019. See, also, Section 62‑5‑201 effective January 1, 2019.

 The family courts of this State have jurisdiction over the care, custody, and control of the persons of minors.

HISTORY: 1987 Act No. 171, Section 66.

Part 2

Jurisdiction [Effective January 1, 2019]

**SECTION 62‑5‑201.** Jurisdiction.

Section effective January 1, 2019. See, also, Sections 62‑5‑102 and 62‑5‑201 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 66; 1988 Act No. 659, Section 5. Formerly Code 1976 Sections 62‑5‑102 and 62‑5‑201, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Under Section 62‑5‑102, the probate courts are given subject matter jurisdiction over the appointment of fiduciaries who will have custody of or manage assets of persons under disability. When proceedings relating to the appointment of a fiduciary who will have custody and proceedings relating to the appointment of a fiduciary who will manage assets are commenced in the same probate court, such proceedings may be consolidated.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

CROSS REFERENCES

Appointment of guardian ad litem under South Carolina Rules of Civil Procedure, see Rule 17, SCRCP.

Code provisions applicable to both mentally ill and mentally retarded persons, see Section 44‑23‑10 et seq.

Exclusive original jurisdiction of family court, see Section 63‑3‑510.

Jurisdiction in matters pertaining to minors and persons mentally incompetent, see SC Const, Art V, Section 12.

Jurisdiction of probate judges, generally, see Section 14‑23‑1150.

Probate court jurisdiction over actions involving the protection of minors, see Section 62‑1‑302.

Probate courts, generally, see Section 14‑23‑30 et seq.

Prohibition against collateral attack on court’s jurisdiction, see Section 14‑23‑260.

Protective services for developmentally disabled and senile persons, see Section 43‑35‑5 et seq.

Library References

Guardian and Ward 8.

Infants 18.

Mental Health 108.

Westlaw Topic Nos. 196, 211.

C.J.S. Guardian and Ward Sections 8, 13 to 16.

C.J.S. Infants Sections 10 to 11.

C.J.S. Mental Health Section 117.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 9, Jurisdiction of Court.

NOTES OF DECISIONS

Under former Section 21‑19‑10 1

1. Under former Section 21‑19‑10

Under SC Const, Art 5, Section 19 (now Art 5, Section 8) and the provisions of this section [Code 1962 Section 31‑1] and Code 1962 Section 31‑2, the probate court is not an inferior court but a court of independent and general jurisdiction of certain special subjects among which are matters appertaining to the estate of minors and the duties imposed by law upon their guardians. Williams v Weeks, 70 SC 1, 48 SE 619 (1904). Dunlap v Savings Bank of Rock Hill, 69 SC 270, 48 SE 49 (1904).

Probate court may approve expenditure of part or all of corpus of estate belonging to infants, when reasonably necessary for their maintenance or education. Beckwith v. McAlister (S.C. 1932) 165 S.C. 1, 162 S.E. 623. Guardian And Ward 58

Probate court cannot authorize release of property belonging to infants for purpose of paying, compromising, or settling parents’ debts, though infants participated in enjoyment of benefits for which debts were incurred. Beckwith v. McAlister (S.C. 1932) 165 S.C. 1, 162 S.E. 623. Infants 1136

Probate judge is vested with such powers as legislature sees fit. Bradford v. Richardson (S.C. 1918) 111 S.C. 205, 97 S.E. 58.

This section [Code 1962 Section 31‑1] does not expressly confer on the probate court the power to appoint guardians of the persons of minors. Therefore, the right of a guardian appointed by a probate court to the custody of an infant child is inferior to the right of the child’s father to his custody. Ex parte Davidge (S.C. 1905) 72 S.C. 16, 51 S.E. 269.

It is within the jurisdiction of a probate judge when jeopardy of a minor’s estate is brought to his attention to inquire into the sufficiency of the guardian’s bond, and, if necessary, to require a new one of adequate amount with sufficient sureties. Williams v. Weeks (S.C. 1904) 70 S.C. 1, 48 S.E. 619.

If, after inquiry into the insufficiency of a guardian’s bond, a probate judge holds a new bond to be necessary, his taking of the new bond becomes a ministerial duty. Williams v. Weeks (S.C. 1904) 70 S.C. 1, 48 S.E. 619.

The probate judge is liable for a failure to perform his duty to take a new bond with discretion and care. Williams v. Weeks (S.C. 1904) 70 S.C. 1, 48 S.E. 619.

The appointment of a trustee to take the place of a deceased testamentary trustee is not embraced within the jurisdiction conferred by this section [Code 1962 Section 31‑1]. Thomas v. Poole (S.C. 1883) 19 S.C. 323.

Objection that the probate court is without jurisdiction in a case because of its being instituted by a ward after attaining his majority will not be considered when made for the first time in the Supreme Court. Waller v. Cresswell (S.C. 1873) 4 S.C. 353.

Part 3

Guardians of Incapacitated Persons [Effective until January 1, 2019]

**SECTION 62‑5‑301.** Testamentary appointment of guardian for incapacitated person.

Section effective until January 1, 2019. See, also, Section 62‑5‑301 effective January 1, 2019.

 (a) The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. A testamentary appointment by a parent becomes effective when, after having given twenty days prior written notice of intention to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated, if prior thereto, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

 (b) The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. The appointment becomes effective when, after having given twenty days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated. An effective appointment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.

 (c) This State shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator’s domicile in another state.

 (d) On the filing with the court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under the succeeding section of this Part.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑302.** Venue.

Section effective until January 1, 2019. See, also, Section 62‑5‑302 effective January 1, 2019.

 The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑303.** Procedure for court appointment of a guardian of an incapacitated person.

Section effective until January 1, 2019. See, also, Sections 62‑5‑303, 62‑5‑303A, 62‑5‑303B, 62‑5‑303C, and 62‑5‑303D effective January 1, 2019.

 (a) The incapacitated person or a person interested in his welfare may petition for a finding of incapacity and appointment of a guardian.

 (b) Upon the filing and service of the summons and the petition the court shall send a visitor to the place where the allegedly incapacitated person resides to observe conditions and report in writing to the court. The court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an attorney to represent him in the proceedings and that attorney shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by two examiners, one of whom shall be a physician appointed by the court who shall submit their reports in writing to the court. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. He is entitled to be represented by counsel, to present evidence including testimony by a physician of his own choosing, to cross‑examine witnesses, including the court‑appointed examiners. The issue may be determined at a closed hearing if the person alleged to be incapacitated or his counsel so requests.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 25, eff June 7, 2010.

**SECTION 62‑5‑304.** Order of appointment; alternatives; limitations on guardian’s powers.

Section effective until January 1, 2019. See, also, Section 62‑5‑304 effective January 1, 2019.

 (A) The court shall exercise the authority conferred in this part so as to encourage the development of maximum self‑reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person’s mental and adaptive limitations or other conditions warranting the procedure.

 (B) The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. The court, on appropriate findings, may:

 (1) treat the petition as one for a protective order under Section 62‑5‑401 and proceed accordingly;

 (2) enter another appropriate order; or

 (3) dismiss the proceeding.

 (C) The court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by this article and create a limited guardianship. A limitation on the statutory power of a guardian of an incapacitated person must be endorsed on the guardian’s letters or, in the case of a guardian by parental or spousal appointment, must be reflected in letters issued at the time a limitation is imposed. Following the same procedure, a limitation may be removed or modified and appropriate letters issued.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 1.

**SECTION 62‑5‑305.** Acceptance of appointment; consent to jurisdiction.

Section effective until January 1, 2019. See, also, Section 62‑5‑305 effective January 1, 2019.

 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 shall be delivered to the guardian or mailed to him by ordinary first class mail at his address as listed in the court records and to his address as then known to the petitioner.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 26, eff June 7, 2010.

**SECTION 62‑5‑306.** Termination of guardianship for incapacitated person.

Section effective until January 1, 2019. See, also, Section 62‑5‑306 effective January 1, 2019.

 The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in Section 62‑5‑307. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑307.** Removal or resignation of guardian; termination of incapacity.

Section effective until January 1, 2019. See, also, Sections 62‑5‑307 and 52‑5‑307A effective January 1, 2019.

 (a) After service of the summons and petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

 (b) An order adjudicating or readjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the ward may make a request for an order from the court that he is no longer incapacitated, and for removal of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

 (c) Before acting upon any such petition or request, the court shall send a visitor to the residence of the present guardian and to the place where the ward resides or is detained to observe conditions and report in writing to the court. After reviewing the report of the visitor, the court may order termination of the ward’s incapacity or a hearing following the procedures set forth in Section 62‑5‑303.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 27, eff June 7, 2010.

**SECTION 62‑5‑308.** Visitor in guardianship proceeding.

Section effective until January 1, 2019. See, also, Section 62‑5‑308 effective January 1, 2019.

 A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, or social work and is an officer, employee, or special appointee of the court with no personal interest in the proceedings.

HISTORY: 1986 Act No. 539, Section 1.

Library References

Mental Health 123, 139, 142.

Westlaw Topic No. 257A.

C.J.S. Mental Health Section 131.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 13, Court Appointment.

**SECTION 62‑5‑309.** Service and notice in guardianship proceedings.

Section effective until January 1, 2019. See, also, Sections 62‑5‑303A and 62‑5‑303C effective January 1, 2019.

 (A) In a proceeding that is properly commenced by filing and service of the summons and petition for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, the following persons must be properly served:

 (1) the ward or the person alleged to be incapacitated and his spouse, parents, and adult children;

 (2) a person who is serving as his guardian, conservator, or attorney in fact under a durable power of attorney pursuant to Section 62‑5‑501 or who has his care and custody;

 (3) if no other person is notified under item (1), at least one of his closest adult relatives, if one can be found.

 (B) Notice of hearing must be given as provided in Section 62‑1‑401. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is given by his attorneys or, in proceedings for removal, confirmed in an interview with the visitor, which may be done at any time. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 2; 2010 Act No. 244, Section 28, eff June 7, 2010.

**SECTION 62‑5‑310.** Temporary guardians.

Section effective until January 1, 2019. See, also, Section 62‑5‑108 effective January 1, 2019.

 (A) If the court makes emergency preliminary findings that:

 (1) a physician has certified to the court, orally or in writing, that the person is incapacitated;

 (2) no guardian has been appointed previously; and

 (3) the welfare of the incapacitated person requires immediate action; then the court, with or without petition or notice, may appoint a temporary guardian for a specified period not to exceed six months in accordance with the priorities set out in Section 62‑5‑311.

 (B) If the court makes emergency preliminary findings that:

 (1) the appointed guardian or temporary guardian is not effectively performing his duties; and

 (2) the welfare of the allegedly incapacitated person requires immediate action, then the court may appoint, with or without petition or notice, a temporary guardian for a specified period not to exceed six months in accordance with the priorities set out in Section 62‑5‑311.

 (C)(1) The court may itself exercise the power of temporary guardian, with or without petition or notice, if the court makes emergency preliminary findings that either no person appears to have authority to act on behalf of the incapacitated person or more than one person is authorized to make health care decisions for the incapacitated person, and these authorized persons disagree on whether certain care must be provided and:

 (a) the person has been adjudicated as being incapacitated, or a physician has certified to the court, orally or in writing, that the person is incapacitated; and

 (b) an emergency exists.

 (2) For health care purposes, “emergency” means that a delay caused by (i) further attempts to locate a person authorized to make health care decisions or (ii) proceedings for appointment of a guardian would present a serious threat to the life, health, or bodily integrity of the incapacitated person.

 (D) If a temporary guardian is appointed without petition or notice under this section, a hearing to review the appointment must be held after petition and notice and within thirty days after the appointment of the temporary guardian.

 (E) A temporary guardian is entitled to the care and custody of the ward and the authority of a permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make reports the court requires. In other respects the provisions of law concerning guardians apply to temporary guardians.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 3; 1997 Act No. 152, Section 22; 2010 Act No. 244, Section 29, eff June 7, 2010.

**SECTION 62‑5‑311.** Who may be guardian; priorities.

Section effective until January 1, 2019. See, also, Section 62‑5‑308 effective January 1, 2019.

 (A) Any competent person or a suitable institution may be appointed guardian of an incapacitated person.

 (B) Subject to a finding of good cause by the court, persons who are not disqualified have priority for appointment as guardian in the following order:

 (1) a person nominated to serve as guardian by the incapacitated person;

 (2) an attorney in fact appointed by the incapacitated person pursuant to Section 62‑5‑501, whose authority includes powers relating to the person of the incapacitated person;

 (3) the spouse of the incapacitated person. A person who claims to be a common law spouse of the incapacitated person has the burden of proving that status in order to qualify for appointment as a guardian under this provision. A decision by the probate court regarding the status of a common law spouse is for the purpose of guardianship appointment proceedings only and is not binding in any other court of law or in any administrative proceeding;

 (4) an adult child of the incapacitated person;

 (5) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

 (6) another relative of the incapacitated person;

 (7) a person nominated by the person who is caring for him or paying benefits to him.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 4.

**SECTION 62‑5‑312.** General powers and duties of guardian.

Section effective until January 1, 2019. See, also, Section 62‑5‑309 effective January 1, 2019.

 (a) A guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

 (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, he is entitled to custody of the person of his ward and may establish the ward’s place of abode within or without this State.

 (2) If entitled to custody of his ward he shall make provision for the care, comfort, and maintenance of his ward and, whenever appropriate, arrange for his training and education. Without regard to custodial rights of the ward’s person, he shall take reasonable care of his ward’s clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

 (3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.

 (4) If no conservator for the estate of the ward has been appointed or if the guardian is also conservator, he may:

 (i) institute 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;

 (ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but, he may not use funds from his ward’s estate for room and board or services which he, his spouse, parent, or child have furnished the ward unless a charge for the services and/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.

 (5) A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as required by the court or court rule, but at least on an annual basis.

 (6) If a conservator has been appointed, 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 must be paid to the conservator for management as provided in this Code, and the guardian must account to the conservator for funds expended.

 (b) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward’s estate by payment to third persons or institutions for the ward’s care and maintenance.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑313.** Proceedings subsequent to appointment; venue.

Section effective until January 1, 2019. See, also, Section 62‑5‑310 effective January 1, 2019.

 (a) The court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, has jurisdiction over resignation, removal, accounting, and other proceedings relating to the guardianship.

 (b) If the court which appointed the guardian, or in which acceptance of appointment is filed, being the court in which proceedings subsequent to appointment are commenced, determines that the proceedings more appropriately belong in the court located where the ward resides, the first court shall notify the other court, in this or another state, and after consultation with the other court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.

HISTORY: 1986 Act No. 539, Section 1.

Part 3

Guardians of Incapacitated Individuals [Effective January 1, 2019]

**SECTION 62‑5‑301.** Testamentary nomination of guardian for incapacitated individual.

Section effective January 1, 2019. See, also, Section 62‑5‑301 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

CROSS REFERENCES

Authority of guardian appointed pursuant to this part to make health care decisions for patient who is unable to consent, see Section 44‑66‑30.

Decision, by person appointed as guardian pursuant to this section, as to need for treatment of patient determined to be unable to consent to surgery, electro‑convulsive therapy, or major medical therapy or treatment, see Section 44‑22‑40.

Library References

Mental Health 113, 116.

Westlaw Topic No. 257A.

C.J.S. Mental Health Sections 116, 123.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 12, Testamentary Appointment.

**SECTION 62‑5‑302.** Venue.

Section effective January 1, 2019. See, also, Section 62‑5‑302 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

CROSS REFERENCES

Jurisdiction for the resignation, removal, accounting, and other proceedings relating to guardianship, see Section 62‑5‑310.

Library References

Mental Health 112.

Westlaw Topic No. 257A.

C.J.S. Mental Health Section 120.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 5, Venue.

Attorney General’s Opinions

This section [Code 1962 Section 31‑3] is jurisdictional and authorizes the appointment of guardians for minors in those counties, and only in those counties, in which the infant for whom guardianship is sought resides. 1963‑64 Op. Atty Gen, No 1601, p 15.

**SECTION 62‑5‑303.** Procedure for court appointment of a guardian; summons and petition.

Section effective January 1, 2019. See, also, Section 62‑5‑303 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 25, eff June 7, 2010; 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment revised subsection (a) to delete “any” and replace it with “a” and revise subsection (b) to add “and service” and “the summons and the” in the first sentence to clarify that a summons and petition are required in a formal proceeding, including a guardianship proceeding. 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. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

CROSS REFERENCES

“Party” defined, see Section 62‑5‑101.

Library References

Mental Health 120 to 143.

Westlaw Topic No. 257A.

C.J.S. Mental Health Sections 130 to 139.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Death and Right to Die Section 37, Actions Involving Incompetent Persons.

S.C. Jur. Guardian and Conservator Section 13, Court Appointment.

S.C. Jur. Guardian and Conservator Section 43, Termination of Incapacity.

NOTES OF DECISIONS

In general 1

1. In general

Statute that provided immunity to persons who in good faith made health care decisions for a patient who was unable to consent did not provide doctor with immunity for his alleged negligence in declaring patient to be permanently incapacitated in regards to proceeding to appoint guardian for patient. Vaughan v. McLeod Regional Medical Center (S.C. 2007) 372 S.C. 505, 642 S.E.2d 744. Health 768

**SECTION 62‑5‑303A.** Procedure for court appointment of a guardian; service.

Section effective January 1, 2019. See, also, Sections 62‑5‑303 and 62‑5‑309 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 2; 2010 Act No. 244, Sections 25, 28, eff June 7, 2010. Formerly Code Sections 62‑5‑303 and 62‑5‑309, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑303] revised subsection (a) to delete “any” and replace it with “a” and revise subsection (b) to add “and service” and “the summons and the” in the first sentence to clarify that a summons and petition are required in a formal proceeding, including a guardianship proceeding. 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. (2011 Act No. 2, Section 2.)

The 2010 amendment [to 62‑5‑309] revised subsection (A) to add “that is properly commenced by filing and service of the summons and petition”, delete “notice of hearing,” adding “the following persons,” deleting “given to each of the following”, and adding “properly served.” The intention of the amendment to subsection (A) was to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for guardianship, and also that certain persons must be properly served with the summons and petition. 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 2010 amendment also revised subsection (B) to delete “must be served personally on the alleged incapacitated person and his spouse and parents if they are found within the state. Notice to the spouse and parents, if they cannot be found within the State, and to all other persons except the alleged incapacitated person” and add “of hearing” to clarify that the notice, which is a notice of hearing, must be given as referred to in Section 62‑1‑401. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Library References

Mental Health 120 to 143.

Westlaw Topic No. 257A.

C.J.S. Mental Health Sections 130 to 139.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Death and Right to Die Section 37, Actions Involving Incompetent Persons.

S.C. Jur. Death and Right to Die Section 40, Family Members and Other Interested Parties.

S.C. Jur. Death and Right to Die Section 41, Health Care Providers.

S.C. Jur. Guardian and Conservator Section 13, Court Appointment.

S.C. Jur. Guardian and Conservator Section 14, Notice.

S.C. Jur. Guardian and Conservator Section 43, Termination of Incapacity.

**SECTION 62‑5‑303B.** Procedure for court appointment of a guardian; appointments of counsel, guardians ad litem, and an examiner.

Section effective January 1, 2019. See, also, Section 62‑5‑303 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 25, eff June 7, 2010. Formerly Code 1976 Section 62‑5‑303, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑303] revised subsection (a) to delete “any” and replace it with “a” and revise subsection (b) to add “and service” and “the summons and the” in the first sentence to clarify that a summons and petition are required in a formal proceeding, including a guardianship proceeding. 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. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

CROSS REFERENCES

Procedure for court appointment of a guardian, report evaluating condition of alleged incapacitated individual, see Section 62‑5‑303D.

Responsibilities and duties of guardian ad litem, reports, see Section 62‑5‑106.

Library References

Mental Health 120 to 143.

Westlaw Topic No. 257A.

C.J.S. Mental Health Sections 130 to 139.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Death and Right to Die Section 37, Actions Involving Incompetent Persons.

S.C. Jur. Guardian and Conservator Section 13, Court Appointment.

S.C. Jur. Guardian and Conservator Section 43, Termination of Incapacity.

**SECTION 62‑5‑303C.** Procedure for court appointment of a guardian; hearing.

Section effective January 1, 2019. See, also, Sections 62‑5‑303 and 62‑5‑309 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 2; 2010 Act No. 244, Sections 25, 28, eff June 7, 2010. Formerly Code Sections 62‑5‑303 and 62‑5‑309, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑303] revised subsection (a) to delete “any” and replace it with “a” and revise subsection (b) to add “and service” and “the summons and the” in the first sentence to clarify that a summons and petition are required in a formal proceeding, including a guardianship proceeding. 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. (2011 Act No. 2, Section 2.)

