~~Indicates Matter Stricken~~

Indicates New Matter

COMMITTEE AMENDMENT ADOPTED

April 19, 2016

**S. 777**

Introduced by Senators Malloy and Bennett

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Read the first time May 14, 2015.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 62‑5‑436 SO AS TO PROVIDE ADDITIONAL AND ALTERNATIVE REQUIREMENTS FOR MATTERS INVOLVING PAYMENT OF BENEFITS FROM THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS AND TO DEFINE RELEVANT TERMS; TO AMEND SECTION 62‑1‑201, AS AMENDED, RELATING TO DEFINITIONS APPLICABLE TO THE SOUTH CAROLINA PROBATE CODE, SO AS TO DEFINE THE TERM “VA” AND TO MAKE OTHER TECHNICAL CORRECTIONS; TO AMEND SECTION 62‑5‑404, RELATING TO THE ORIGINAL PETITION FOR APPOINTMENT OR PROTECTIVE ORDER, SO AS TO REQUIRE THE PETITION TO SHOW THAT THE PERSON TO BE PROTECTED HAS BEEN RATED INCOMPETENT BY THE VA AND TO PROVIDE THAT THE PETITION SHALL STATE THE NAME AND ADDRESS OF THE PERSON TO BE NOTIFIED ON BEHALF OF THE VA; TO AMEND SECTION 62‑5‑405, AS AMENDED, RELATING TO SERVICE OF SUMMONS AND PETITIONS, NOTICE OF HEARING, AND WAIVER OF NOTICE BY THE PERSON TO BE PROTECTED, SO AS TO REQUIRE SERVICE UPON THE VA AND NOTICE OF THE HEARING IN CERTAIN CIRCUMSTANCES; TO AMEND SECTION 62‑5‑407, AS AMENDED, RELATING TO PROCEDURES CONCERNING THE HEARING AND ORDER ON ORIGINAL PETITION, SO AS TO CLARIFY CERTAIN PROVISIONS IN CASES INVOLVING PAYMENT OF BENEFITS FROM THE VA; AND TO REPEAL PART 6, ARTICLE 5, CHAPTER 5, TITLE 62 RELATING TO THE UNIFORM VETERANS’ GUARDIANSHIP ACT.

Amend Title To Conform

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

SECTION 1. Part 4, Article 5, Chapter 5, Title 62 of the 1976 Code is amended by adding:

“Section 62‑5‑436. (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 per cent of the income of the protected person during any year. If extraordinary services are rendered by a conservator, the court may, upon application of the conservator and notice to the VA, authorize additional compensation payable from the estate of the protected person. No compensation is allowed on the corpus of an estate derived from payments from the VA. The conservator may be allowed reimbursement from the estate of the protected person for reasonable premiums paid to a corporate surety upon the bond furnished by the conservator.”

REPORTER’S COMMENTS

This section 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.

SECTION 2. Sections 62‑1‑201(51) and (52) of the 1976 Code, as last amended by Act 100 of 2013, are further amended to read:

“(51) ‘VA’ means the United States Department of Veterans Affairs or its successor.

(52) ‘Ward’ is as defined in Section 62‑5‑101.

~~(52)~~(53) ‘Will’ includes codicil and any testamentary instrument ~~which~~that merely appoints an executor or revokes or revises another will.”

REPORTER’S COMMENTS

The definitions set out in this section are applicable throughout this Code. Of interest is the definition of “claims” in item (4) which includes claims arising out of tort.

Also see Sections 62‑4‑101, 62‑5‑101, and 62‑6‑101 for additional definitions for Articles 4, 5, and 6.

The 2010 amendment revised certain definitions in Section 62‑1‑201, i.e., “application” in item (1), “formal proceedings” in item (17), “informal proceedings” in item (22), “petition” in item (34), and “testacy proceeding” in item (48), as well as other relevant sections throughout the Probate Code, to clarify that the law requires a summons in formal proceedings and the rules of civil procedure adopted for the circuit court and other rules of procedure in this title apply to and govern formal proceedings in probate court. See S.C. Code Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP; also see, Weeks v. Drawdy, 495 S.E. 2d 454 (Ct. App. 1997) (the rules of probate court governing procedure address only a limited number of issues and in the absence of a specific probate court rule, the rules of civil procedure applicable in the court of common pleas shall be applied in the probate court unless to do so would be inconsistent with the provisions of the Code).

Prior to the 2010 amendments, certain confusion existed regarding the requirement of a summons in a formal proceeding and how the South Carolina Rules of Civil Procedure apply to formal proceedings in the probate court. The 2010 amendments in this section and throughout other portions of the Probate Code are intended to minimize such confusion and to expressly clarify that a “formal proceeding” is commenced by a summons and petition and governed by the rules of civil procedure adopted for the circuit court and other rules of procedure in this title, and that an “application” does not require a summons and is not governed by or subject to the rules of civil procedure adopted for the circuit court. Where applicable and appropriate, the 2010 amendments expand the matters in which an application may be utilized.

The 2013 amendment added definitions for “Fair Market Value” and “Probate Estate”. The 2013 amendment also made changes to the definitions of “Guardian”, “Person”, and “State”. The definition of “Stepchild” has been removed as a result of changes to Section 62‑2‑103(6).

Effect of Amendment

The 2010 amendment rewrote the definitions of “Application”, “Formal proceedings”, “Informal proceedings”, and “Petition”, and added “formal” preceding “proceeding” in the definition of “Testacy proceeding”.

The 2013 amendment added subsection (14), definition of “Fair market value”; rewrote subsection (18), definition of “Guardian”; rewrote subsection (32), definition of “Person”; added subsection (35), definition of “Probate estate”; added subsection (40), definition of “SCACR”; rewrote subsection (45), definition of “State”; deleted former subsection (40), definition of “Stepchild”; and renumbered the subsections accordingly.

The 2015 amendment added a definition of “VA” as (51) and renumbered ~~“Trustee” as (51),~~ “Ward” as (52) and “Will” as (53).

SECTION 3. Section 62‑5‑404(b) of the 1976 Code is amended to read:

“(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.”

REPORTER’S COMMENTS

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.

SECTION 4. Section 62‑5‑405 of the 1976 Code, as last amended by Act 244 of 2010, is further amended to read:

“Section 62‑5‑405. (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 (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.”

REPORTER’S COMMENTS

This section 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 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 2015 amendment 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.

SECTION 5. Section 62‑5‑407(b) of the 1976 Code, as last amended by Act 244 of 2010, is further amended to read:

“(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. ~~If~~ 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.”

REPORTER’S COMMENTS

The 2010 amendment 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 2015 amendment 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.

SECTION 6. Part 6 of Article 5, Chapter 5, Title 62 of the 1976 Code is repealed.

SECTION 7. This act takes effect upon approval by the Governor.

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