The 2010 amendment [to 62‑5‑309] revised subsection (A) to add “that is properly commenced by filing and service of the summons and petition”, delete “notice of hearing,” adding “the following persons,” deleting “given to each of the following”, and adding “properly served.” The intention of the amendment to subsection (A) was to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for guardianship, and also that certain persons must be properly served with the summons and petition. 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 2010 amendment also revised subsection (B) to delete “must be served personally on the alleged incapacitated person and his spouse and parents if they are found within the state. Notice to the spouse and parents, if they cannot be found within the State, and to all other persons except the alleged incapacitated person” and add “of hearing” to clarify that the notice, which is a notice of hearing, must be given as referred to in Section 62‑1‑401. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Library References

Mental Health 120 to 143.

Westlaw Topic No. 257A.

C.J.S. Mental Health Sections 130 to 139.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Death and Right to Die Section 37, Actions Involving Incompetent Persons.

S.C. Jur. Death and Right to Die Section 40, Family Members and Other Interested Parties.

S.C. Jur. Death and Right to Die Section 41, Health Care Providers.

S.C. Jur. Guardian and Conservator Section 13, Court Appointment.

S.C. Jur. Guardian and Conservator Section 14, Notice.

S.C. Jur. Guardian and Conservator Section 43, Termination of Incapacity.

**SECTION 62‑5‑303D.** Procedure for court appointment of a guardian; report evaluating condition of alleged incapacitated individual.

Section effective January 1, 2019. See, also, Section 62‑5‑303 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 25, eff June 7, 2010. Formerly Code 1976 Section 62‑5‑303, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑303] revised subsection (a) to delete “any” and replace it with “a” and revise subsection (b) to add “and service” and “the summons and the” in the first sentence to clarify that a summons and petition are required in a formal proceeding, including a guardianship proceeding. 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. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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 62‑5‑304 A, 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.

CROSS REFERENCES

Procedure for court appointment of a guardian, appointments of counsel, guardians ad litem, and an examiner, see Section 62‑5‑303B.

Library References

Mental Health 120 to 143.

Westlaw Topic No. 257A.

C.J.S. Mental Health Sections 130 to 139.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Death and Right to Die Section 37, Actions Involving Incompetent Persons.

S.C. Jur. Guardian and Conservator Section 13, Court Appointment.

S.C. Jur. Guardian and Conservator Section 43, Termination of Incapacity.

**SECTION 62‑5‑304.** Order of appointment; alternatives; limitations on guardian’s powers.

Section effective January 1, 2019. See, also, Section 62‑5‑304 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 1; 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

Library References

Mental Health 143, 146.

Westlaw Topic No. 257A.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Death and Right to Die Section 15, Overview.

S.C. Jur. Death and Right to Die Section 40, Family Members and Other Interested Parties.

S.C. Jur. Divorce Section 74, Action for Divorce on Behalf of Incompetent Person.

S.C. Jur. Guardian and Conservator Section 2, Definitions.

S.C. Jur. Guardian and Conservator Section 15, Priorities in Appointment.

S.C. Jur. Mental Health Section 3, Definitions‑ Statutory Terms.

**SECTION 62‑5‑304A.** Rights and powers of ward and guardian.

Section effective January 1, 2019.

 (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.

HISTORY: 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

CROSS REFERENCES

Procedure for court appointment of a guardian, report evaluating condition of alleged incapacitated individual, see Section 62‑5‑303D.

Responsibilities and duties of guardian ad litem, reports, see Section 62‑5‑106.

**SECTION 62‑5‑305.** Acceptance of appointment; consent to jurisdiction.

Section effective January 1, 2019. See, also, Section 62‑5‑305 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 26, eff June 7, 2010; 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment revised this section by adding “first class” to clarify that the mailing requirement for notice to any guardian as referred to in this section must be by “first class” mail. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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

Library References

Mental Health 108, 480.

Westlaw Topic No. 257A.

C.J.S. Mental Health Sections 117, 258.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 14, Notice.

S.C. Jur. Guardian and Conservator Section 15, Priorities in Appointment.

**SECTION 62‑5‑306.** Termination of guardianship for incapacitated person; accounting of funds.

Section effective January 1, 2019. See, also, Sections 62‑5‑106 and 62‑5‑306 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2008 Act No. 303, Section 1, eff June 11, 2008. Formerly Code 1976 Sections 62‑5‑106 and 62‑5‑306, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 45, Termination of Conservatorship.

**SECTION 62‑5‑307.** Informal request for relief.

Section effective January 1, 2019. See, also, Sections 62‑5‑106 and 62‑5‑307 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2008 Act No. 303, Section 1, eff June 11, 2008; 2010 Act No. 244, Section 27, eff June 7, 2010. Formerly Code 1976 Sections 62‑5‑106 and 62‑5‑307, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑307] revised subsection (a) to delete “On” and replace it with “After service of the summons and” at the beginning of the first sentence. The intention of the amendment to subsection (a) was to clarify that a summons and petition are required in a formal proceeding, including a guardianship proceeding. 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 2010 amendment [to 62‑5‑307] also revised subsection (b) to delete “or any person interested in his welfare,” delete “petition” and replace it with “make a request,” add “from the court”, and delete “or resignation.” The intention of the amendment to subsection (b) was to allow only the ward to make a request for an order from the court to request that he is no longer incapacitated and to remove the guardian, which request may be made by informal letter to the court or judge.

The 2010 amendment [to 62‑5‑307] also revised subsection (c) to add “or request” after petition. The 2010 amendment to subsection (c) was to make a corresponding reference to a “request” as referred to in subsection (b). (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

CROSS REFERENCES

Order of appointment, alternatives, limitations on guardian’s powers, see Section 62‑5‑304.

Library References

Mental Health 168, 177.

Westlaw Topic No. 257A.

C.J.S. Mental Health Sections 148, 160 to 164.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Death and Right to Die Section 40, Family Members and Other Interested Parties.

S.C. Jur. Guardian and Conservator Section 43, Termination of Incapacity.

S.C. Jur. Guardian and Conservator Section 44, Removal of Guardian.

Forms

Am. Jur. Pl. & Pr. Forms Guardian and Ward Section 160 , Introductory Comments.

**SECTION 62‑5‑307A.** Removal of guardian; termination of incapacity.

Section effective January 1, 2019. See, also, Section 62‑5‑307 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 27, eff June 7, 2010. Formerly Code 1976 Section 62‑5‑307, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑307] revised subsection (a) to delete “On” and replace it with “After service of the summons and” at the beginning of the first sentence. The intention of the amendment to subsection (a) was to clarify that a summons and petition are required in a formal proceeding, including a guardianship proceeding. 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 2010 amendment [to 62‑5‑307] also revised subsection (b) to delete “or any person interested in his welfare,” delete “petition” and replace it with “make a request,” add “from the court”, and delete “or resignation.” The intention of the amendment to subsection (b) was to allow only the ward to make a request for an order from the court to request that he is no longer incapacitated and to remove the guardian, which request may be made by informal letter to the court or judge.

The 2010 amendment [to 62‑5‑307] also revised subsection (c) to add “or request” after petition. The 2010 amendment to subsection (c) was to make a corresponding reference to a “request” as referred to in subsection (b). (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

CROSS REFERENCES

Order of appointment, alternatives, limitations on guardian’s powers, see Section 62‑5‑304.

Library References

Mental Health 168, 177.

Westlaw Topic No. 257A.

C.J.S. Mental Health Sections 148, 160 to 164.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Death and Right to Die Section 40, Family Members and Other Interested Parties.

S.C. Jur. Guardian and Conservator Section 43, Termination of Incapacity.

S.C. Jur. Guardian and Conservator Section 44, Removal of Guardian.

Forms

Am. Jur. Pl. & Pr. Forms Guardian and Ward Section 160 , Introductory Comments.

**SECTION 62‑5‑308.** Who may be guardian; priorities.

Section effective January 1, 2019. See, also, Section 62‑5‑311 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 4. Formerly Code 1976 Section 62‑5‑311, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Under Section 62‑5‑311 any competent person or suitable institution may be appointed as guardian.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑308 was titled Visitor in guardianship proceeding, and had the following history: 1986 Act No. 539, Section 1.

CROSS REFERENCES

Procedure for court appointment of a guardian, summons and petition, see Section 62‑5‑303.

Testamentary nomination of guardian for incapacitated individual, see Section 62‑5‑301.

Library References

Mental Health 116.

Westlaw Topic No. 257A.

C.J.S. Mental Health Section 123.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Death and Right to Die Section 14, Nature of a Health Care Power of Attorney.

S.C. Jur. Guardian and Conservator Section 2, Definitions.

S.C. Jur. Guardian and Conservator Section 3, Temporary Guardians.

S.C. Jur. Guardian and Conservator Section 15, Priorities in Appointment.

**SECTION 62‑5‑309.** Delegation of guardian’s powers.

Section effective January 1, 2019. See, also, Sections 62‑5‑104 and 62‑5‑312 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 65; 1997 Act No. 152, Section 21. Formerly Code 1976 Sections 62‑5‑104 and 62‑5‑312, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑104] allows a parent or a guardian of any incapacitated person to delegate temporarily to someone else his responsibilities with respect to the person of such incapacitated person. Such delegation cannot exceed six months and is effected by means of the execution of a power of attorney.

Section 62‑5‑312(1) would allow the guardian to establish the ward’s place of abode within or without the State.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

The Reporter’s Comments do not reflect the amendment made by 1997 Act No. 152, Section 21, which changed the time period for a delegation of powers from six months to thirty days.

Prior Laws: Former Section 62‑5‑309 was titled Service and notice in guardianship proceedings, and had the following history: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 2; 2010 Act No. 244, Section 28, eff June 7, 2010. See now, Code 1976 Sections 62‑5‑303A and 62‑5‑303C.

CROSS REFERENCES

Authority of guardian appointed pursuant to this part to make health care decisions for patient who is unable to consent, see Section 44‑66‑30.

Jurisdiction, see Section 62‑5‑201.

Provisions of the Children’s Code, see Title 63.

Library References

Guardian and Ward 28.

Mental Health 179, 216, 217.

Westlaw Topic Nos. 196, 257A.

C.J.S. Guardian and Ward Sections 70 to 76, 100.

C.J.S. Mental Health Sections 158 to 159, 167 to 168, 177 to 179.

C.J.S. Right to Die Sections 5, 8.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 2, Definitions.

NOTES OF DECISIONS

In general 1

Under former Sections 21‑19‑180 and 21‑19‑190 2

1. In general [under former Section 62‑5‑302]

A son could not bring a divorce action on behalf of his father as his guardian since a spouse who is mentally incompetent as to his property and person may not bring an action for divorce either on his own behalf or through a guardian; however, absolute denial would not apply to a spouse who is capable of exercising reasonable judgment as to his personal decisions, is able to understand the nature of the action, and is able to express unequivocally a desire to dissolve the marriage. Murray by Murray v. Murray (S.C. 1993) 310 S.C. 336, 426 S.E.2d 781, 32 A.L.R.5th 883.

2. Under former Sections 21‑19‑180 and 21‑19‑190

Commissions to one person holding two distinct offices of trust, see Ex parte Commissioner in Equity for Lancaster District (S.C. 1850).

Commissions were not allowed before this section [Code 1962 Section 31‑18]. Floyd v. Priester (S.C. 1856).

**SECTION 62‑5‑310.** Proceedings subsequent to appointment; venue.

Section effective January 1, 2019. See, also, Section 62‑5‑313 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑313, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Section 62‑5‑313 provides primary jurisdiction in the court which appointed the guardian and secondary jurisdiction in the court where the ward presently resides.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑310 was titled Temporary guardians, and had the following history: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 3; 1997 Act No. 152, Section 22; 2010 Act No. 244, Section 29, eff June 7, 2010. See now, Code 1976 Section 62‑5‑108.

CROSS REFERENCES

Venue for guardianship proceedings for an incapacitated person, generally, see Section 62‑5‑302.

Library References

Mental Health 112, 480.

Westlaw Topic No. 257A.

C.J.S. Mental Health Sections 120, 258.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 4, Jurisdiction of Court.

S.C. Jur. Guardian and Conservator Section 5, Venue.

**SECTION 62‑5‑311.** Omitted.

Section effective January 1, 2019. See, also, Section 62‑5‑311 effective until January 1, 2019.

HISTORY: Former Section, titled Who may be guardian; priorities, had the following history: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 4. Omitted by 2017 Act No. 87, Section 5.A, eff January 1, 2019. See now, Code 1976 Section 62‑5‑308.

**SECTION 62‑5‑312.** Omitted.

Section effective January 1, 2019. See, also, Section 62‑5‑312 effective until January 1, 2019.

HISTORY: Former Section, titled General powers and duties of guardian, had the following history: 1986 Act No. 539, Section 1. Omitted by 2017 Act No. 87, Section 5.A, eff January 1, 2019. See now, Code 1976 Section 62‑5‑309.

**SECTION 62‑5‑313.** Omitted.

Section effective January 1, 2019. See, also, Section 62‑5‑313 effective until January 1, 2019.

HISTORY: Former Section, titled Proceedings subsequent to appointment; venue, had the following history: 1986 Act No. 539, Section 1. Omitted by 2017 Act No. 87, Section 5.A, eff January 1, 2019. See now, Code 1976 Section 62‑5‑310.

Part 4

Protection of Property of Persons Under Disability and Minors [Effective until January 1, 2019]

**SECTION 62‑5‑401.** Protective proceedings.

Section effective until January 1, 2019. See, also, Sections 62‑5‑402 and 62‑5‑403 effective January 1, 2019.

 After service of the summons and petition and notice of hearing in accordance with the provisions of this part, the court may appoint a conservator or make other protective order for cause as follows:

 (1) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by his minority, or that funds are needed for his support and education and that protection is necessary or desirable to obtain or provide funds.

 (2) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that (i) the person is unable to manage his property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 30, eff June 7, 2010.

**SECTION 62‑5‑402.** Protective proceedings; jurisdiction of affairs of protected persons.

Section effective until January 1, 2019. See, also, Section 62‑5‑426 effective January 1, 2019.

 After the service of the summons and petition in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the probate court in which the summons and petition are filed has:

 (1) exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated;

 (2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this State must be managed, expended, or distributed to or for the use of the protected person or any of his dependents; and

 (3) concurrent jurisdiction to determine the validity of claims for or against the person or estate of the protected person except as limited by Section 62‑5‑433.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 6; 2010 Act No. 244, Section 31, eff June 7, 2010.

**SECTION 62‑5‑403.** Venue.

Section effective until January 1, 2019. See, also, Section 62‑5‑401 effective January 1, 2019.

 Venue for proceedings under this part is:

 (1) In the place in this State where the person to be protected resides whether or not a guardian has been appointed in another place; or

 (2) If the person to be protected does not reside in this State, in any place where he has property.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑404.** Original petition for appointment or protective order.

Section effective until January 1, 2019. See, also, Section 62‑5‑403 effective January 1, 2019.

 (a) The person to be protected, any person who is interested in his estate, affairs, or welfare, including his parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a conservator or for other appropriate protective order.

 (b) The petition shall set forth to the extent known, the interest of the petitioner; the name, age, residence, and address of the person to be protected; the name and address of his guardian, if any; the name and address of his nearest relative known to the petitioner; a general statement of his property with an estimate of the value of the property, including any compensation, insurance, pension, or allowance to which he is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his priority for appointment. The petition shall set forth whether the person to be protected 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.

HISTORY: 1986 Act No. 539, Section 1; 2016 Act No. 278 (S.777), Section 3, eff June 9, 2016.

**SECTION 62‑5‑405.** Service of summons and petition; notice of hearing; waiver of notice by person to be protected.

Section effective until January 1, 2019. See, also, Sections 62‑5‑403A and 62‑5‑403C effective January 1, 2019.

 (a) After filing of the summons and the petition for appointment of a conservator or other protective order, the person to be protected must be served personally with the summons and petition. The following persons also must be properly served: the spouse and the adult children of the person to be protected, or if none, his parents or nearest adult relatives if there are no parents, and other persons as the court may direct.

 (b) Notice of hearing on a petition for appointment of a conservator or other initial protective order, and of a subsequent hearing, must be given to the person to be protected, to a person who has filed a request for notice under Section 62‑5‑406, to interested persons, and to other persons as the court may direct. Notice must be given pursuant to Section 62‑1‑401. Waiver of notice of hearing by the person to be protected is not effective unless he attends the hearing or waiver of notice is given by his attorney.

 (c) In addition to the requirements of subsections (a) and (b), if the petition is for the purpose of receiving benefits from the VA and is not brought by or on behalf of the VA, service must be effected upon the VA and notice of the hearing must be given to the VA.

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 23; 2010 Act No. 244, Section 32, eff June 7, 2010; 2016 Act No. 278 (S.777), Section 4, eff June 9, 2016.

**SECTION 62‑5‑406.** Protective proceedings; request for notice; interested person.

Section effective until January 1, 2019. See, also, Section 62‑5‑403C effective January 1, 2019.

 Any interested person who desires to be notified before any order is made in a protective proceeding may file with the court a request for notice subsequent to payment of any fee required by statute or court rule. The clerk shall mail a copy of the request to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and his address, or that of his attorney, and is effective only as to matters occurring after the filing. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 67.

**SECTION 62‑5‑407.** Procedure concerning hearing and order on original petition.

Section effective until January 1, 2019. See, also, Sections 62‑5‑402, 62‑5‑403B, 62‑5‑403C, and 62‑5‑403D effective January 1, 2019.

 (a) Upon the filing of a summons and petition for appointment of a conservator or other protective order because of minority, and after service of the summons and the petition, the court may set a date for hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if fourteen years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem. If the minor already has an attorney, that attorney shall act as his guardian ad litem.

 (b) Upon the filing of a summons and petition for appointment of a conservator or other protective order for reasons other than minority, and after service of the summons and the petition, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice, the court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the protected person already has representation by an attorney, that attorney shall act as his guardian ad litem. Except in cases governed by Section 62‑5‑436 relating to benefits from the VA, if the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court shall direct that the person to be protected be examined by one or more physicians designated by the court, preferably physicians who are not connected with an institution in which the person is a patient or is detained.

 (c) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate protective order.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 33, eff June 7, 2010; 2016 Act No. 278 (S.777), Section 5, eff June 9, 2016.

**SECTION 62‑5‑408.** Permissible court orders.

Section effective until January 1, 2019. See, also, Sections 62‑5‑107, 62‑5‑108, 62‑5‑404, 62‑5‑405, 62‑5‑414, 62‑5‑422, and 62‑5‑423 effective January 1, 2019.

 The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

 (1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing upon such notice by the court as is reasonable under the circumstances, and if the petition requests temporary relief, the court has the power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents; however, notice of such actions of the court shall be given to interested parties as soon thereafter as practicable.

 (2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, his family, and members of his household.

 (3)(a) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and of his estate and fulfillment of his legal obligations of support of dependents, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to, the power to:

 (i) make gifts as the court, in its discretion, believes would be made by the person if he were competent;

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

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

 (iv) enter into contracts;

 (v) create or amend revocable trusts or create irrevocable trusts of property of the estate which may extend beyond the person’s disability or life;

 (vi) fund trusts;

 (vii) exercise options of the disabled person to purchase securities or other property;

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

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

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

 (xi) ratify any such actions taken on the person’s behalf.

 (b) In order to exercise, or direct the exercise of the court’s authority in any powers set forth in item (a), the court must entertain a petition in which the specific relief sought is set forth, the incapacitated person, his known heirs, devisees, donees, and beneficiaries are made parties to the action, and which contains a statement that the person either is incapable of consenting or has consented to the proposed exercise of power.

 (c) In exercising the powers set forth in item (b), the court also must inquire into and consider any known lifetime gifts or the estate plan of the person, the terms of any revocable trust of which he is grantor, and any contract, transfer, or joint ownership arrangements with provisions for payment or transfer of benefits or interests at his death to another which he may have originated. In exercising the court’s authority set forth in item (b), the court must set forth in the record specific findings upon which it has based its ruling.

 (4) An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person, except to the extent the order affects his estate or affairs.

HISTORY: 1986 Act No. 539, Section 1; 2000 Act No. 398, Section 10.

**SECTION 62‑5‑409.** Protective arrangements and single transactions authorized.

Section effective until January 1, 2019. See, also, Section 62‑5‑405 effective January 1, 2019.

 (a) If it is established in a proper proceeding that a basis exists as described in Section 62‑5‑401 for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct, or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit, or retention of funds or property, sale, mortgage, lease, or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

 (b) When it has been established in a proper proceeding that a basis exists as described in Section 62‑5‑401 for affecting the property and affairs of a person, the court, without appointing a conservator, may authorize, direct, or ratify any contract, trust, or other transaction relating to the protected person’s financial affairs or involving his estate if the court determines that the transaction is in the best interests of the protected person.

 (c) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑410.** Who may be appointed conservator; priorities.

Section effective until January 1, 2019. See, also, Section 62‑5‑408 effective January 1, 2019.

 (a) The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

 (1) a conservator, guardian of property, or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

 (2) an individual or corporation nominated by the protected person if he is fourteen or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

 (3) an attorney in fact appointed by such protected person pursuant to Section 62‑5‑501;

 (4) the spouse of the protected person;

 (5) an adult child of the protected person;

 (6) a parent of the protected person, or a person nominated by the will of a deceased parent;

 (7) any other relative of the protected person;

 (8) a person nominated by the person who is caring for him or paying benefits to him.

 (b) A person in priorities (1), (4), (5), (6), or (7) may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the court is to select the one who is best qualified of those willing to serve. The court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.

 (c) A probate judge or an employee of the probate court shall not serve as a conservator of an estate of a protected person; however, a probate judge or an employee of the probate 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.

HISTORY: 1986 Act No. 539, Section 1; 1995 Act No. 15, Section 4.

**SECTION 62‑5‑411.** Bond.

Section effective until January 1, 2019. See, also, Section 62‑5‑409 effective January 1, 2019.

 The court, unless for good cause stated, shall require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law and will approve all sureties. If bond is required, the person qualifying 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 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. Upon application of the conservator or another interested person, or upon the court’s own motion, the court may increase or reduce the amount of the bond, release sureties, dispense with security or securities, or permit the substitution of another bond with the same or different sureties. A denial of an application by the court is not an adjudication and does not preclude a formal proceeding.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 7; 2010 Act No. 244, Section 34, eff June 7, 2010.

**SECTION 62‑5‑412.** Terms and requirements of bonds.

Section effective until January 1, 2019. See, also, Section 62‑5‑410 effective January 1, 2019.

 (a) The following requirements and provisions apply to any bond required under Section 62‑5‑411:

 (1) Sureties shall 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 which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party defendant. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner;

 (3) After service of a summons and petition by a successor conservator or any interested person, 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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 35, eff June 7, 2010.

**SECTION 62‑5‑413.** Acceptance of appointment; consent to jurisdiction.

Section effective until January 1, 2019. See, also, Section 62‑5‑411 effective January 1, 2019.

 By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the conservator, or mailed to him by registered or certified mail at his address as listed in the petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑414.** Compensation and expenses.

Section effective until January 1, 2019. See, also, Sections 62‑5‑105 and 62‑5‑412 effective January 1, 2019.

 If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate, as determined by the court.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑415.** Death, resignation, or removal of conservator.

Section effective until January 1, 2019. See, also, Section 62‑5‑428 effective January 1, 2019.

 The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. After his death, resignation, or removal, the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of his predecessor.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑416.** Requests for orders subsequent to appointment; service of petition and summons; denial of application.

Section effective until January 1, 2019. See, also, Section 62‑5‑428 effective January 1, 2019.

 (a) Upon filing a petition and summons with the appointing court, a person interested in the welfare of a person for whom a conservator has been appointed may request an order (1) requiring bond or security or additional bond or security, or reducing bond, (2) requiring an accounting for the administration of the trust, (3) directing distribution, (4) removing the conservator and appointing a temporary or successor conservator, or (5) granting other appropriate relief. The petition and summons must be served upon the conservator and other persons as the court may direct.

 (b) Upon application to the appointing court, a conservator may request instructions concerning his fiduciary responsibility. A denial of the application by the court is not an adjudication and does not preclude a formal proceeding.

 (c) After notice and hearing as the court may direct, the court may give appropriate instructions or make any appropriate order.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 36, eff June 7, 2010.

**SECTION 62‑5‑417.** General duty of conservator.

Section effective until January 1, 2019. See, also, Section 62‑5‑414 effective January 1, 2019.

 In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by Section 62‑7‑933.

HISTORY: 1986 Act No. 539, Section 1; 2005 Act No. 66, Section 7.

**SECTION 62‑5‑418.** Inventory and records.

Section effective until January 1, 2019. See, also, Section 62‑5‑415 effective January 1, 2019.

 Within thirty days after his appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed. The court may, for good cause shown, increase the allotted time. The conservator shall provide a copy thereof to the protected person if he can be located, has attained the age of fourteen years, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑419.** Accounts.

Section effective until January 1, 2019. See, also, Section 62‑5‑416 effective January 1, 2019.

 Every conservator shall account to the court for his administration of the trust annually and upon his resignation or removal, and at other times as the court may direct. On termination of the protected person’s minority or disability a conservator shall account to the court. Upon the filing and service of summons and petition for approval of accounting, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to his liabilities concerning the matters shown in connection with it and an order, made upon notice and hearing, allowing a final account adjudicates as to all unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship concerning the matters shown. In connection with an account, the court may require a conservator to submit to a physical check of the estate in his control, to be made in a manner the court may specify.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 37, eff June 7, 2010.

**SECTION 62‑5‑420.** Conservators; title by appointment.

Section effective until January 1, 2019. See, also, Section 62‑5‑417 effective January 1, 2019.

 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 theretofore held for the protected person by custodians or attorneys in fact. Neither the appointment of a conservator nor the establishment of a trust in accordance with Title 44, Chapter 6, Article 6, is a transfer or alienation within the meaning of general provisions 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, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

HISTORY: 1986 Act No. 539, Section 1; 1993 Act No. 164, Part II, Section 74B.

**SECTION 62‑5‑421.** Recording of conservator’s letters.

Section effective until January 1, 2019. See, also, Section 62‑5‑418 effective January 1, 2019.

 Letters of conservatorship transfer all assets of a protected person to the conservator. An order terminating a conservatorship transfers all assets of the estate from the conservator to the protected person or his successors. Letters of conservatorship, and orders terminating conservatorships, shall 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 other counties where the protected person owns real estate.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑422.** Sale, encumbrance, or transaction involving conflict of interest; voidable; exceptions.

Section effective until January 1, 2019. See, also, Section 62‑5‑419 effective January 1, 2019.

 Any sale or encumbrance to a conservator, his spouse, agent, or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is void unless the transaction is approved by the court after notice to interested persons and others as directed by the court.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑423.** Persons dealing with conservators; protection.

Section effective until January 1, 2019. See, also, Section 62‑5‑420 effective January 1, 2019.

 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 provided in Sections 62‑5‑408 and 62‑5‑422, 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 62‑5‑426 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. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑424.** Powers of conservator in administration.

Section effective until January 1, 2019. See, also, Section 62‑5‑422 effective January 1, 2019.

 (A) A conservator has power without court authorization or confirmation to invest and reinvest funds of the estate as would a trustee.

 (B) A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without court authorization or confirmation, to:

 (1) 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 the assets may be retained even though they include an asset in which he personally is interested;

 (2) receive additions to the estate;

 (3) invest and reinvest estate assets in accordance with subsection (A);

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

 (5) make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish improvement, to raze existing or erect 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 has 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 distributee or by paying the sum for the use of 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 him 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; and

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

 (C) A conservator acting reasonably in efforts to accomplish the purpose for which he was appointed may act with court approval 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) acquire or dispose of an estate asset including land in another state 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; to make or obtain the vacation of plats and adjust boundaries; to adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;

 (5) enter into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

 (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, 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 gifts to charitable organizations and for other religious, charitable, eleemosynary, or educational purposes which are tax deductible as the protected person might have been expected to make, in amounts which do not exceed in total for any year twenty percent of the income from the estate, if and only if the estate is ample to provide for the purposes implicit in the distributions authorized by Section 62‑5‑425;

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

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 8; 1997 Act No. 152, Section 24.

**SECTION 62‑5‑425.** Distributive duties and powers of conservator.

Section effective until January 1, 2019. See, also, Section 62‑5‑423 effective January 1, 2019.

 (a) A conservator may expend or distribute sums from the principal of the estate without court authorization or confirmation for the support, education, care, or benefit of the protected person and his dependents in accordance with the following principles:

 (1) The conservator is to consider recommendations relating to the appropriate standard of support, education, and benefit for the protected person made by a parent or guardian, if any. He may not be surcharged for sums paid to persons or organizations actually furnishing support, education, or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless he knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person.

 (2) The conservator is to expend or distribute sums reasonably necessary for the support, education, care, or benefit of the protected person with due regard to (i) 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 which has been conserved for him; (ii) the accustomed standard of living of the protected person and members of his household; (iii) other funds or sources used for the support of the protected person.

 (3) The conservator may expend funds of the estate for the support of persons legally dependent on the protected person.

 (4) Funds expended under this subsection may be paid by the conservator to any person, including the protected person, to reimburse for expenditures which the conservator might have made, 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.

 (b) When a minor who has not been adjudged disabled under Section 62‑5‑401(2) attains his majority or is emancipated, his conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible. An individual under the age of eighteen who is also married shall remain a minor for purposes of this subsection until attaining majority or emancipation.

 (c)(1) When the conservator is satisfied that a protected person’s disability (other than minority) has ceased, then he shall petition the court, and after determination by the court that the disability has ceased in accordance with Section 62‑5‑430, the conservator, after meeting all prior claims and expenses of administration shall pay over and distribute all funds and properties to the former protected person as soon as possible.

 (2) When the conservator is satisfied that a protected person’s estate has a value of less than five thousand dollars, then he may petition the court, and after determination by the court that the protected person’s estate has a value of less than five thousand dollars, the court in its discretion may terminate the conservatorship and order the conservator, after meeting all prior claims and expenses of administration, to pay over and distribute all funds and properties to or for the protected person as soon as possible and in accordance with Section 62‑5‑103.

 (d) 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 his possession, inform the executor or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. If after thirty days from the death of the protected person no other person has been appointed personal representative and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative so that he may proceed to administer and distribute the decedent’s estate. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under Section 62‑3‑204 and to any person nominated executor in any will of which the applicant is aware, the court may order the conferral of the power upon determining that there is no objection, and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section shall have the effect of an order of appointment of a personal representative as provided in Section 62‑3‑308 and Parts 6 through 10 of Article 3 [Sections 62‑3‑601 et seq. through Sections 62‑3‑1001 et seq.] except that estate in the name of the conservator, after administration, may be distributed to the decedent’s successors without prior retransfer to the conservator as personal representative.

 (e) A person shall not be disqualified as an executor of a deceased protected person solely by reason of his having been appointed and acting conservator of that protected person.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 83; 1997 Act No. 152, Section 25.

**SECTION 62‑5‑426.** Enlargement or limitation of powers of conservator.

Section effective until January 1, 2019. See, also, Sections 62‑5‑404 and 62‑5‑428 effective January 1, 2019.

 The court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by Sections 62‑5‑424 and 62‑5‑425, or previously conferred by the court, and may at any time relieve him of any limitation. If the court limits any power conferred on the conservator by Section 62‑5‑424 or Section 62‑5‑425, the limitation shall be endorsed upon his letters of appointment and upon any certificate evidencing his appointment.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑427.** Preservation of estate plan.

Section effective until January 1, 2019. See, also, Section 62‑5‑425 effective January 1, 2019.

 In investing the estate, and in selecting assets of the estate for distribution under subsections (a) and (b) of Section 62‑5‑425, in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, the conservator and the court should take into account any known estate plan of the protected person, any revocable trust of which he is settlor, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑428.** Claims against protected person; enforcement.

Section effective until January 1, 2019. See, also, Section 62‑5‑426 effective January 1, 2019.

 (a)(1) A conservator must pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship upon their presentation and allowance. A claim may be presented by either of the following methods:

 (i) the 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;

 (ii) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of court and deliver or mail a copy of the statement to the conservator.

 (2) A claim is considered presented on the first to occur of receipt of the written statement of claim by the conservator or the filing of the claim with the court. Every claim which 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 in the court or commences a proceeding against the conservator not 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. The presentation of a claim tolls any statute of limitation relating to the claim until thirty days after its disallowance.

 (b) A claimant whose claim has not been paid may petition, by service of the summons and the petition, the court for determination of his claim at any time before it is barred by the applicable statute of limitation, and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is initiated against a protected person, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

 (c) If it appears that the estate in conservatorship is 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.

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 26; 2010 Act No. 244, Section 38, eff June 7, 2010.

**SECTION 62‑5‑429.** Individual liability of conservator.

Section effective until January 1, 2019. See, also, Section 62‑5‑427 effective January 1, 2019.

 (a) Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in his fiduciary capacity in the court of administration of the estate unless he fails to reveal his representative capacity and 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 in the course of 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 in the course of 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 therefor.

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

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑430.** Proceeding to terminate conservatorship; application; notice.

Section effective until January 1, 2019. See, also, Section 62‑5‑428 effective January 1, 2019.

 (A) The protected person, the conservator, or any other interested person, by service of a summons and petition, may request that the court terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The court, upon determining after notice and hearing, that the disability of the protected person has ceased, may terminate the conservatorship.

 (B) The protected person, his personal representative, or the conservator may make application for the termination of the conservatorship when the protected person has attained his majority or if the protected person is deceased. Notice must be given to those persons as the court may direct.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 39, eff June 7, 2010.

**SECTION 62‑5‑431.** Payment of debt and delivery of property to foreign conservator without local proceedings.

Section effective until January 1, 2019. See, also, Section 62‑5‑429 effective January 1, 2019.

 Any 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:

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

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

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

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑432.** Foreign conservator; proof of authority; bond; powers.

Section effective until January 1, 2019. See, also, Section 62‑5‑430 effective January 1, 2019.

 If no local conservator has been appointed and no petition in a protective proceeding is pending in this State, then, except as provided in Section 62‑5‑431, a domiciliary foreign conservator may file with the court in this State in all counties in which property belonging to the protected person is located, authenticated copies of his appointment and of any official bond he has given. Thereafter, he may exercise as to assets in this State all powers of a local conservator and maintain actions and proceedings in this State subject to any conditions imposed upon nonresident parties generally.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62‑5‑433.** Definitions; procedures for settlement of claims in favor of or against minors or incapacitated persons.

Section effective until January 1, 2019. See, also, Section 62‑5‑433 effective January 1, 2019.

 (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 person, “court” means the circuit court of the county in which the minor or incapacitated person 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 person, “court” means either the circuit court or the probate court of the county in which the minor or incapacitated person 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 person as a result of the settlement.

 (3) “Petitioner” means either a conservator appointed by the probate court for the minor or incapacitated person or the guardian or guardian ad litem of the minor or incapacitated person if a conservator has not been appointed.

 (B) The settlement of any claim over twenty‑five thousand dollars in favor of or against any minor or incapacitated person 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 person.

 (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 person, 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 person, 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 person.

 (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 shall, upon receiving the money or personal property, 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 any claim that does not exceed twenty‑five thousand dollars in favor of or against a minor or incapacitated person 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 person, 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 person.

 (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 person 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 any claim that does not exceed two thousand five hundred dollars in favor of or against any minor or incapacitated person for the payment of money or the possession of personal property may be effected by the parent or guardian of the minor or incapacitated person 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 person, 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 person. The payment or delivery of money or personal property to or for a minor or incapacitated person must be made in accordance with Section 62‑5‑103.

HISTORY: 1988 Act No. 659, Section 9; 1990 Act No. 521, Sections 84‑86; 2000 Act No. 398, Section 1.

**SECTION 62‑5‑434.** Settlement of claims involving minors completed between July 1, 1987, and September 24, 1987, presumed valid.

Section omitted by 2017 Act No. 87, Section 5.A, effective January 1, 2019.

 The settlement of any claim involving a minor completed between July 1, 1987, and September 24, 1987, is presumed facially valid whether effectuated with or without court approval.

HISTORY: 1988 Act No. 659, Section 21.

**SECTION 62‑5‑435.** Liability for approving or completing settlement.

Section omitted by 2017 Act No. 87, Section 5.A, effective January 1, 2019.

 Neither the court which may have approved a settlement nor a person who completed the settlement of a minor’s claim but did not seek court approval during this time period is liable for their good faith exercise of discretion in approving or completing the settlement.

HISTORY: 1988 Act No. 659, Section 21(A) (last sentence).

**SECTION 62‑5‑436.** Payment of benefits from U.S. Department of Veterans Affairs to a minor or an incapacitated person; definitions.

Section effective until January 1, 2019. See, also, Section 62‑5‑431 effective January 1, 2019.

 (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.

HISTORY: 2016 Act No. 278 (S.777), Section 1, eff June 9, 2016.

Part 4

Protection of Property of Persons Under Disability and Minors [Effective January 1, 2019]

**SECTION 62‑5‑401.** Venue.

Section effective January 1, 2019. See, also, Section 62‑5‑403 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑403, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Section 62‑5‑403 puts venue for proceedings in the county of residence of the person to be protected, or if he resides out of state, where his property lies.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑401 was titled Protective proceedings, and had the following history: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 30, eff June 7, 2010. See now, Code 1976 Sections 62‑5‑402 and 62‑5‑403.

CROSS REFERENCES

Special needs trust, see Section 62‑5‑432.

Venue of suits against guardians, see Sections 15‑7‑40, 15‑7‑50.

Library References

Absentees 5.

Guardian and Ward 13(1), 124.

Mental Health 112.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 13, 28, 258 to 259.

C.J.S. Mental Health Section 120.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 10, Venue.

**SECTION 62‑5‑402.** Protective proceedings; minors.

Section effective January 1, 2019. See, also, Sections 62‑5‑401 and 62‑5‑407 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Sections 30, 33, eff June 7, 2010. Formerly Code 1976 Sections 62‑5‑401 and 62‑5‑407, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This is the basic section [62‑5‑401] of this part providing for protective proceedings for minors and disabled persons. “Protective proceedings” is a generic term used to describe proceedings to establish conservatorships and obtain protective orders. Persons who may be subjected to the proceedings described here include a broad category of persons who, for a variety of different reasons, may be unable to manage their own property.

The comment to Section 62‑5‑304, supra, points up the different meanings of incapacity (warranting guardianship), and disability.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [of 62‑5‑401] revised the first sentence in this section to delete “Upon” and replace it with “After service of the summons and,” delete “after” and “and,” add “of” to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for appointment of a conservator or other protective order. 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. (2011 Act No. 2, Section 2.)

The 2010 amendment [to 62‑5‑407] revised subsections (a) and (b) to delete certain language and replace it with language to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding seeking appointment of a conservator or other protective order. 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.

SOUTH CAROLINA REPORTER’S COMMENTS (2016 REVISION)

The 2016 amendment [to 62‑5‑407] recognized the repeal of Part 6 of Article 5, the Uniform Veterans’ Guardianship Act, and the enactment of new Section 62‑5‑436 to provide an overlay to proceedings involving the appointment of a conservator to receive VA benefits.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑402 was titled Protective proceedings; jurisdiction of affairs of protected persons, and had the following history: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 6; 2010 Act No. 244, Section 31, eff June 7, 2010. See now, Code 1976 Section 62‑5‑426.

CROSS REFERENCES

Appointment of guardian ad litem under South Carolina Rules of Civil Procedure, see SC R RCP Rule 17.

Commitment of tuberculosis patients, see Sections 44‑31‑110 et seq.

Declaratory judgment in respect to trust and estate of lunatic, see Section 15‑53‑50.

Duty of conservator when a minor, who has not been adjudged disabled under this section, attains his majority, see Section 62‑5‑425.

Jurisdiction in matters pertaining to minors and persons mentally incompetent, see SC Const, Art 5, Section 12.

Order for appointment of guardian, see Section 62‑5‑304.

“Party” defined, see Section 62‑5‑101.

Protection of persons under disability and their property, definitions and use of terms, see Section 62‑5‑101.

Protective arrangements or other transactions that court may authorize if basis exists for affecting person’s property and affairs, see Section 62‑5‑409.

Provision that, for purposes of Title 62, “disability” means cause for a protective order as described in this section, see Section 62‑1‑201.

Service of process on persons confined and duties of superintendent of state mental health facility in respect thereto, see Section 15‑9‑510.

Library References

Absentees 5.

Guardian and Ward 9.5, 13(7).

Mental Health 104, 137.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 7 to 8, 33 to 35, 49.

C.J.S. Mental Health Section 111.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Children and Families Section 73, Rights Under the South Carolina Probate Code (SCPC).

S.C. Jur. Guardian and Conservator Section 16, Protective Proceedings.

S.C. Jur. Guardian and Conservator Section 18, Procedure After Petition for Appointment.

S.C. Jur. Guardian and Conservator Section 45, Termination of Conservatorship.

Attorney General’s Opinions

Upon the death of a committee, in order to appoint a successor committee, the statutory provision under this section [Code 1962 Section 32‑1035 and former Section 44‑23‑710] should be followed. 1966‑67 Op. Atty Gen, No 2295, p 115.

NOTES OF DECISIONS

In general 1

Under former Section 44‑23‑710 2

1. In general [under former Section 62‑5‑401]

Creation of irrevocable trust by putative settlor’s daughter, to whom settlor had granted a durable power of attorney, did not amount to the execution of a will in violation of the powers of a power of attorney; power of attorney specifically granted daughter power to create both revocable and irrevocable trusts, and fact that trust used settlor’s will to specify how to distribute assets held by trust in no way impeded settlor’s right to change her will. Watson v. Underwood (S.C.App. 2014) 407 S.C. 443, 756 S.E.2d 155. Principal and Agent 51; Trusts 8

Probate court’s appointment of physicians, previously designated by mother as her experts, as medical examiners to aid in determining mother’s capacity was error, in proceeding in which daughter sought to be appointed conservator of mother’s assets; since mother had previously designated physicians as her experts, it was foregone conclusion that physicians would opine mother was capable of handling her own financial affairs. In re Campbell (S.C.App. 2006) 367 S.C. 209, 625 S.E.2d 233, certiorari granted, affirmed as modified 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

2. Under former Section 44‑23‑710

In action for appointment of committee, testimony of three physicians supported conclusion of non compos mentis, despite some evidence to the contrary. Monteith v. Hagood (S.C. 1976) 267 S.C. 168, 226 S.E.2d 708.

Daughter of person for whom committee was sought to be appointed was unquestionably an interested party as contemplated by Code 1962 Section 32‑1035 [Code 1976 Section 44‑23‑710]. Monteith v. Hagood (S.C. 1976) 267 S.C. 168, 226 S.E.2d 708.

**SECTION 62‑5‑403.** Protective proceedings; incapacitated and disabled persons.

Section effective January 1, 2019. See, also, Sections 62‑5‑401 and 62‑5‑404 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 30, eff June 7, 2010; 2016 Act No. 278 (S.777), Section 3, eff June 9, 2016. Formerly Code 1976 Sections 62‑5‑401 and 62‑5‑404, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This is the basic section [62‑5‑401] of this part providing for protective proceedings for minors and disabled persons. “Protective proceedings” is a generic term used to describe proceedings to establish conservatorships and obtain protective orders. Persons who may be subjected to the proceedings described here include a broad category of persons who, for a variety of different reasons, may be unable to manage their own property.

The comment to Section 62‑5‑304, supra, points up the different meanings of incapacity (warranting guardianship), and disability.

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 in the proceeding, the name and address of the person to be notified on behalf of the VA is also to be included.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑401] revised the first sentence in this section to delete “Upon” and replace it with “After service of the summons and,” delete “after” and “and,” add “of” to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for appointment of a conservator or other protective order. 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. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑403 was titled Venue, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑401.

CROSS REFERENCES

Appointment of guardian ad litem under South Carolina Rules of Civil Procedure, see SC R RCP Rule 17.

Commitment of tuberculosis patients, see Sections 44‑31‑110 et seq.

Declaratory judgment in respect to trust and estate of lunatic, see Section 15‑53‑50.

Jurisdiction in matters pertaining to minors and persons mentally incompetent, see SC Const, Art 5, Section 12.

“Party” defined, see Section 62‑5‑101.

Provision that, for purposes of Title 62, “disability” means cause for a protective order as described in this section, see Section 62‑1‑201.

Service of process on persons confined and duties of superintendent of state mental health facility in respect thereto, see Section 15‑9‑510.

Library References

Absentees 5.

Guardian and Ward 13(3).

Mental Health 124, 126.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 29 to 31.

C.J.S. Mental Health Sections 132 to 133.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 17, Petition for Appointment.

**SECTION 62‑5‑403A.** Service of summons and petition.

Section effective January 1, 2019. See, also, Section 62‑5‑405 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 23; 2010 Act No. 244, Section 32, eff June 7, 2010; 2016 Act No. 278 (S.777), Section 4, eff June 9, 2016. Formerly Code 1976 Section 62‑5‑405, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑405] sets up a tiered system for giving notice. The petition is served first on the spouse and, if none, the parents. Section 62‑5‑405(b) provides that notice of a petition must be given to a person who has filed a request for notice and to interested persons or those whom the court may choose. Section 62‑5‑405 specifically establishes a twenty‑day period between service and a hearing.

The 2010 amendment [to 62‑5‑405] extensively revised the first sentence of subsection (a) to delete “On a” and replace it with “After filing of the summons and the,” delete “notice of the proceedings at least twenty days before the date of hearing” and replace it with “the summons and petition,” revise the second sentence of subsection (a) to add “following persons also must be properly served: the,” and delete the remainder of the second sentence after “parents,” and add “and other persons as the court may direct.” The 2010 amendment also revised subsection (b) to add “hearing on,” “the person to be protected, to,” delete “Except as otherwise provided in (a), notice shall” and replace it with “Notice must.” The intention of the foregoing amendments was to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for appointment of a conservator or other protective order. 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 2010 amendment also added a new last sentence regarding waiver by the person to be protected. The latter amendment and new sentence were added to clarify and provide that waiver of notice of hearing by the protected person is not effective unless he attends the hearing or waiver of notice is given by his attorney.

The 2016 amendment [to 62‑5‑405] added subsection (c) to continue the requirement set out in former Section 62‑5‑620 that the VA be a necessary party when appointing a conservator to receive VA benefits.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Library References

Absentees 5.

Guardian and Ward 13(3).

Mental Health 127.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 29 to 31.

C.J.S. Mental Health Section 134.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 19, Notice.

**SECTION 62‑5‑403B.** Appointment of counsel and guardian ad litem.

Section effective January 1, 2019. See, also, Section 62‑5‑407 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 33, eff June 7, 2010; 2016 Act No. 278 (S.777), Section 5, eff June 9, 2016. Formerly Code 1976 Section 62‑5‑407, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

The 2010 amendment [to 62‑5‑407] revised subsections (a) and (b) to delete certain language and replace it with language to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding seeking appointment of a conservator or other protective order. 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 2016 amendment [to 62‑5‑407] recognized the repeal of Part 6 of Article 5, the Uniform Veterans’ Guardianship Act, and the enactment of new Section 62‑5‑436 to provide an overlay to proceedings involving the appointment of a conservator to receive VA benefits.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

CROSS REFERENCES

Report of examiner, see Section 62‑5‑403D.

Responsibilities and duties of guardian ad litem, reports, see Section 62‑5‑106.

NOTES OF DECISIONS

In general 1

Medical examiners 3

Under former Section 21‑23‑720 2

1. In general

Probate court’s appointment of physicians, previously designated by mother as her experts, as medical examiners to aid in determining mother’s capacity was error, in proceeding in which daughter sought to be appointed conservator of mother’s assets; since mother had previously designated physicians as her experts, it was foregone conclusion that physicians would opine mother was capable of handling her own financial affairs. In re Campbell (S.C.App. 2006) 367 S.C. 209, 625 S.E.2d 233, certiorari granted, affirmed as modified 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

2. Under former Section 21‑23‑720

Provision in this section [Code 1962 Section 32‑1036] for mental examination is prospective in nature and does not contemplate a certificate of the examiners based upon a former examination. In re Cogdell’s Estate (S.C. 1960) 236 S.C. 404, 114 S.E.2d 562.

Probate court erred in receiving and acting upon the certificate of physicians who had not examined appellant as required by this section [Code 1962 Section 32‑1036]. In re Cogdell’s Estate (S.C. 1960) 236 S.C. 404, 114 S.E.2d 562.

Failure to comply with the requirement for an examination renders void the appointment of a committee. In re Cogdell’s Estate (S.C. 1960) 236 S.C. 404, 114 S.E.2d 562.

3. Medical examiners

Statute requiring appointment of one or more physicians to examine person subject to conservatorship petition, “preferably physicians who are not connected with any institution in which the person is a patient or is detained,” did not require that the court‑appointed physician be “disinterested”; rather, legislature likely intended that court‑appointed examiner be unbiased. In re Campbell (S.C. 2008) 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

Appointed examiners in conservatorship proceedings must be able to render an objective opinion. In re Campbell (S.C. 2008) 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

The obvious purpose of the statute permitting the appointment of examiners in the context of a petition for conservatorship is to provide the probate court with a medical opinion regarding the person’s mental capacity, and it is inherent that such an opinion come from a neutral physician. In re Campbell (S.C. 2008) 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

Mother’s medical expert witnesses were not unbiased, and thus, should not have been appointed by Probate Court to examine mother, in context of daughter’s petition for appointment as conservator of mother’s assets; in addition to being named as mother’s expert witnesses on her behalf, physicians were mother’s friends, mother’s counsel had coached them prior to their meetings with mother, and mother compensated physicians for their work performed as expert witnesses. In re Campbell (S.C. 2008) 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

**SECTION 62‑5‑403C.** Hearing; waiver.

Section effective January 1, 2019. See, also, Sections 62‑5‑405, 62‑5‑406, and 62‑5‑407 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 67; 1997 Act No. 152, Section 23; 2010 Act No. 244, Sections 32, 33, eff June 7, 2010; 2016 Act No. 278 (S.777), Sections 4, 5, eff June 9, 2016. Formerly Code 1976 Sections 62‑5‑405, 62‑5‑406, and 62‑5‑407, renumbered and amended by 2017 Act No. 87, Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑405] sets up a tiered system for giving notice. The petition is served first on the spouse and, if none, the parents. Section 62‑5‑405(b) provides that notice of a petition must be given to a person who has filed a request for notice and to interested persons or those whom the court may choose. Section 62‑5‑405 specifically establishes a twenty‑day period between service and a hearing.

This section [62‑5‑406] provides for notification of any interested person prior to filing of an order.

The 2010 amendment [to 62‑5‑405] extensively revised the first sentence of subsection (a) to delete “On a” and replace it with “After filing of the summons and the,” delete “notice of the proceedings at least twenty days before the date of hearing” and replace it with “the summons and petition,” revise the second sentence of subsection (a) to add “following persons also must be properly served: the,” and delete the remainder of the second sentence after “parents,” and add “and other persons as the court may direct.” The 2010 amendment also revised subsection (b) to add “hearing on,” “the person to be protected, to,” delete “Except as otherwise provided in (a), notice shall” and replace it with “Notice must.” The intention of the foregoing amendments was to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for appointment of a conservator or other protective order. 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 2010 amendment also added a new last sentence regarding waiver by the person to be protected. The latter amendment and new sentence were added to clarify and provide that waiver of notice of hearing by the protected person is not effective unless he attends the hearing or waiver of notice is given by his attorney.

The 2010 amendment [to 62‑5‑407] revised subsections (a) and (b) to delete certain language and replace it with language to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding seeking appointment of a conservator or other protective order. 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 2016 amendment [to 62‑5‑405] added subsection (c) to continue the requirement set out in former Section 62‑5‑620 that the VA be a necessary party when appointing a conservator to receive VA benefits.

The 2016 amendment [to 62‑5‑407] recognized the repeal of Part 6 of Article 5, the Uniform Veterans’ Guardianship Act, and the enactment of new Section 62‑5‑436 to provide an overlay to proceedings involving the appointment of a conservator to receive VA benefits.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Library References

Absentees 5.

Guardian and Ward 13(3), 13(7).

Mental Health 127, 137.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 29 to 31, 33 to 35, 49.

C.J.S. Mental Health Section 134.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 19, Notice.

**SECTION 62‑5‑403D.** Report of examiner.

Section effective January 1, 2019. See, also, Section 62‑5‑407 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 33, eff June 7, 2010; 2016 Act No. 278 (S.777), Section 5, eff June 9, 2016. Formerly Code 1976 Section 62‑5‑407, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

The 2010 amendment [to 62‑5‑407] revised subsections (a) and (b) to delete certain language and replace it with language to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding seeking appointment of a conservator or other protective order. 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 2016 amendment [to 62‑5‑407] recognized the repeal of Part 6 of Article 5, the Uniform Veterans’ Guardianship Act, and the enactment of new Section 62‑5‑436 to provide an overlay to proceedings involving the appointment of a conservator to receive VA benefits.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

CROSS REFERENCES

Appointment of counsel and guardian ad litem, see Section 62‑5‑403B.

Library References

Absentees 5.

Guardian and Ward 13(7).

Mental Health 137.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 33 to 35, 49.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 18, Procedure After Petition for Appointment.

S.C. Jur. Guardian and Conservator Section 20, Powers of Court.

NOTES OF DECISIONS

In general 1

Medical examiners 3

Under former Section 21‑23‑720 2

1. In general

Probate court’s appointment of physicians, previously designated by mother as her experts, as medical examiners to aid in determining mother’s capacity was error, in proceeding in which daughter sought to be appointed conservator of mother’s assets; since mother had previously designated physicians as her experts, it was foregone conclusion that physicians would opine mother was capable of handling her own financial affairs. In re Campbell (S.C.App. 2006) 367 S.C. 209, 625 S.E.2d 233, certiorari granted, affirmed as modified 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

2. Under former Section 21‑23‑720

Provision in this section [Code 1962 Section 32‑1036] for mental examination is prospective in nature and does not contemplate a certificate of the examiners based upon a former examination. In re Cogdell’s Estate (S.C. 1960) 236 S.C. 404, 114 S.E.2d 562.

Probate court erred in receiving and acting upon the certificate of physicians who had not examined appellant as required by this section [Code 1962 Section 32‑1036]. In re Cogdell’s Estate (S.C. 1960) 236 S.C. 404, 114 S.E.2d 562.

Failure to comply with the requirement for an examination renders void the appointment of a committee. In re Cogdell’s Estate (S.C. 1960) 236 S.C. 404, 114 S.E.2d 562.

3. Medical examiners

Statute requiring appointment of one or more physicians to examine person subject to conservatorship petition, “preferably physicians who are not connected with any institution in which the person is a patient or is detained,” did not require that the court‑appointed physician be “disinterested”; rather, legislature likely intended that court‑appointed examiner be unbiased. In re Campbell (S.C. 2008) 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

Appointed examiners in conservatorship proceedings must be able to render an objective opinion. In re Campbell (S.C. 2008) 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

The obvious purpose of the statute permitting the appointment of examiners in the context of a petition for conservatorship is to provide the probate court with a medical opinion regarding the person’s mental capacity, and it is inherent that such an opinion come from a neutral physician. In re Campbell (S.C. 2008) 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

Mother’s medical expert witnesses were not unbiased, and thus, should not have been appointed by Probate Court to examine mother, in context of daughter’s petition for appointment as conservator of mother’s assets; in addition to being named as mother’s expert witnesses on her behalf, physicians were mother’s friends, mother’s counsel had coached them prior to their meetings with mother, and mother compensated physicians for their work performed as expert witnesses. In re Campbell (S.C. 2008) 379 S.C. 593, 666 S.E.2d 908. Mental Health 142

**SECTION 62‑5‑404.** Protective proceedings; limited conservatorship.

Section effective January 1, 2019. See, also, Sections 62‑5‑408 and 62‑5‑426 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2000 Act No. 398, Section 10. Formerly Code 1976 Sections 62‑5‑408 and 62‑5‑426, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑408] gives specific powers to the court to take action with respect to the estate and affairs of a person if necessary even if that person has not yet been judged incompetent.

Section 62‑5‑426 permits the court to limit the powers of a conservator which he otherwise would have pursuant to Sections 62‑5‑424 and 62‑5‑425 and also to relieve him of any limitation at any time.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑404 was titled Original petition for appointment or protective order, and had the following history: 1986 Act No. 539, Section 1; 2016 Act No. 278 (S.777), Section 3, eff June 9, 2016. See now, Code 1976 Section 62‑5‑403.

CROSS REFERENCES

Acceptance and disbursement of deposits of minors, see Section 34‑11‑20.

Adoption, see Section 63‑9‑10.

Jurisdiction of family court in domestic matters, see Section 63‑3‑530.

Proceedings for judicial admission of mentally ill person to a hospital, see Section 44‑17‑510 et seq.

Library References

Absentees 5.

Guardian and Ward 13(7).

Mental Health 146.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 76, 100.

C.J.S. Guardian and Ward Sections 33 to 35, 49.

C.J.S. Mental Health Sections 158 to 159.

C.J.S. Right to Die Sections 5, 8.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 20, Powers of Court.

S.C. Jur. Guardian and Conservator Section 37, Court Limitation of Powers.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.4, Capacity of a Minor to Make a Donative Transfer.

Restatement (2d) of Property, Don. Trans. Section 34.5, Donor Mentally Incompetent.

NOTES OF DECISIONS

Under former provision as to manner in which custody of minors may be disposed of (Section 21‑21‑20) 1

Under former provision as to when probate judge shall act as guardian (Section 21‑23‑10) 2

1. Under former provision as to manner in which custody of minors may be disposed of (Section 21‑21‑20)

This section [Code 1962 Section 31‑52] enables the father to exercise whatever power of disposition as to custody the statute confers on him during his life. Tillman v. Tillman (S.C. 1910) 84 S.C. 552, 66 S.E. 1049.

2. Under former provision as to when probate judge shall act as guardian (Section 21‑23‑10)

Official bond of probate judge is liable for all funds received by him as public guardian where he received funds from sale of realty by him in aid of assets to pay debts of decedents, whether surplus proceeds of sale were held by him for minors or for persons sui juris. In re Wells (S.C. 1934) 174 S.C. 403, 177 S.E. 665. Judges 37

This section [Code 1962 Section 31‑101] does not create a separate office, but merely imposes new duties on the probate judge. State v. Green (S.C. 1898) 52 S.C. 520, 30 S.E. 683.

**SECTION 62‑5‑405.** Protective arrangements.

Section effective January 1, 2019. See, also, Sections 62‑5‑408 and 62‑5‑409 effective until January 1, 2019.

 (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).

HISTORY: 1986 Act No. 539, Section 1; 2000 Act No. 398, Section 10. Formerly Code 1976 Sections 62‑5‑408 and 62‑5‑409, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑408] gives specific powers to the court to take action with respect to the estate and affairs of a person if necessary even if that person has not yet been judged incompetent.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑405 was titled Service of summons and petition; notice of hearing; waiver of notice by person to be protected, and had the following history: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 23; 2010 Act No. 244, Section 32, eff June 7, 2010; 2016 Act No. 278 (S.777), Section 4, eff June 9, 2016. See now, Code 1976 Sections 62‑5‑403A and 62‑5‑403C.

CROSS REFERENCES

Acceptance and disbursement of deposits of minors, see Section 34‑11‑20.

Adoption, see Section 63‑9‑10.

Appointment of guardian ad litem under South Carolina Rules of Civil Procedure, see Rule 17.

Gifts of securities or money to minors, see Article 5, Chapter 5, Title 63.

Jurisdiction in matters pertaining to minors and persons mentally incompetent, see SC Const, Art V, Section 12.

Jurisdiction of family court in domestic matters, see Section 63‑3‑530.

Legal capacity of minors, see Article 3, Chapter 5, Title 63.

Limitation of actions with respect to persons under disability, see Section 15‑3‑370.

Proceedings for judicial admission of mentally ill person to a hospital, see Sections 44‑17‑510 et seq.

Who may be appointed conservator, priorities, see Section 62‑5‑408.

Library References

Absentees 5.

Guardian and Ward 13(7).

Infants 21 to 45.

Mental Health 351 to 396.

Westlaw Topic Nos. 5, 196, 211, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Bills and Notes; Letters of Credit Section 65.

C.J.S. Contracts Section 464.

C.J.S. Guardian and Ward Sections 33 to 35, 49.

C.J.S. Infants Sections 146 to 150, 163 to 164, 166 to 208.

C.J.S. Mental Health Sections 210 to 218, 221 to 223.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 6, Definitions.

S.C. Jur. Guardian and Conservator Section 20, Powers of Court.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.4, Capacity of a Minor to Make a Donative Transfer.

Restatement (2d) of Property, Don. Trans. Section 34.5, Donor Mentally Incompetent.

**SECTION 62‑5‑406.** Reserved.

Section effective January 1, 2019. See, also, Section 62‑5‑406 effective until January 1, 2019.

HISTORY: Former Section, titled Protective proceedings; request for notice; interested person, had the following history: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 67. Reserved by 2017 Act No. 87, Section 5.A, eff January 1, 2019. See now, Code 1976 Section 62‑5‑403C.

**SECTION 62‑5‑407.** Order of appointment; rights and powers of protected person.

Section effective January 1, 2019.

 (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.

HISTORY: 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

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

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑407 was titled Procedure concerning hearing and order on original petition, and had the following history: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 33, eff June 7, 2010; 2016 Act No. 278 (S.777), Section 5, eff June 9, 2016. See now, Code 1976 Sections 62‑5‑402, 62‑5‑403B, 62‑5‑403C, and 62‑5‑403D.

CROSS REFERENCES

Report of examiner, see Section 62‑5‑403D.

**SECTION 62‑5‑408.** Who may be appointed conservator; priorities.

Section effective January 1, 2019. See, also, Section 62‑5‑410 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1995 Act No. 15, Section 4. Formerly Code 1976 Section 62‑5‑410, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑410] sets forth in detail the tiered system prioritizing those who may be appointed conservator.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑408 was titled Permissible court orders, and had the following history: 1986 Act No. 539, Section 1; 2000 Act No. 398, Section 10. See now, Code 1976 Sections 62‑5‑107, 62‑5‑108, 62‑5‑404, 62‑5‑405, 62‑5‑414, 62‑5‑422, and 62‑5‑423.

CROSS REFERENCES

Proceedings for judicial admission of mentally ill person to a hospital, see Sections 44‑17‑510 et seq.

Protective proceedings, incapacitated and disabled persons, see Section 62‑5‑403.

Protective proceedings, minors, see Section 62‑5‑402.

Library References

Absentees 5.

Guardian and Ward 10.

Mental Health 116.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 19 to 27.

C.J.S. Mental Health Section 123.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 21, Priorities in Appointment.

NOTES OF DECISIONS

In general 1

1. In general

Probate Court did not abuse its discretion in appointing a nonrelative as committee for an incompetent mother where the court determined that the best interests of the incompetent would be served by the appointment of a committee unrelated to any other parties. Patterson v. Cook (S.C. 1986) 288 S.C. 220, 341 S.E.2d 782. Mental Health 118

While close relatives should be carefully considered for appointment as committee for an incompetent, they may not be appointed if, in its discretion, the court determines that the best interests of the incompetent requires the appointment of someone else. Patterson v. Cook (S.C. 1986) 288 S.C. 220, 341 S.E.2d 782.

**SECTION 62‑5‑409.** Bond.

Section effective January 1, 2019. See, also, Section 62‑5‑411 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 7; 2010 Act No. 244, Section 34, eff June 7, 2010. Formerly Code 1976 Section 62‑5‑411, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑411] revised this section to move the term “shall” in the first sentence, which made no substantive change. The 2010 amendment also revised the next to last sentence to delete “On petition” and replace it with “Upon application.” The 2010 amendment also added a new sentence at the end allowing the conservator or another interested person to make application for an informal proceeding regarding bond and also to allow the court on its own motion to pursue matters regarding the bond as set forth in this section. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in Section 62‑1‑201. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑409 was titled Protective arrangements and single transactions authorized, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑405.

CROSS REFERENCES

Bonds in judicial proceedings, generally, see Section 15‑1‑230.

Costs against certain fiduciaries, see Section 15‑37‑180.

Protective proceedings, minors, see Section 62‑5‑402.

Recovery of damages on breach of bond under South Carolina Rules of Civil Procedure, see SC R RCP Rule 65.

Security of general guardian of infant under South Carolina Rules of Civil Procedure, see SC R RCP Rule 17.

Terms and requirements of bonds, see Section 62‑5‑410.

Library References

Absentees 5.

Guardian and Ward 15.

Mental Health 166, 187.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Section 10.

C.J.S. Mental Health Section 141.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Compromise and Settlement Section 10, Minors’ Settlements‑ Appropriate Procedure for Approval.

S.C. Jur. Guardian and Conservator Section 23, Valuation.

NOTES OF DECISIONS

Under former Section 21‑19‑40 2

Under former provision as to borrowing by minors and incompetents pursuant to court authorization (Section 15‑71‑120) 1

1. Under former provision as to borrowing by minors and incompetents pursuant to court authorization (Section 15‑71‑120)

This article was held not to be unconstitutional as a taking of private property due to the failure to require a posting of bond by guardian where loan was for agricultural, horticultural, or truck production. Lynch v. Stanton (S.C. 1933) 168 S.C. 249, 167 S.E. 392.

2. Under former Section 21‑19‑40

It was never the intention of the law that a judge of probate could accept directly from the guardian a mortgage of real estate in lieu of a proper bond. Gullick v. Slaten (S.C. 1933) 169 S.C. 244, 168 S.E. 697.

This section [Code 1962 Section 31‑4] refers to guardians of estates and not of persons. Ex parte Davidge (S.C. 1905) 72 S.C. 16, 51 S.E. 269.

Relieved sureties remain liable for all property then in hands of the guardian. Hall v. Hall (S.C. 1895) 45 S.C. 166, 22 S.E. 818.

Liability is not limited to property owned by ward when the trust is assumed, but to all property subsequently accruing. Gray v. Brown (S.C. 1845) 1 Rich. 351.

**SECTION 62‑5‑410.** Terms and requirements of bonds.

Section effective January 1, 2019. See, also, Section 62‑5‑412 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 35, eff June 7, 2010. Formerly Code 1976 Section 62‑5‑412, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Section 62‑5‑412 amplifies 62‑5‑411.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑412] revised subsection (a)(3) to delete “On” at the beginning and replace it with “After service of a summons and” to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding regarding bond matters as set forth in this section. 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 2010 amendment also revised subsection (a)(3) to add “or upon the court’s own motion” so the court could pursue such a proceeding by way of motion. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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

Editor’s Note

Prior Laws: Former Section 62‑5‑410 was titled Who may be appointed conservator; priorities, and had the following history: 1986 Act No. 539, Section 1; 1995 Act No. 15, Section 4. See now, Code 1976 Section 62‑5‑408.

CROSS REFERENCES

Costs against certain fiduciaries, see Section 15‑37‑180.

Library References

Absentees 5.

Guardian and Ward 15.

Mental Health 166, 187.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Section 10.

C.J.S. Mental Health Section 141.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 24, Terms and Liabilities of Sureties.

NOTES OF DECISIONS

Under former Section 21‑19‑170 1

1. Under former Section 21‑19‑170

There can be no action at law on bond until decree. Anderson v Maddox, 14 SCL 237 (1825). Harrington v Cole, 14 SCL 509 (1826). Wallace v James, 15 SCL 121 (1827). Somerall v Gibbes, 15 SCL 547 (1828). Pratt v McJunkin, 38 SCL 5 (1850).

Sureties may reduce the amount of the decree by proper proof thereof. Pratt v. McJunkin (S.C. 1850) 4 Rich. 5.

As defense, errors in such decree against the principal cannot be proved unless set out in plea of surety. Davant v. Webb (S.C. 1846) 2 Rich. 379. Principal And Surety 157

**SECTION 62‑5‑411.** Acceptance of appointment; consent to jurisdiction.

Section effective January 1, 2019. See, also, Section 62‑5‑413 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑413, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑413] specifies the jurisdiction of the court over a conservator who accepts appointment and provides for notice to him.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑411 was titled Bond, and had the following history: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 7; 2010 Act No. 244, Section 34, eff June 7, 2010. See now, Code 1976 Section 62‑5‑409.

CROSS REFERENCES

Service of process on nonresident individual fiduciaries, see Section 15‑9‑450.

Library References

Absentees 5.

Guardian and Ward 8, 129.

Mental Health 108, 498.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 8, 13 to 16, 263.

C.J.S. Mental Health Sections 117, 275 to 278.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 19, Notice.

S.C. Jur. Guardian and Conservator Section 21, Priorities in Appointment.

**SECTION 62‑5‑412.** Compensation and expenses.

Section effective January 1, 2019. See, also, Section 62‑5‑414 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑414, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Section 62‑5‑414 entitles those who have served the estate to reasonable compensation.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑412 was titled Terms and requirements of bonds, and had the following history: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 35, eff June 7, 2010. See now, Code 1976 Section 62‑5‑410.

Library References

Absentees 5.

Guardian and Ward 149.

Mental Health 180.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 218 to 221.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 11, Compensation.

NOTES OF DECISIONS

In general [under former Section 62‑5‑414] 1

Under former Sections 21‑19‑180 and 21‑19‑190 2

1. In general [under former Section 62‑5‑414]

Daughter who petitioned unsuccessfully to be appointed mother’s guardian and conservator was not entitled to attorney fees under statute providing “reasonable compensation” to any lawyers “appointed” in protective proceeding, where daughter’s lawyer was not appointed to represent mother in the proceeding. Dowaliby v. Chambless (S.C.App. 2001) 344 S.C. 558, 544 S.E.2d 646. Mental Health 159

2. Under former Sections 21‑19‑180 and 21‑19‑190

As to commissions to one person holding two distinct offices of trust, see Ex parte Commissioner in Equity for Lancaster District (S.C. 1850).

Commissions were not allowed before this section [Code 1962 Section 31‑18]. Floyd v. Priester (S.C. 1856).

**SECTION 62‑5‑413.** Informal request for relief.

Section effective January 1, 2019.

 (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.

HISTORY: 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑413 was titled Acceptance of appointment; consent to jurisdiction, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑411.

**SECTION 62‑5‑414.** General duty of conservator; financial plan.

Section effective January 1, 2019. See, also, Sections 62‑5‑408 and 62‑5‑417 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2000 Act No. 398 Section 10; 2005 Act No. 66, Section 7. Formerly Code 1976 Sections 62‑5‑408 and 62‑5‑417, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑408] gives specific powers to the court to take action with respect to the estate and affairs of a person if necessary even if that person has not yet been judged incompetent.

This section [62‑5‑417] imposes the standard of care applicable to trustees, the “prudent man dealing with the property of another” rule.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑414 was titled Compensation and expenses, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Sections 62‑5‑105 and 62‑5‑412.

CROSS REFERENCES

Acceptance and disbursement of deposits of minors, see Section 34‑11‑20.

Adoption, see Section 63‑9‑10.

Jurisdiction of family court in domestic matters, see Section 63‑3‑530.

Proceedings for judicial admission of mentally ill person to a hospital, see Section 44‑17‑510 et seq.

Library References

Absentees 5.

Guardian and Ward 28.

Mental Health 179.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 70 to 76, 100.

C.J.S. Mental Health Sections 158 to 159.

C.J.S. Right to Die Sections 5, 8.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 28, Powers and Duties in General.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.4, Capacity of a Minor to Make a Donative Transfer.

Restatement (2d) of Property, Don. Trans. Section 34.5, Donor Mentally Incompetent.

**SECTION 62‑5‑415.** Inventory and records.

Section effective January 1, 2019. See, also, Section 62‑5‑418 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑418, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Section 62‑5‑418 requires the conservator to file a verifiable inventory of the protected estate within thirty days after his appointment.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑415 was titled Death, resignation, or removal of conservator, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑428.

Library References

Absentees 5.

Guardian and Ward 32.

Mental Health 219.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Section 79.

C.J.S. Mental Health Section 179.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 29, Inventory and Records.

**SECTION 62‑5‑416.** Reporting requirements.

Section effective January 1, 2019. See, also, Section 62‑5‑419 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 37, eff June 7, 2010. Formerly Code 1976 Section 62‑5‑419, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑419] requires every conservator to account to the court annually and at the time of his resignation or removal. It also establishes protection for those dealing with the conservator.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑419] revised this section by changing “must” to “shall” in the first sentence, deleting “Subject to appeal within the same time permitted” and replacing it with “Upon the filing and service of summons and petition for approval of accounting,” as well as certain grammatical changes thereafter to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for court approval of an intermediate and final account. 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. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑416 was titled Requests for orders subsequent to appointment; service of petition and summons; denial of application, and had the following history: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 36, eff June 7, 2010. See now, Code 1976 Section 62‑5‑428.

CROSS REFERENCES

Computation of time for publication of notices, see Section 15‑29‑10.

Distributive duties and powers of conservator, see Section 62‑5‑423.

Library References

Absentees 5.

Guardian and Ward 137 to 165.

Mental Health 291 to 313.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 207 to 251, 280.

C.J.S. Mental Health Sections 183 to 202.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 30, Accounts.

Attorney General’s Opinions

Procedure for determining if assets held by guardian are being, or have been wasted or misappropriated, is inventory and annual return as required by Sections 21‑19‑130 and 21‑19‑140. Action at law is legal procedure for recovering assets from guardian for breach of bond. Information discovered in accounting which probate court reasonably believes constitutes breach of trust, should be referred to Solicitor. 1984 Op. Atty Gen, No. 84‑100, p. 234.

NOTES OF DECISIONS

Under former Section 21‑19‑140 1

Under former Section 44‑23‑780 2

1. Under former Section 21‑19‑140

Where guardian did not render to the probate judge the annual accounts required of her by this section [Code 1962 Section 31‑13] a forfeiture of commissions resulted and neither guardian nor surety could claim them. Gullick v. Slaten (S.C. 1933) 169 S.C. 244, 168 S.E. 697. Guardian And Ward 151

2. Under former Section 44‑23‑780

Ostensible purpose of Section 44‑23‑780 is to protect incompetent from self‑serving committee. South Carolina Dept. of Mental Health v. Hanna (S.C. 1978) 270 S.C. 210, 241 S.E.2d 563.

Valid lien on patient’s property is sufficient to vest Department of Mental Health with capacity to sue for removal of committee who failed to make accounting required by Section 44‑23‑780. South Carolina Dept. of Mental Health v. Hanna (S.C. 1978) 270 S.C. 210, 241 S.E.2d 563.

Where committee failed to make accounting as required by Section 44‑23‑780, Department of Mental Health’s capacity to sue attached at time of violations and was not extinguished simply because committee was able to procure patient’s discharge from State facilities. South Carolina Dept. of Mental Health v. Hanna (S.C. 1978) 270 S.C. 210, 241 S.E.2d 563.

**SECTION 62‑5‑417.** Conservators; title by appointment.

Section effective January 1, 2019. See, also, Section 62‑5‑420 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1; 1993 Act No. 164, Part II, Section 74B. Formerly Code 1976 Section 62‑5‑420, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This 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 62‑5‑419. As a trustee, a conservator holds title to the property of the protected person. 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.

Unlike a situation involving appointment of a guardian, the appointment of a conservator has no bearing on the capacity of the disabled person to contract or engage in other transactions.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑417 was titled General duty of conservator, and had the following history: 1986 Act No. 539, Section 1; 2005 Act No. 66, Section 7. See now, Code 1976 Section 62‑5‑414.

Library References

Absentees 5.

Guardian and Ward 34.

Mental Health 220.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Section 78.

C.J.S. Mental Health Section 167.

RESEARCH REFERENCES

ALR Library

32 ALR 5th 673 , Power of Incompetent Spouse’s Guardian or Representative to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or to Make Compromise or Settlement in Such Suit.

Encyclopedias

S.C. Jur. Divorce Section 74, Action for Divorce on Behalf of Incompetent Person.

S.C. Jur. Guardian and Conservator Section 28, Powers and Duties in General.

NOTES OF DECISIONS

In general [under former Section 62‑5‑420] 1

1. In general [under former Section 62‑5‑420]

A son could not bring a divorce action on behalf of his father as his attorney‑in‑fact where he had subsequently been appointed conservator and guardian of his father’s estate, thus terminating his appointment as attorney‑in‑fact; in the absence of proof that the power of attorney was made durable despite the appointment of a conservator, the court would assume that no special provision was made. Murray by Murray v. Murray (S.C. 1993) 310 S.C. 336, 426 S.E.2d 781, 32 A.L.R.5th 883.

**SECTION 62‑5‑418.** Fiduciary letters of conservatorship.

Section effective January 1, 2019. See, also, Section 62‑5‑421 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑421, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Since the legal title to the real property is transferred to the conservator, in order to prevent fraudulent conveyances and to inhibit erroneous conveyances letters of conservatorship should be recorded.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑418 was titled Inventory and records, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑415.

Library References

Absentees 5.

Guardian and Ward 16.

Mental Health 160.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Section 11.

C.J.S. Mental Health Sections 142, 145.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 31, Letters.

Attorney General’s Opinions

The fee set forth in Section 8‑21‑310(9) should be charged for the filing of letters of conservatorship under Section 62‑5‑421. 1987 Op. Atty Gen, No. 87‑91, p 245.

**SECTION 62‑5‑419.** Sale or encumbrance involving conflict of interest.

Section effective January 1, 2019. See, also, Section 62‑5‑422 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑422, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑422] allows court authorized sales and purchases of protected property.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑419 was titled Accounts, and had the following history: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 37, eff June 7, 2010. See now, Code 1976 Section 62‑5‑416.

CROSS REFERENCES

Actions for requests subsequent to appointment, procedures, see Section 62‑5‑428.

Library References

Absentees 5.

Guardian and Ward 40, 62, 99, 100.

Mental Health 237, 268.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 92 to 94, 128 to 132, 161, 165.

C.J.S. Mental Health Section 179.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 32, Void Sales.

**SECTION 62‑5‑420.** Persons dealing with conservators; protection.

Section effective January 1, 2019. See, also, Section 62‑5‑423 effective until January 1, 2019.

 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 62‑5‑404 or Section 62‑5‑428 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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑423, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Section 62‑5‑423 carries Section 62‑5‑422 one step further by affording protection to bona fide purchasers for value of protected property.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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

Code Commissioner’s Note

At the direction of the Code Commissioner, “Section 62‑5‑404 or Section 62‑5‑428” was substituted for “Section 62‑5‑424” to correct a scrivener’s error.

Editor’s Note

Prior Laws: Former Section 62‑5‑420 was titled Conservators; title by appointment, and had the following history: 1986 Act No. 539, Section 1; 1993 Act No. 164, Part II, Section 74B. See now, Code 1976 Section 62‑5‑417.

CROSS REFERENCES

Acceptance and disbursement of deposits of minors, see Section 34‑11‑20.

Library References

Absentees 5.

Guardian and Ward 36 to 74.

Mental Health 216 to 275.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 57, 73 to 78, 82 to 85, 87 to 135, 278 to 279.

C.J.S. Mental Health Sections 167 to 182.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 33, Persons Dealing With Conservators Protected.

**SECTION 62‑5‑421.** Interest of protected person not transferable or assignable.

Section effective January 1, 2019.

 (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.

HISTORY: 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑421 was titled Recording of conservator’s letters, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑418.

**SECTION 62‑5‑422.** Powers of conservator in administration.

Section effective January 1, 2019. See, also, Sections 62‑5‑408 and 62‑5‑424 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 8; 1997 Act No. 152, Section 24; 2000 Act No. 398, Section 10. Formerly Code 1976 Sections 62‑5‑408 and 62‑5‑424, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑408] gives specific powers to the court to take action with respect to the estate and affairs of a person if necessary even if that person has not yet been judged incompetent.

Section 62‑5‑424 sets out the powers of a conservator in administration. Subsection (a) provides that a conservator has all powers conferred in this section and also any additional powers granted by law to trustees in South Carolina. In subsection (b) a conservator is expressly granted power to invest and reinvest funds of the estate “as would a trustee,” without court authorization or confirmation. Subsection (c) contains a list of eighteen specifically itemized powers which a conservator has and may exercise without court authorization or confirmation, where “acting reasonably in efforts to accomplish the purpose for which he was appointed.” Subsection (d) contains a list of nine specifically itemized powers which a conservator may exercise with court approval.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑422 was titled Sale, encumbrance, or transaction involving conflict of interest; voidable; exceptions., and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑419.

CROSS REFERENCES

Acceptance and disbursement of deposits of minors, see Section 34‑11‑20.

Actions for requests subsequent to appointment, procedures, see Section 62‑5‑428.

Adoption, see Section 63‑9‑10.

Application of this section to the procedures for settlement of claims in favor of or against minors or incapacitated persons, see Section 62‑5‑433.

Appointment of guardian ad litem under South Carolina Rules of Civil Procedure, see SCRCP Rule 17.

Jurisdiction in matters pertaining to minors and persons mentally incompetent, see SC Const, Art V, Section 12.

Jurisdiction of family court in domestic matters, see Section 63‑3‑530.

Limitations on powers of conservator otherwise conferred by this section, see Sections 62‑5‑404, 62‑5‑428.

Order of appointment, rights and powers of protected person, see Section 62‑5‑407.

Powers of conservator in administration, see Section 62‑5‑422.

Preservation of estate plan, see Section 62‑5‑425.

Proceedings for judicial admission of mentally ill person to a hospital, see Section 44‑17‑510 et seq.

Rights and powers of ward and guardian, see Section 62‑5‑304A.

Library References

Absentees 5.

Guardian and Ward 28 to 115.

Mental Health 179, 216 to 275.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 51 to 206, 278 to 279.

C.J.S. Mental Health Sections 158 to 159, 167 to 182.

C.J.S. Right to Die Sections 5, 8.

RESEARCH REFERENCES

ALR Library

32 ALR 5th 673 , Power of Incompetent Spouse’s Guardian or Representative to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or to Make Compromise or Settlement in Such Suit.

Encyclopedias

S.C. Jur. Compromise and Settlement Section 10, Minors’ Settlements‑ Appropriate Procedure for Approval.

S.C. Jur. Divorce Section 74, Action for Divorce on Behalf of Incompetent Person.

S.C. Jur. Guardian and Conservator Section 28, Powers and Duties in General.

S.C. Jur. Guardian and Conservator Section 34, Administrative Powers and Duties.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.4, Capacity of a Minor to Make a Donative Transfer.

Restatement (2d) of Property, Don. Trans. Section 34.5, Donor Mentally Incompetent.

Attorney General’s Opinions

A county court has concurrent jurisdiction with the circuit court to approve the settlement of claims in favor of or against any minor or incompetent under the provisions of this section [Code 1962 Section 10‑2553]. 1967‑68 Op. Atty Gen, No 2481, p 149.

NOTES OF DECISIONS

In general 1

1. In general

A son could not bring a divorce action on behalf of his father as his conservator since no statutory authority allows a conservator to maintain an action with regard to personal matters. Murray by Murray v. Murray (S.C. 1993) 310 S.C. 336, 426 S.E.2d 781, 32 A.L.R.5th 883. Mental Health 476

**SECTION 62‑5‑423.** Distributive duties and powers of conservator.

Section effective January 1, 2019. See, also, Sections 62‑5‑408 and 62‑5‑625 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 83; 1997 Act No. 152, Section 25; 2000 Act No. 398, Section 10. Formerly Code 1976 Sections 62‑5‑408 and 62‑5‑425, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑408] gives specific powers to the court to take action with respect to the estate and affairs of a person if necessary even if that person has not yet been judged incompetent.

Section 62‑5‑425 sets out the distributive duties and powers of a conservator. Subsection (a) provides that a conservator may expend or distribute sums from the principal of the estate without court authorization or confirmation for the support, care, or benefit of the protected person and his dependents in accordance with principles stated in paragraphs (1) through (4). Subsection (b) simply directs distribution to a former minor when he attains majority, unless he has been adjudged disabled under Section 62‑5‑401(2). Subsection (c) directs a conservator for a disabled person to petition the court when the conservator is satisfied that disability has ceased, and upon determination that the disability has ceased, to make distribution to the formerly disabled person. Subsection (d) provides for distribution in case of the death of the protected person. Subsection (e) merely provides that previous service as a conservator for a protected person does not disqualify the previous conservator from serving as executor of the protected person.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑423 was titled Persons dealing with conservators; protection, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑420.

CROSS REFERENCES

Acceptance and disbursement of deposits of minors, see Section 34‑11‑20.

Adoption, see Section 63‑9‑10.

Jurisdiction of family court in domestic matters, see Section 63‑3‑530.

Proceedings for judicial admission of mentally ill person to a hospital, see Section 44‑17‑510 et seq.

Protection of persons dealing in good faith with conservator, in transactions other than those requiring a court order, see Section 62‑5‑420.

Library References

Absentees 5.

Guardian and Ward 13(7).

Mental Health 146, 231.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 33 to 35, 49, 103 to 109.

C.J.S. Mental Health Section 176.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Divorce Section 74, Action for Divorce on Behalf of Incompetent Person.

S.C. Jur. Guardian and Conservator Section 20, Powers of Court.

S.C. Jur. Guardian and Conservator Section 28, Powers and Duties in General.

S.C. Jur. Guardian and Conservator Section 35, Distributive Powers and Duties.

S.C. Jur. Guardian and Conservator Section 36, Death of the Protected Person.

S.C. Jur. Guardian and Conservator Section 45, Termination of Conservatorship.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.4, Capacity of a Minor to Make a Donative Transfer.

Restatement (2d) of Property, Don. Trans. Section 34.5, Donor Mentally Incompetent.

**SECTION 62‑5‑424.** Reserved.

Section effective January 1, 2019. See, also, Section 62‑5‑424 effective until January 1, 2019.

HISTORY: Former Section, titled Powers of conservator in administration, had the following history: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 8; 1997 Act No. 152, Section 24. Reserved by 2017 Act No. 87, Section 5.A, eff January 1, 2019. See now, Code 1976 Section 62‑5‑422.

**SECTION 62‑5‑425.** Preservation of estate plan.

Section effective January 1, 2019. See, also, Section 62‑5‑427 effective until January 1, 2019.

 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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑427, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑427] provides that the conservator and the court “should” take into account any known estate plan of the protected person, in making investments, in distribution of assets, and in exercising certain other powers.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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).

Editor’s Note

Prior Laws: Former Section 62‑5‑425 was titled Distributive duties and powers of conservator, and had the following history: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 83; 1997 Act No. 152, Section 25. See now, Code 1976 Section 62‑5‑423.

CROSS REFERENCES

Powers of conservator in administration, see Section 62‑5‑422.

Library References

Absentees 5.

Guardian and Ward 36, 53.

Mental Health 221, 224.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 73 to 75, 77 to 78, 115 to 122.

C.J.S. Mental Health Sections 168 to 171.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 28, Powers and Duties in General.

**SECTION 62‑5‑426.** Claims against protected person.

Section effective January 1, 2019. See, also, Sections 62‑5‑402 and 62‑5‑428 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 6; 1997 Act No. 152, Section 26; 2010 Act No. 244, Sections 31, 38, eff June 7, 2010. Formerly Code 1976 Sections 62‑5‑402 and 62‑5‑428, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑402] vests in the probate court, upon filing of the petition, exclusive jurisdiction over determination of the need for a conservator and the management of the protected person’s estate. Concurrent jurisdiction with the circuit court is given to determine the validity of claims.

Section 62‑5‑428 sets out the procedure for presentation and enforcement of claims against the estate of the protected person. Presentation of a claim in the prescribed manner tolls any statute of limitations relating to the claim until thirty days after its disallowance. In subsection (c) preference is given to “prior claims for the care, maintenance, and education of the protected person or his dependents and existing claims for expenses of administration”.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑402] revised the first sentence to delete “notice” and replace it with “the summons and petition,” add “summons and,” delete “is” and replace it with “are” to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for appointment of a conservator or other protective order. 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. (2011 Act No. 2, Section 2.)

The 2010 amendment [to 62‑5‑428] revised this section to renumber and also clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding seeking allowance of a claim before it is barred by the applicable statute of limitations. 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. (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑426 was titled Enlargement or limitation of powers of conservator, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Sections 62‑5‑404 and 62‑5‑428.

CROSS REFERENCES

Appointment of guardian ad litem under South Carolina Rules of Civil Procedure, see SC R RCP Rule 17.

Jurisdiction in matters pertaining to minors and persons mentally incompetent, see SC Const, Art 5, Section 12.

Procedures for settlement of claims in favor of or against minors and incapacitated persons, see Section 62‑5‑433.

Library References

Absentees 5.

Courts 472.4.

Guardian and Ward 67.

Mental Health 239.1 to 257.

Westlaw Topic Nos. 5, 106, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Courts Section 186.

C.J.S. Guardian and Ward Section 101.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 39, Claims Against the Estate.

Attorney General’s Opinions

A county court has concurrent jurisdiction with the circuit court to approve the settlement of claims in favor of or against any minor or incompetent under the provisions of this section [Code 1962 Section 10‑2553 and former Section 15‑71‑30]. 1967‑68 Op. Atty Gen, No 2481, p 149.

A probate court has no authority to appoint a guardian for the estate of a nonresident minor even though such minor may have property in this State. 1963‑64 Op. Atty Gen, No 1601, p 15.

There is no statutory authority for the appointment of guardians for minors who are not residents of this State, nor domiciled here and who have property interests here. 1963‑64 Op. Atty Gen, No 1601, p 15.

NOTES OF DECISIONS

In general [under former Section 62‑5‑402] 1

1. In general [under former Section 62‑5‑402]

Probate court that established conservatorship for minor beneficiary performed a judicial act in supervising the management of the conservatorship, and thus probate court was entitled to judicial immunity in beneficiary’s action alleging gross negligence or recklessness in the supervision of her conservatorship, though conservator had only informal interaction with the probate court; determination of whether conservatorship estate was effectively managed, expended, or distributed involved adjudication of whether the conservator was acting within confines of the law, which was precisely the type of judicial act to which immunity applied. Plyler v. Burns (S.C. 2007) 373 S.C. 637, 647 S.E.2d 188. Judges 36

**SECTION 62‑5‑427.** Individual liability of conservator.

Section effective January 1, 2019. See, also, Section 62‑5‑429 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑429, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Section 62‑5‑429 relieves a conservator of personal liability for contracts properly entered into in his fiduciary capacity unless he fails to reveal his representative capacity and identify the estate in the contract, and also relieves him from obligations arising from ownership or control of property and tort liability unless he is personally at fault. Claims may be asserted by proceeding against the conservator in his fiduciary capacity, whether or not he is individually liable. Questions of liability between the conservator and the estate may be determined in a proceeding for accounting or other appropriate proceeding.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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

Editor’s Note

Prior Laws: Former Section 62‑5‑427 was titled Preservation of estate plan, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑425.

Library References

Absentees 5.

Guardian and Ward 109, 119.

Mental Health 179.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 199, 256.

C.J.S. Mental Health Sections 158 to 159.

C.J.S. Right to Die Sections 5, 8.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 38, Personal Liability.

S.C. Jur. Guardian and Conservator Section 41, Claims Against a Conservator.

**SECTION 62‑5‑428.** Actions for requests subsequent to appointment; procedures.

Section effective January 1, 2019. See, also, Sections 62‑5‑106, 62‑5‑415, 62‑5‑416, 62‑5‑426, and 62‑5‑430 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2008 Act No. 303, Section 1, eff June 11, 2008; 2010 Act No. 244, Section 36, 39, eff June 7, 2010. Formerly Code 1976 Sections 62‑5‑106, 62‑5‑415, 62‑5‑416, 62‑5‑426, and 62‑5‑430, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This [62‑5‑416] permits any interested person to petition the court for subsequent orders including instructions.

Section 62‑5‑426 permits the court to limit the powers of a conservator which he otherwise would have pursuant to Sections 62‑5‑424 and 62‑5‑425 and also to relieve him of any limitation at any time.

Section 62‑5‑430 provides that the conservatorship may be terminated upon determination, after notice and hearing, that the minority or disability of the protected person has ceased.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment [to 62‑5‑416] revised subsection (a) to delete “Any” and replace it with “Upon filing a petition and summons with the appointing court” and also delete “file a petition in the appointment court” in order to clarify that a summons and petition are required to commence a formal proceeding, including formal proceeding by an interested person for certain requests subsequent to appointment as set forth in this section. 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 2010 amendment also revised subsection (b) by deleting “A conservator may petition” and replacing it with “Upon application to,” deleting “for” and adding “a conservator may request,” and adding a new sentence at the end of subsection (b). The latter amendment was intended to allow the conservator to request instructions concerning his fiduciary responsibility by making application and clarifies the effect of a denial by the court. The 2010 amendment also revised subsection (c) to provide for notice and hearing as the court may direct. (2011 Act No. 2, Section 2.)

The 2010 amendment [to 62‑5‑430] essentially rewrote this section to divide it into two subsections. Subsection (A) clarifies that a summons and petition are required to commence a formal proceeding, including a formal proceeding to terminate the conservatorship when the disability of the protected person has ceased and procedure for same. 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. Subsection (B) allows the protected person, his personal representative, or the conservator to terminate the conservatorship by way of an application, instead of a petition, when the protected person has attained his majority or if the protected person is deceased. Unlike a petition, an application does not require a summons and petition. See Section 62‑1‑201(1). (2011 Act No. 2, Section 2.)

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑428 was titled Claims against protected person; enforcement, and had the following history: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 26; 2010 Act No. 244, Section 38, eff June 7, 2010. See now, Code 1976 Section 62‑5‑426.

CROSS REFERENCES

Order of appointment, rights and powers of protected person, see Section 62‑5‑407.

Powers of conservator in administration, see Section 62‑5‑422.

Protective proceedings, limited conservatorship, see Section 62‑5‑404.

Requirement that guardianship proceedings be held in court of county wherein guardian was appointed, see Section 14‑23‑340.

Library References

Absentees 5.

Guardian and Ward 15, 18, 20 to 28, 138.

Mental Health 167 to 177, 179, 215, 293.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 8 to 10, 23, 36 to 42, 44 to 48, 50, 70 to 76, 100, 209.

C.J.S. Mental Health Sections 146 to 148, 158 to 159, 160 to 164, 193.

C.J.S. Right to Die Sections 5, 8.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 28, Powers and Duties in General.

S.C. Jur. Guardian and Conservator Section 37, Court Limitation of Powers.

S.C. Jur. Guardian and Conservator Section 45, Termination of Conservatorship.

S.C. Jur. Guardian and Conservator Section 46, Removal of Conservator.

**SECTION 62‑5‑429.** Payment of debt and delivery of property to foreign conservator without local proceedings.

Section effective January 1, 2019. See, also, Section 62‑5‑431 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑431, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

Section 62‑5‑431 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.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑429 was titled Individual liability of conservator, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑427.

Library References

Absentees 5.

Guardian and Ward 168.

Mental Health 196.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 272, 274.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 8, Foreign Conservator.

**SECTION 62‑5‑430.** Foreign conservator; proof of authority; bond; powers.

Section effective January 1, 2019. See, also, Section 62‑5‑432 effective until January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1. Formerly Code 1976 Section 62‑5‑432, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [62‑5‑432] provides that a foreign conservator may file authenticated 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.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑430 was titled Proceeding to terminate conservatorship; application; notice, and had the following history: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 39, eff June 7, 2010 See now, Code 1976 Section 62‑5‑428.

Library References

Absentees 5.

Guardian and Ward 166.

Mental Health 195.

Westlaw Topic Nos. 5, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Guardian and Ward Sections 271 to 273.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 8, Foreign Conservator.

Attorney General’s Opinions

Probate judges may recognize foreign guardianships and authorize disbursement of funds belonging to minors to such foreign guardians. 1963‑64 Op. Atty Gen, No 1601, p 15.

Recognition rests in discretion of judge. Recognition to foreign guardianship proceedings, while commonly given as a matter of course, rests in the sound discretion of the probate judge in this State before whom foreign guardianship proceedings are presented. 1963‑64 Op. Atty Gen, No 1601, p 15.

**SECTION 62‑5‑431.** Payment of benefits from U.S. Department of Veterans Affairs to a minor or an incapacitated person; definitions.

Section effective January 1, 2019. See, also, Section 62‑5‑436 effective until January 1, 2019.

 (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.

HISTORY: 2016 Act No. 278 (S.777), Section 1, eff June 9, 2016. Formerly Code 1976 Section 62‑5‑436, renumbered and amended by 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

REPORTER’S COMMENTS

This section [former 62‑5‑436] 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 person 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.

SOUTH CAROLINA REPORTER’S COMMENTS (2017 REVISION)

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑431 was titled Payment of debt and delivery of property to foreign conservator without local proceedings, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑429.

CROSS REFERENCES

Appointment of counsel and guardian ad litem, see Section 62‑5‑402, 62‑5‑403B, 62‑5‑403C, 62‑5‑403D.

Procedure concerning hearing and order on original petition, see Section 62‑5‑407.

**SECTION 62‑5‑432.** Special needs trust.

Section effective January 1, 2019.

 (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.

HISTORY: 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

Editor’s Note

Prior Laws: Former Section 62‑5‑432 was titled Foreign conservator; proof of authority; bond; powers, and had the following history: 1986 Act No. 539, Section 1. See now, Code 1976 Section 62‑5‑430.

**SECTION 62‑5‑433.** Definitions; procedures for settlement of claims in favor of or against minors or incapacitated persons.

Section effective January 1, 2019. See, also, Section 62‑5‑433 effective until January 1, 2019.

 (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.

HISTORY: 1988 Act No. 659, Section 9; 1990 Act No. 521, Sections 84‑86; 2000 Act No. 398, Section 1; 2017 Act No. 87 (S.415), Section 5.A, eff January 1, 2019.

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.

CROSS REFERENCES

Application of this section to an exception to the probate court’s concurrent jurisdiction to determine the validity of claims for or against the person or estate of protected persons, see Section 62‑5‑426.

Claims against protected person, see Section 62‑5‑426.

Jurisdiction of the circuit court, see Section 15‑72‑10.

Powers of conservator in administration, see Section 62‑5‑422.

Procedures for enforcing a claim against a protected person, see Section 62‑5‑426.

Library References

Absentees 5.

Corporations 640.

Guardian and Ward 67, 116 to 136.

Mental Health 239.1 to 257.

Westlaw Topic Nos. 5, 101, 196, 257A.

C.J.S. Absentees Sections 7 to 14.

C.J.S. Corporations Sections 893, 900.

C.J.S. Guardian and Ward Sections 101, 252 to 270.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Children and Families Section 90, General Considerations.

S.C. Jur. Compromise and Settlement Section 10, Minors’ Settlements‑ Appropriate Procedure for Approval.

S.C. Jur. Compromise and Settlement Section 11, Minors’ Settlements‑The Law Today‑ 1988 and 1990 Amendments to South Carolina Probate Code (SCPC).

S.C. Jur. Guardian and Conservator Section 9, Jurisdiction of Court.

S.C. Jur. Guardian and Conservator Section 40, Procedure for Settlement of Claims.

Forms

South Carolina Litigation Forms and Analysis Section 33:27 , Verified Consent Petition for Settlement Approval.

South Carolina Litigation Forms and Analysis Section 33:29 , Order Approving Settlement.

**SECTION 62‑5‑434.** Omitted.

Section effective January 1, 2019. See, also, Section 62‑5‑434 effective until January 1, 2019.

HISTORY: Former Section, titled Settlement of claims involving minors completed between July 1, 1987, and September 24, 1987, presumed valid, had the following history: 1988 Act No. 659, Section 21. Omitted by 2017 Act No. 87, Section 5.A, eff January 1, 2019.

**SECTION 62‑5‑435.** Omitted.

Section effective January 1, 2019. See, also, Section 62‑5‑435 effective until January 1, 2019.

HISTORY: Former Section, titled Liability for approving or completing settlement, had the following history: 1988 Act No. 659, Section 21(A) (last sentence). Omitted by 2017 Act No. 87, Section 5.A, eff January 1, 2019.

**SECTION 62‑5‑436.** Omitted.

Section effective January 1, 2019. See, also, Section 62‑5‑436 effective until January 1, 2019.

HISTORY: Former Section, titled Payment of benefits from U.S. Department of Veterans Affairs to a minor or an incapacitated person; definitions, had the following history: 2016 Act No. 278 (S.777), Section 1, eff June 9, 2016. Omitted by 2017 Act No. 87, Section 5.A, eff January 1, 2019. See now, Code 1976 Section 62‑5‑431.

Part 5

Health Care Powers of Attorney

**SECTION 62‑5‑500.** Short title.

 This part may be cited as the “South Carolina Statutory Health Care Power of Attorney Act”.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

Editor’s Note:

“The South Carolina Uniform Power of Attorney Act (‘SCUPOAA’), which is based on the Uniform Power of Attorney Act (‘UPOAA’), replaces former South Carolina Probate Code Section 62‑5‑501 and becomes Article 8 of the South Carolina Probate Code, so its section numbers will be consistent with the UPOAA’s numbering. The SCUPOAA also incorporates the provisions of former South Carolina Probate Code Sections 62‑5‑502 and 62‑5‑503.

The provisions of South Carolina’s Health Care Power of Attorney statute, formerly found at Section 62‑5‑504, are now renumbered as Sections 62‑5‑501 through 62‑5‑518, without changing the substance of former Section 62‑5‑504.

The Uniform Veterans Guardianship Act (‘UVGA’) no longer exists as a uniform law. The corresponding sections of the South Carolina version of the UVGA are repealed, although pertinent provisions are retained by folding them into existing sections of the South Carolina Probate Code (62‑1‑201, 62‑5‑404, and 62‑5‑407) and by adding one section (62‑5‑436).

Consequently, Title 62, Article 5, Part 5 now covers only health care powers of attorney and Title 62, Article 8 now covers powers of attorney (other than health care powers) that were formerly found in Title 62, Article 5, Part 5.”

**SECTION 62‑5‑501.** Definitions.

 As used in this part:

 (1) “Agent” or “health care agent” means an individual designated in a health care power of attorney to make health care decisions on behalf of a principal.

 (2) “Declaration of a desire for a natural death” or “declaration” means a document executed in accordance with the South Carolina Death with Dignity Act or a similar document executed in accordance with the law of another state.

 (3) “Health care” means a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and placement in or removal from a facility that provides these forms of care.

 (4) “Health care power of attorney” means a durable power of attorney executed in accordance with this part.

 (5) “Health care provider” means a person, health care facility, organization, or corporation licensed, certified, or otherwise authorized or permitted by the laws of this State to administer health care.

 (6) “Life‑sustaining procedure” means a medical procedure or intervention that serves only to prolong the dying process. Life‑sustaining procedures do not include the administration of medication or other treatment for comfort care or alleviation of pain. The principal shall indicate in the health care power of attorney whether the provision of nutrition and hydration through medically or surgically implanted tubes is desired.

 (7) “Permanent unconsciousness” means a medical diagnosis, consistent with accepted standards of medical practice, that a person is in a persistent vegetative state or some other irreversible condition in which the person has no neocortical functioning, but only involuntary vegetative or primitive reflex functions controlled by the brain stem.

 (8) “Nursing care provider” means a nursing care facility or an employee of the facility.

 (9) “Principal” means an individual who executes a health care power of attorney. A principal must be eighteen years of age or older and of sound mind.

 (10) “Separated” means that the principal and his or her spouse are separated pursuant to one of the following:

 (a) entry of a pendente lite order in a divorce or separate maintenance action;

 (b) formal signing of a written property or marital settlement agreement;

 (c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

Editor’s Note

Prior Laws: Former Section 62‑5‑501 was titled When power of attorney not affected by disability, and had the following history: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 5; 1990 Act No. 521, Section 104; 1992 Act No. 256, Section 1; 1992 Act No. 306, Sections 5, 6; 1997 Act No. 152, Section 27; 2002 Act No. 362, Section 9; 2010 Act No. 244, Section 40, eff June 7, 2010. See now, 1976 Code Section 62‑8‑101 et seq.

RESEARCH REFERENCES

Encyclopedias

40 Am. Jur. Proof of Facts 3d 287, Proof of Basis for Refusal or Discontinuance of Life‑Sustaining Treatment on Behalf of Incapacitated Person.

102 Am. Jur. Proof of Facts 3d 95, Advance Directives for Medical and Psychiatric Care.

63 Am. Jur. Trials 1, Decisionmaking at the End of Life.

S.C. Jur. Agency Section 22, Statutory Termination.

S.C. Jur. Agency Section 26, Construction of Powers of Attorney.

S.C. Jur. Death and Right to Die Section 14, Nature of a Health Care Power of Attorney.

S.C. Jur. Divorce Section 74, Action for Divorce on Behalf of Incompetent Person.

S.C. Jur. Guardian and Conservator Section 14, Notice.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 15, Agency and Custodianship.

41 Causes of Action 2d 1, Cause of Action for Enforcement of Arbitration Clause in Long‑Term Care Agreement.

Restatement (2d) of Property, Don. Trans. Section 34.5, Donor Mentally Incompetent.

**SECTION 62‑5‑502.** Health care power of attorney is a durable power of attorney; applicability of part.

 (a) A health care power of attorney is a durable power of attorney. Statutory provisions that refer to a durable power of attorney or judicial interpretations of the law relating to durable powers of attorney apply to a health care power of attorney to the extent that they are not inconsistent with this part.

 (b) This section does not affect the right of a person to execute a durable power of attorney relating to health care pursuant to other provisions of law but which does not conform to the requirements of this section. If a durable power of attorney for health care executed under this part or under the laws of another state does not conform to the requirements of this section, the provisions of this section do not apply to it. However, a court is not precluded from determining that the law applicable to nonconforming durable powers of attorney for health care is the same as the law set forth in this section for health care powers of attorney.

 (c) To the extent not inconsistent with this part, the provisions of the Adult Health Care Consent Act apply to the making of decisions by a health care agent and the implementation of those decisions by health care providers.

 (d) In determining the effectiveness of a health care power of attorney, mental incompetence is to be determined according to the standards and procedures for inability to consent pursuant to Section 44‑66‑20(8), except that certification of mental incompetence by the agent may be substituted for certification by a second physician. If the certifying physician states that the principal’s mental incompetence precludes the principal from making all health care decisions or all decisions concerning certain categories of health care, and that the principal’s mental incompetence is permanent or of extended duration, no further certification is necessary in regard to the stated categories of health care decisions during the stated duration of mental incompetence unless the agent or the attending physician believes the principal may have regained capacity.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

Editor’s Note

Prior Laws: Former Section 62‑5‑502 was titled Other powers of attorney not revoked until notice of death or disability, and had the following history: 1986 Act No. 539, Section 1. See now, 1976 Code Section 62‑8‑101 et seq.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 15, Agency and Custodianship.

Restatement (3d) of Agency Section 3.07, Death, Cessation of Existence, and Suspension of Powers.

Restatement (3d) of Agency Section 3.08, Loss of Capacity.

Restatement (3d) of Agency Section 3.07 TD 2, Death, Cessation of Existence, and Suspension of Powers.

Restatement (3d) of Agency Section 3.08 TD 2, Loss of Capacity.

**SECTION 62‑5‑503.** Requirements for health care power of attorney.

 (a) A health care power of attorney must:

 (1) be substantially in the form set forth in Section 62‑5‑504;

 (2) be dated and signed by the principal or in the principal’s name by another person in the principal’s presence and by his direction;

 (3) be signed by at least two persons, each of whom witnessed either the signing of the health care power of attorney or the principal’s acknowledgment of his signature on the health care power of attorney. Each witness must state in a declaration as set forth in Section 62‑5‑504 that, at the time of the execution of the health care power of attorney, to the extent the witness has knowledge, the witness is not related to the principal by blood, marriage, or adoption, either as a spouse, lineal ancestor, descendant of the parents of the principal, or spouse of any of them; not directly financially responsible for the principal’s medical care; not entitled to a portion of the principal’s estate upon his decease under a will of the principal then existing or as an heir by intestate succession; not a beneficiary of a life insurance policy of the principal; and not appointed as health care agent or successor health care agent in the health care power of attorney; and that no more than one witness is an employee of a health care facility in which the principal is a patient, no witness is the attending physician or an employee of the attending physician, or no witness has a claim against the principal’s estate upon his decease;

 (4) state the name and address of the agent. A health care agent must be an individual who is eighteen years of age or older and of sound mind. A health care agent may not be a health care provider, or an employee of a provider, with whom the principal has a provider‑patient relationship at the time the health care power of attorney is executed, or an employee of a nursing care facility in which the principal resides, or a spouse of the health care provider or employee, unless the health care provider, employee, or spouse is a relative of the principal.

 (b) The validity of a health care power of attorney is not affected by the principal’s failure to initial any of the choices provided in Section 4, 6, or 7 of the Health Care Power of Attorney form or to name successor agents. If the principal fails to indicate either of the statements in Section 7 concerning provision of artificial nutrition and hydration, the agent does not have authority to direct that nutrition and hydration necessary for comfort care or alleviation of pain be withheld or withdrawn.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

Editor’s Note

Prior Laws: Former Section 62‑5‑503 was titled Jurisdiction, and had the following history: 1990 Act No. 521, Section 87. See now, 1976 Code Section 62‑8‑101 et seq.

CROSS REFERENCES

Document or writing deemed to comply with requirements of this part, see Section 62‑5‑517.

**SECTION 62‑5‑504.** Form of health care power of attorney.

 A health care power of attorney executed on or after January 1, 2007, must be substantially in the following form:

INFORMATION ABOUT THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

 1. THIS DOCUMENT GIVES THE PERSON YOU NAME AS YOUR AGENT THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOU CANNOT MAKE THE DECISION FOR YOURSELF. THIS POWER INCLUDES THE POWER TO MAKE DECISIONS ABOUT LIFE‑SUSTAINING TREATMENT. UNLESS YOU STATE OTHERWISE, YOUR AGENT WILL HAVE THE SAME AUTHORITY TO MAKE DECISIONS ABOUT YOUR HEALTH CARE AS YOU WOULD HAVE.

 2. THIS POWER IS SUBJECT TO ANY LIMITATIONS OR STATEMENTS OF YOUR DESIRES THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TREATMENT YOU DO NOT DESIRE OR TREATMENT YOU WANT TO BE SURE YOU RECEIVE. YOUR AGENT WILL BE OBLIGATED TO FOLLOW YOUR INSTRUCTIONS WHEN MAKING DECISIONS ON YOUR BEHALF. YOU MAY ATTACH ADDITIONAL PAGES IF YOU NEED MORE SPACE TO COMPLETE THE STATEMENT.

 3. AFTER YOU HAVE SIGNED THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE HEALTH CARE DECISIONS FOR YOURSELF IF YOU ARE MENTALLY COMPETENT TO DO SO. AFTER YOU HAVE SIGNED THIS DOCUMENT, NO TREATMENT MAY BE GIVEN TO YOU OR STOPPED OVER YOUR OBJECTION IF YOU ARE MENTALLY COMPETENT TO MAKE THAT DECISION.

 4. YOU HAVE THE RIGHT TO REVOKE THIS DOCUMENT, AND TERMINATE YOUR AGENT’S AUTHORITY, BY INFORMING EITHER YOUR AGENT OR YOUR HEALTH CARE PROVIDER ORALLY OR IN WRITING.

 5. IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A SOCIAL WORKER, LAWYER, OR OTHER PERSON TO EXPLAIN IT TO YOU.

 6. THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS TWO PERSONS SIGN AS WITNESSES. EACH OF THESE PERSONS MUST EITHER WITNESS YOUR SIGNING OF THE POWER OF ATTORNEY OR WITNESS YOUR ACKNOWLEDGMENT THAT THE SIGNATURE ON THE POWER OF ATTORNEY IS YOURS.

THE FOLLOWING PERSONS MAY NOT ACT AS WITNESSES:

 A. YOUR SPOUSE, YOUR CHILDREN, GRANDCHILDREN, AND OTHER LINEAL DESCENDANTS; YOUR PARENTS, GRANDPARENTS, AND OTHER LINEAL ANCESTORS; YOUR SIBLINGS AND THEIR LINEAL DESCENDANTS; OR A SPOUSE OF ANY OF THESE PERSONS.

 B. A PERSON WHO IS DIRECTLY FINANCIALLY RESPONSIBLE FOR YOUR MEDICAL CARE.

 C. A PERSON WHO IS NAMED IN YOUR WILL, OR, IF YOU HAVE NO WILL, WHO WOULD INHERIT YOUR PROPERTY BY INTESTATE SUCCESSION.

 D. BENEFICIARY OF A LIFE INSURANCE POLICY ON YOUR LIFE.

 E. THE PERSONS NAMED IN THE HEALTH CARE POWER OF ATTORNEY AS YOUR AGENT OR SUCCESSOR AGENT.

 F. YOUR PHYSICIAN OR AN EMPLOYEE OF YOUR PHYSICIAN.

 G. A PERSON WHO WOULD HAVE A CLAIM AGAINST ANY PORTION OF YOUR ESTATE (PERSONS TO WHOM YOU OWE MONEY).

IF YOU ARE A PATIENT IN A HEALTH FACILITY, NO MORE THAN ONE WITNESS MAY BE AN EMPLOYEE OF THAT FACILITY.

 7. YOUR AGENT MUST BE A PERSON WHO IS 18 YEARS OF AGE OR OLDER AND OF SOUND MIND. IT MAY NOT BE YOUR DOCTOR OR ANY OTHER HEALTH CARE PROVIDER THAT IS NOW PROVIDING YOU WITH TREATMENT; OR AN EMPLOYEE OF YOUR DOCTOR OR PROVIDER; OR A SPOUSE OF THE DOCTOR, PROVIDER, OR EMPLOYEE; UNLESS THE PERSON IS A RELATIVE OF YOURS.

 8. YOU SHOULD INFORM THE PERSON THAT YOU WANT HIM OR HER TO BE YOUR HEALTH CARE AGENT. YOU SHOULD DISCUSS THIS DOCUMENT WITH YOUR AGENT AND YOUR PHYSICIAN AND GIVE EACH A SIGNED COPY. IF YOU ARE IN A HEALTH CARE FACILITY OR A NURSING CARE FACILITY, A COPY OF THIS DOCUMENT SHOULD BE INCLUDED IN YOUR MEDICAL RECORD.

HEALTH CARE POWER OF ATTORNEY

(S.C. STATUTORY FORM)

1. DESIGNATION OF HEALTH CARE AGENT

I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, hereby appoint:

(Principal)

(Agent’s Name) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(Agent’s Address) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Telephone: home: \_\_\_\_\_\_\_\_\_\_ work: \_\_\_\_\_\_\_\_\_\_ mobile: \_\_\_\_\_\_ as my agent to make health care decisions for me as authorized in this document.

Successor Agent: If an agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successors to my agent, each to act alone and successively, in the order named:

A. First Alternate Agent:

Address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Telephone: home: \_\_\_\_\_\_\_\_ work: \_\_\_\_\_\_\_\_ mobile: \_\_\_\_\_\_\_\_

B. Second Alternate Agent:

Address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Telephone: home: \_\_\_\_\_\_\_\_ work: \_\_\_\_\_\_\_\_ mobile: \_\_\_\_\_\_\_\_

Unavailability of Agent(s): If at any relevant time the agent or successor agents named here are unable or unwilling to make decisions concerning my health care, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Health Care Consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

2. EFFECTIVE DATE AND DURABILITY

By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence, except as provided in Paragraph 3 below.

3. HIPAA AUTHORIZATION

When considering or making health care decisions for me, all individually identifiable health information and medical records may be released without restriction to my health care agent(s) and/or my alternate health care agent(s) named above including, but not limited to, (i) diagnostic, treatment, other health care, and related insurance and financial records and information associated with any past, present, or future physical or mental health condition including, but not limited to, diagnosis or treatment of HIV/AIDS, sexually transmitted disease(s), mental illness, and/or drug or alcohol abuse and (ii) any written opinion relating to my health that such health care agent(s) and/or alternate health care agent(s) may have requested. Without limiting the generality of the foregoing, this release authority applies to all health information and medical records governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. 1320d and 45 C.F.R. 160‑164; is effective whether or not I am mentally competent; has no expiration date; and shall terminate only in the event that I revoke the authority in writing and deliver it to my health care provider.

4. AGENT’S POWERS

I grant to my agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my agent cannot determine the choice I would want made, then my agent shall make a choice for me based upon what my agent believes to be in my best interests. My agent’s authority to interpret my desires is intended to be as broad as possible, except for any limitations I may state below.

Accordingly, unless specifically limited by the provisions specified below, my agent is authorized as follows:

 A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation.

 B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though that use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death.

 C. To authorize my admission to or discharge, even against medical advice, from a hospital, nursing care facility, or similar facility or service.

 D. To take another action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting a waiver or release from liability required by a hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

 E. The powers granted above do not include the following powers or are subject to the following rules or limitations: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

5. ORGAN DONATION (INITIAL ONLY ONE)

My agent may \_\_\_; may not \_\_\_ consent to the donation of all or any of my tissue or organs for purposes of transplantation.

6. EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL)

I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My agent will have authority to make decisions concerning my health care only in situations to which the Declaration does not apply.

7. STATEMENT OF DESIRES CONCERNING LIFE‑SUSTAINING TREATMENT

With respect to any Life‑Sustaining Treatment, I direct the following:

(INITIAL ONLY ONE OF THE FOLLOWING 3 PARAGRAPHS)

 A. \_\_\_ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life‑sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life‑sustaining treatment.

OR

 B. \_\_\_ DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life‑sustaining treatment:

 1. if I have a condition that is incurable or irreversible and, without the administration of life‑sustaining procedures, expected to result in death within a relatively short period of time; or

 2. if I am in a state of permanent unconsciousness.

OR

 C. \_\_\_ DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

8. STATEMENT OF DESIRES REGARDING TUBE FEEDING

With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that in situations where life‑sustaining treatment is being withheld or withdrawn pursuant to Paragraph 7:

(INITIAL ONLY ONE OF THE FOLLOWING 3 PARAGRAPHS):

 A. \_\_\_ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged by tube feeding if my agent believes the burdens of tube feeding outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved, and the quality as well as the possible extension of my life in making this decision.

OR

 B. \_\_\_ DIRECTIVE TO WITHHOLD OR WITHDRAW TUBE FEEDING. I do not want my life prolonged by tube feeding.

OR

 C. \_\_\_ DIRECTIVE FOR PROVISION OF TUBE FEEDING. I want tube feeding to be provided within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedure, and without regard to whether other forms of life‑sustaining treatment are being withheld or withdrawn.

IF YOU DO NOT INITIAL ANY OF THE STATEMENTS IN PARAGRAPH 8, YOUR AGENT WILL NOT HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

9. ADMINISTRATIVE PROVISIONS

 A. I revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney.

 B. This power of attorney is intended to be valid in any jurisdiction in which it is presented.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Health Care Power of Attorney on this

\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 20 \_\_. My current home address is:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Principal’s Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print Name of Principal: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Health Care Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, fraud, or undue influence. I am not related to the principal by blood, marriage, or adoption, either as a spouse, a lineal ancestor, descendant of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal’s medical care. I am not entitled to any portion of the principal’s estate upon his decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal’s life, nor do I have a claim against the principal’s estate as of this time. I am not the principal’s attending physician, nor an employee of the attending physician. No more than one witness is an employee of a health care facility in which the principal is a patient. I am not appointed as Health Care Agent or Successor Health Care Agent by this document.

Witness No. 1

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Telephone: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

Address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Witness No. 2

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Telephone: \_\_\_\_\_\_\_\_\_\_\_\_\_

Address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(This portion of the document is optional and is not required to create a valid health care power of attorney.)

STATE OF SOUTH CAROLINA

COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The foregoing instrument was acknowledged before me by Principal on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20 \_\_\_\_\_\_\_\_\_

Notary Public for South Carolina

My Commission Expires: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; 2016 Act No. 279 (S.778), Section 2, eff January 1, 2017.

Editor’s Note

Prior Laws: Former Section 62‑5‑504 was titled Health care power of attorney; definitions; form, and had the following history: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010. See now, 1976 Code Section 62‑5‑500 et seq.

RESEARCH REFERENCES

Encyclopedias

40 Am. Jur. Proof of Facts 3d 287, Proof of Basis for Refusal or Discontinuance of Life‑Sustaining Treatment on Behalf of Incapacitated Person.

102 Am. Jur. Proof of Facts 3d 95, Advance Directives for Medical and Psychiatric Care.

63 Am. Jur. Trials 1, Decisionmaking at the End of Life.

S.C. Jur. Death and Right to Die Section 14, Nature of a Health Care Power of Attorney.

S.C. Jur. Death and Right to Die Section 37, Actions Involving Incompetent Persons.

Forms

South Carolina Legal and Business Forms Section 17:45 , Durable Health Care Power of Attorney.

**SECTION 62‑5‑505.** Health care agent powers.

 A health care agent has, in addition to the powers set forth in the health care power of attorney, the following specific powers to:

 (1) have access to the principal’s medical records and information to the same extent that the principal would have access, including the right to disclose the contents to others;

 (2) contract on the principal’s behalf for placement in a health care or nursing care facility or for health care related services, without the agent incurring personal financial liability for the contract;

 (3) hire and fire medical, social service, and other support personnel responsible for the principal’s care;

 (4) have the same health care facility or nursing care facility visitation rights and privileges of the principal as are permitted to immediate family members or spouses.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

Editor’s Note

Prior Laws: Former Section 62‑5‑505 was titled Validity of durable power of attorney that authorizes attorney to make health care decisions regarding principal properly executed pursuant to Section 62‑5‑501, and had the following history: 1992 Act No. 306, Section 8; omitted by 2016 Act No. 279, Section 2, eff January 1, 2017.

RESEARCH REFERENCES

Encyclopedias

63 Am. Jur. Trials 1, Decisionmaking at the End of Life.

Treatises and Practice Aids

41 Causes of Action 2d 1, Cause of Action for Enforcement of Arbitration Clause in Long‑Term Care Agreement.

**SECTION 62‑5‑506.** Compensation of agent; liability for costs of care or services.

 (a) The agent is not entitled to compensation for services performed under the health care power of attorney, but the agent is entitled to reimbursement for all reasonable expenses incurred as a result of carrying out the health care power of attorney or the authority granted by this section.

 (b) The agent’s consent to health care or to the provision of services to the principal does not cause the agent to be liable for the costs of the care or services.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑507.** Pregnancy of principal.

 If a principal has been diagnosed as pregnant, life‑sustaining procedures may not be withheld or withdrawn pursuant to the health care power of attorney during the course of the principal’s pregnancy. This subsection does not otherwise affect the agent’s authority to make decisions concerning the principal’s obstetrical and other health care during the course of the pregnancy.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑508.** Duty of health care or nursing care provider.

 A health care provider or nursing care provider having knowledge of the principal’s health care power of attorney has a duty to follow directives of the agent that are consistent with the health care power of attorney to the same extent as if they were given by the principal. If it is uncertain whether a directive is consistent with the health care power of attorney, the health care provider, nursing care provider, agent, or other interested person may apply to the probate court for an order determining the authority of the agent to give the directive.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑509.** Duty of agent.

 An agent acting pursuant to a health care power of attorney shall make decisions concerning the principal’s health care in accordance with the principal’s directives in the health care power of attorney and with any other statements of intent by the principal that are known to the agent and are not inconsistent with the directives in the health care power of attorney. If a principal has a valid Declaration of a Desire for a Natural Death pursuant to Chapter 77, Title 44, then the declaration must be given effect in any situation to which it is applicable. The agent named in the health care power of attorney has authority to make decisions only in situations to which the declaration does not apply. However, nothing in this section prevents the principal or a person designated by the principal in the declaration from revoking the declaration pursuant to Section 44‑77‑80.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑510.** Immunity from liability.

 (a) A person who relies in good faith upon a person’s representation that he is the person named as agent in a health care power of attorney is not subject to civil or criminal liability or disciplinary action for recognizing the agent’s authority.

 (b) A health care provider or nursing care provider who in good faith relies on a health care decision made by an agent or successor agent is not subject to civil or criminal liability or disciplinary action on account of relying on the decision.

 (c) An agent who in good faith makes a health care decision pursuant to a health care power of attorney is not subject to civil or criminal liability on account of the substance of the decision.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑511.** Appointment of successor agents.

 (a) The principal may appoint one or more successor agents in the health care power of attorney in the event an agent dies, becomes legally disabled, resigns, refuses to act, is unavailable, or, if the agent is the spouse of the principal, becomes divorced or separated from the principal. A successor agent will succeed to all duties and powers given to the agent in the health care power of attorney.

 (b) If no agent or successor agent is available, willing, and qualified to make a decision concerning the principal’s health care, the decision must be made according to the provisions of and by the person authorized by the Adult Health Care Consent Act.

 (c) All directives, statements of personal values, or statements of intent made by the principal in the health care power of attorney must be treated as exercises of the principal’s right to direct the course of his health care. Decisions concerning the principal’s health care made by a guardian, by the probate court, or by a surrogate pursuant to the Adult Health Care Consent Act, must be made in accordance with the directions stated in the health care power of attorney.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑512.** Revocation of health care power of attorney.

 (a) A health care power of attorney may be revoked in the following ways:

 (1) by a writing, an oral statement, or any other act constituting notification by the principal to the agent or to a health care provider responsible for the principal’s care of the principal’s specific intent to revoke the health care power of attorney; or

 (2) by the principal’s execution of a subsequent health care power of attorney or the principal’s execution of a subsequent durable power of attorney pursuant to Article 8, Title 62, if the durable power of attorney states an intention that the health care power of attorney be revoked or if the durable power of attorney is inconsistent with the health care power of attorney.

 (b) A health care provider who is informed of or provided with a revocation of a health care power of attorney immediately must record the revocation in the principal’s medical record and notify the agent, the attending physician, and all other health care providers or nursing care providers who are responsible for the principal’s care.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

Code Commissioner’s Note

At the direction of the Code Commissioner, in 2016, in (a)(2), the reference to “Section 62‑5‑501” was changed to “Article 8, Title 62”.

**SECTION 62‑5‑513.** Execution of health care power of attorney does not constitute suicide; requirement of signing health care power of attorney prohibited as condition for insurance or receipt of health care; mercy killing not authorized or approved; absence of health care power of attorney not presumption of intent to consent to or refuse death prolonging procedures.

 (a) The execution and effectuation of a health care power of attorney does not constitute suicide for any purpose.

 (b) A person may not be required to sign a health care power of attorney in accordance with this section as a condition for coverage under an insurance contract or for receiving medical treatment or as a condition of admission to a health care or nursing care facility.

 (c) Nothing in this section may be construed to authorize or approve mercy killing or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying.

 (d) The absence of a health care power of attorney by an adult patient does not give rise to a presumption of his intent to consent to or refuse death prolonging procedures. Nothing in this section impairs other legal rights or legal responsibilities which a person may have to effect the provision or the withholding or withdrawal of life‑sustaining procedures in a lawful manner.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑514.** Criminal liability.

 If a person coerces or fraudulently induces another person to execute a health care power of attorney, falsifies or forges a health care power of attorney, or wilfully conceals, cancels, obliterates, or destroys a revocation of a health care power of attorney, and the principal dies as a result of the withdrawal or withholding of treatment pursuant to the health care power of attorney, that person is subject to prosecution in accordance with the criminal laws of this State.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑515.** Informing another person regarding this part not prohibited.

 Nothing in this part prohibits a person from informing another person of the existence of this part, delivering to another person a copy of this part or a form for a health care power of attorney, or counseling another person in good faith concerning the execution of a health care power of attorney.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑516.** Civil liability.

 (a) If a person wilfully conceals, cancels, defaces, obliterates, or damages a health care power of attorney without the principal’s consent, or falsifies or forges a revocation of a health care power of attorney, or otherwise prevents the implementation of the principal’s wishes as stated in a health care power of attorney, that person breaches a duty owed to the principal and is responsible for payment of any expenses or other damages incurred as a result of the wrongful act.

 (b) A physician or health care facility electing for any reason not to follow an agent’s instruction that life‑sustaining procedures be withheld or withdrawn as authorized in the health care power of attorney shall make a reasonable effort to locate a physician or health care facility that will follow the instruction and has a duty to transfer the patient to that physician or facility. If a nurse or other employee of a health care provider or nursing care provider gives notice that the employee does not wish to participate in the withholding or withdrawal of life‑sustaining procedures as directed by an agent, a reasonable effort shall be made by the physician and the health care provider or nursing care provider to effect the withholding or withdrawal of life‑sustaining procedures without the participation of the employee.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑517.** Document or writing deemed to comply with requirements of this part.

 (a) A document or writing containing the following provisions is deemed to comply with the requirements of this part:

 (1) the name and address of the person who meets the requirements of Section 62‑5‑503 and is authorized to make health care related decisions if the principal becomes mentally incompetent;

 (2) the types of health care related decisions that the health care agent is authorized to make;

 (3) the signature of the principal;

 (4) the signature of at least two persons who witnessed the principal’s signature and who meet the requirements of Section 62‑5‑503; and

 (5) the attestation of a notary public.

 (b) Additionally, a document that meets the above requirements and also provides expressions of the principal’s intentions or wishes with respect to the following health care issues authorizes the health care agent to act in accordance with these provisions:

 (1) organ donations;

 (2) life‑sustaining treatment;

 (3) tube feeding;

 (4) other kinds of medical treatment that the principal wishes to have or not to have;

 (5) comfort and treatment issues;

 (6) provisions for interment or disposal of the body after death; and

 (7) any written statements that the principal may wish to have communicated on his behalf.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

**SECTION 62‑5‑518.** Validity of a durable power of attorney.

 The validity of a durable power of attorney that authorizes an attorney to make health care decisions regarding the principal which is properly executed pursuant to this part before or after the effective date of this act is not affected by the amendments contained in this act.

HISTORY: 1992 Act No. 306, Section 1; 2005 Act No. 172, Section 1; 2006 Act No. 365, Section 1; 2008 Act No. 303, Sections 2, 3, eff June 11, 2008; 2010 Act No. 244, Section 41, eff June 7, 2010; formerly 1976 Code Section 62‑5‑504; 2016 Act No. 279, Section 2, eff January 1, 2017.

Part 6

Uniform Veterans’ Guardianship Act [Repealed]

**SECTIONS 62‑5‑601 to 62‑5‑624.** Repealed.

HISTORY: Former 62‑5‑601, titled Short title, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑602, titled Definitions, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑603, titled Appointment of guardians, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑604, titled Persons who may file summons and petition for appointment, had the following history: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 42, eff June 7, 2010. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑605, titled Contents of petition for appointment of guardian, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑606, titled Facts that constitute prima facie evidence of need for guardian of a minor ward, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑607, titled Facts that constitute prima facie evidence of need for guardian of a mentally incompetent ward, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑608, titled Notice of summons and petition, had the following history: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 43, eff June 7, 2010. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑609, titled Fitness of guardian; bond, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑610, titled Limitation on number of wards of one guardian, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑611, titled Annual account of guardians receiving funds from Veterans’ Administration, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑612, titled Exhibit of securities at time of filing account, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑613, titled Effect of failure to account, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑614, titled Accountability for funds not received from Administration, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑615, titled Investments that guardians may make, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑616, titled Use of estate for support of persons other than ward, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑617, titled Copies of public records shall be furnished without charge, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑618, titled Compensation of guardians, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑619, titled Final discharge of guardian; paying out funds less than one thousand dollars, had the following history: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 68. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑620, titled Proceedings in which administrator shall be a party in interest, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑621, titled Copies of accounts, certificates, or pleadings shall be sent to Veterans’ Administration, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑622, titled Time, place, and notice of hearing on account, petition, or other pleading, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑623, titled Notice of hearings shall be given to guardian; orders, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

HISTORY: Former 62‑5‑624, titled Construction, had the following history: 1986 Act No. 539, Section 1. Repealed by 2016 Act No. 278, Section 6, eff June 9, 2016.

Part 7

South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act [Effective until January 1, 2019]

**SECTION 62‑5‑700.** Short title.

Section effective until January 1, 2019. See, also, Section 62‑5‑700 effective January 1, 2019.

 This act may be cited as the “South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act”.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑701.** Exclusive jurisdiction.

Section effective until January 1, 2019. See, also, Section 62‑5‑701 effective January 1, 2019.

 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑702.** Definitions.

Section effective until January 1, 2019. See, also, Section 62‑5‑702 effective January 1, 2019.

 As used in this part, the term:

 (1) “Adult” means an individual who has attained eighteen years of age or who has been emancipated by a court of competent jurisdiction.

 (2) “Conservator” means a person appointed by a court to manage an estate of a protected person.

 (3) “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.

 (4) “Emergency” means circumstances that will likely result in substantial harm to a respondent’s health, safety, or welfare or substantial economic loss or expense.

 (5) “Guardian” means a person who has qualified as a guardian of an incapacitated person pursuant to a court appointment, but excludes one who is a guardian ad litem or a statutory guardian.

 (6) “Guardianship order” means an order appointing a guardian.

 (7) “Guardianship proceeding” means a judicial proceeding in which an order for the appointment of a guardian is sought or has been issued.

 (8) “Home state” means the state in which the respondent was physically present, including a period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including a period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

 (9) “Incapacitated person” means an adult for whom a guardian or conservator has been appointed.

 (10) “Party” means the respondent, petitioner, guardian, conservator, or other person allowed by the court to participate in a guardianship or protective proceeding.

 (11) “Person”, except in the term “incapacitated person” or “protected person”, means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or another legal or commercial entity.

 (12) “Protected person” means an adult for whom a protective order has been issued.

 (13) “Protective order” means an order appointing a conservator or a court order relating to the management of property of an incapacitated person.

 (14) “Protective proceeding” means a judicial proceeding in which a protective order is sought or has been issued.

 (15) “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.

 (16) “Respondent” means an adult for whom a protective order or the appointment of a guardian is sought.

 (17) “Significant‑connection state” means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available. In determining pursuant to Sections 62‑5‑707 and 62‑5‑714(E) whether a respondent has a significant connection with a particular state, the court shall consider the:

 (a) location of the respondent’s family and other persons required to be notified of the guardianship or protective proceeding;

 (b) length of time the respondent at any time was physically present in the state and the duration of any absence;

 (c) location of the respondent’s property; and

 (d) extent to which the respondent 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.

 (18) “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 a territory or insular possession subject to the jurisdiction of the United States.

 (19) “Ward” means a person for whom a guardian has been appointed.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑703.** Treatment of foreign countries.

Section effective until January 1, 2019. See, also, Section 62‑5‑703 effective January 1, 2019.

 The court may treat a foreign country as if it were a state for the purpose of applying this part.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑704.** Court communication with court in another state; record required; exceptions; participation of parties.

Section effective until January 1, 2019. See, also, Section 62‑5‑704 effective January 1, 2019.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑705.** Requests to court of another state; requests from court of another state.

Section effective until January 1, 2019. See, also, Section 62‑5‑705 effective January 1, 2019.

 (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 respondent;

 (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 respondent or the incapacitated 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑706.** Testimony of witness located in another state; permitted means of giving testimony; lack of original writing.

Section effective until January 1, 2019. See, also, Section 62‑5‑706 effective January 1, 2019.

 (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 do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑707.** Jurisdiction of court.

Section effective until January 1, 2019. See, also, Section 62‑5‑707 effective January 1, 2019.

 The court has jurisdiction to appoint a guardian or issue a protective order for a respondent if:

 (1) this State is the respondent’s home state;

 (2) on the date the petition is filed, this State is a significant‑connection state; and

 (a) the respondent does not have a home state or a court of the respondent’s home state has declined to exercise jurisdiction because this State is a more appropriate forum; or

 (b) the respondent 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:

 (i) a petition for an appointment or order is not filed in the respondent’s home state;

 (ii) an objection to the court’s jurisdiction is not filed by a person required to be notified of the proceeding; and

 (iii) the court concludes that it is an appropriate forum pursuant to the factors provided in Section 62‑5‑710(C);

 (3) this State does not have jurisdiction pursuant to either item (1) or (2), the respondent’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

 (4) the requirements for special jurisdiction pursuant to Section 62‑5‑708 are met.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑708.** Special jurisdiction.

Section effective until January 1, 2019. See, also, Section 62‑5‑708 effective January 1, 2019.

 (A) The court lacking jurisdiction pursuant to Section 62‑5‑707(1) through (3) 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 a respondent 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 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 respondent’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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑709.** Exclusive and continuing jurisdiction; exception.

Section effective until January 1, 2019. See, also, Section 62‑5‑709 effective January 1, 2019.

 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 expires by its own terms.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑710.** Declining jurisdiction; more appropriate forum; dismissal or stay of proceeding.

Section effective until January 1, 2019. See, also, Section 62‑5‑710 effective January 1, 2019.

 (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 shall either 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 respondent;

 (2) whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;

 (3) the length of time the respondent was physically present in or was a legal resident of this or another state;

 (4) the distance of the respondent from the court in each state;

 (5) the financial circumstances of the respondent’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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑711.** Jurisdiction acquired due to unjustifiable conduct; assessment of reasonable expenses against responsible party.

Section effective until January 1, 2019. See, also, Section 62‑5‑711 effective January 1, 2019.

 (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 respondent or the protection of the respondent’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 respondent 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑712.** Notice requirements to respondent’s home state.

Section effective until January 1, 2019. See, also, Section 62‑5‑712 effective January 1, 2019.

 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 respondent’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 respondent’s home state. The notice must be given in the same manner as notice is required to be given in this State.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑713.** Rules for dealing with conflicting petitions in this and another state.

Section effective until January 1, 2019. See, also, Section 62‑5‑713 effective January 1, 2019.

 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:

 (1) 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.

 (2) 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑714.** Petition to transfer guardianship or conservatorship to another state; notice; hearing; provisional and final orders.

Section effective until January 1, 2019. See, also, Section 62‑5‑714 effective January 1, 2019.

 (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 incapacitated 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 no hearing shall 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 incapacitated person 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 incapacitated person; and

 (3) plans for care and services for the incapacitated person 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)(b);

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑715.** Confirmation of transfer from another state; petition to accept guardianship or conservatorship; notice; hearing; provisional and final orders; determination of needed modification.

Section effective until January 1, 2019. See, also, Section 62‑5‑715 effective January 1, 2019.

 (A) To confirm transfer of a guardianship or conservatorship transferred 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 incapacitated 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).

 (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 incapacitated 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 from the court from which the proceeding is being transferred of a final order 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 incapacitated 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

**SECTION 62‑5‑716.** Registration of orders from another state; powers in this state.

Section effective until January 1, 2019. See, also, Section 62‑5‑716 effective January 1, 2019.

 (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 a court, in any appropriate county of this State, certified copies of the order and letters of office.

 (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 a court of this State, 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.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011.

Part 7

South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act [Effective January 1, 2019]

Editor’s Note

2017 Act No. 87, Section 6, provides as follows:

“(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 statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or suspended.”

CROSS REFERENCES

Subject matter jurisdiction, concurrent jurisdiction with family court, see Section 62‑1‑302.

**SECTION 62‑5‑700.** Short title.

Section effective January 1, 2019. See, also, Section 62‑5‑700 effective until January 1, 2019.

 This act may be cited as the “South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act”.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, reenacted this section with no apparent change.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 4, Jurisdiction of Court.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 13, Guardianship and Conservatorship.

**SECTION 62‑5‑701.** Exclusive jurisdiction.

Section effective January 1, 2019. See, also, Section 62‑5‑701 effective until January 1, 2019.

 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Effect of Amendment

2017 Act No. 87, Section 5.B, reenacted this section with no apparent change.

CROSS REFERENCES

Jurisdiction, see Section 62‑5‑201.

**SECTION 62‑5‑702.** Definitions.

Section effective January 1, 2019. See, also, Section 62‑5‑702 effective until January 1, 2019.

 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

REPORTER’S COMMENTS

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.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

**SECTION 62‑5‑703.** Treatment of foreign countries.

Section effective January 1, 2019. See, also, Section 62‑5‑703 effective until January 1, 2019.

 The court may treat a foreign country as if it were a state for the purpose of applying this part.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, reenacted this section with no apparent change.

**SECTION 62‑5‑704.** Court communication with court in another state; record required; exceptions; participation of parties.

Section effective January 1, 2019. See, also, Section 62‑5‑704 effective until January 1, 2019.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, reenacted this section with no apparent change.

**SECTION 62‑5‑705.** Requests to court of another state; requests from court of another state.

Section effective January 1, 2019. See, also, Section 62‑5‑705 effective until January 1, 2019.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, in (A)(3) and (A)(6), substituted “alleged incapacitated individual” for “respondent”, and in (A)(6), substituted “or the ward” for “or the incapacitated”.

**SECTION 62‑5‑706.** Testimony of witness located in another state; permitted means of giving testimony; lack of original writing.

Section effective January 1, 2019. See, also, Section 62‑5‑706 effective until January 1, 2019.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, in (C), substituted “that does not” for “that do not”.

**SECTION 62‑5‑707.** Jurisdiction of court.

Section effective January 1, 2019. See, also, Section 62‑5‑707 effective until January 1, 2019.

 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Effect of Amendment

2017 Act No. 87, Section 5.B, substituted “alleged incapacitated individual” for “respondent” and “alleged incapacitated individual’s” for “respondent’s” throughout; in (C), substituted “subsections (A) or (B)” for “item (1) or (2)”; and made nonsubstantive changes.

CROSS REFERENCES

Procedure for court appointment of a guardian, summons and petition, see Section 62‑5‑303.

Protective proceedings, incapacitated and disabled persons, see Section 62‑5‑403.

**SECTION 62‑5‑708.** Special jurisdiction.

Section effective January 1, 2019. See, also, Section 62‑5‑708 effective until January 1, 2019.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, in (A), substituted “Sections 62‑5‑707 (A) through (C)” for “Section 62‑5‑707(1) through (3)”; in (A)(1), substituted “an alleged incapacitated individual” for “a respondent”; in (A)(3), inserted “individual” following “for an incapacitated”; and in (B), substituted “alleged incapacitated individual’s” for “respondent’s”.

**SECTION 62‑5‑709.** Exclusive and continuing jurisdiction; exception.

Section effective January 1, 2019. See, also, Section 62‑5‑709 effective until January 1, 2019.

 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, substituted “has expired” for “expires”.

**SECTION 62‑5‑710.** Declining jurisdiction; more appropriate forum; dismissal or stay of proceeding.

Section effective January 1, 2019. See, also, Section 62‑5‑710 effective until January 1, 2019.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, in (B), substituted “either shall dismiss” for “shall either dismiss”; in (C)(1) through (C)(4), substituted “alleged incapacitated individual” for “respondent”; and in (C)(5), substituted “alleged incapacitated individual’s” for “respondent’s”.

**SECTION 62‑5‑711.** Jurisdiction acquired due to unjustifiable conduct; assessment of reasonable expenses against responsible party.

Section effective January 1, 2019. See, also, Section 62‑5‑711 effective until January 1, 2019.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, in (A)(2) and (A)(3)(a), substituted “alleged incapacitated individual” for “respondent”, and in (A)(2), substituted “alleged incapacitated individual’s” for “respondent’s”.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 13, Guardianship and Conservatorship.

**SECTION 62‑5‑712.** Notice requirements to alleged incapacitated individual’s home state.

Section effective January 1, 2019. See, also, Section 62‑5‑712 effective until January 1, 2019.

 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, twice substituted “alleged incapacitated individual’s” for “respondent’s”.

**SECTION 62‑5‑713.** Rules for dealing with conflicting petitions in this and another state.

Section effective January 1, 2019. See, also, Section 62‑5‑713 effective until January 1, 2019.

 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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, changed the paragraph designators from (1) and (2) to (A) and (B), and in (A), substituted “order; or” for “order.”.

**SECTION 62‑5‑714.** Petition to transfer guardianship or conservatorship to another state; notice; hearing; provisional and final orders.

Section effective January 1, 2019. See, also, Section 62‑5‑714 effective until January 1, 2019.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

Effect of Amendment

2017 Act No. 87, Section 5.B, in (C), substituted “ward” for “incapacitated”, and substituted “a hearing must not” for “no hearing shall”; in (D), three times substituted “ward” for “incapacitated person”; and in (E)(1), deleted “(2)(b)” from the Section reference at the end.

CROSS REFERENCES

Proceedings subsequent to appointment, venue, see Section 62‑5‑310.

**SECTION 62‑5‑715.** Confirmation of transfer from another state; petition to accept guardianship or conservatorship; notice; hearing; provisional and final orders; determination of needed modification.

Section effective January 1, 2019. See, also, Section 62‑5‑715 effective until January 1, 2019.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

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).

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

**SECTION 62‑5‑716.** Registration of orders from another state; powers in this state.

Section effective January 1, 2019. See, also, Section 62‑5‑716 effective until January 1, 2019.

 (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.

HISTORY: 2010 Act No. 213, Section 1, eff January 1, 2011; 2017 Act No. 87 (S.415), Section 5.B, eff January 1, 2019.

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.

Editor’s Note

2010 Act No. 213, Section 4, provides as follows:

“The provisions of this act take effect on January 1, 2011, and apply to guardianship and protective proceedings begun on or after that date.”

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 13, Guardianship and Conservatorship.