

## **Article 5 amendments approved by subcommittee during 2012 session**

### **§ 62-5-303(4) and (5)**

Amend the bill further, as and if amended, by striking page 248, lines 28-43, page 249, lines 1-43, and page 250, lines 1-13, in their entirety and inserting the following:

/ (4) The primary respondent is entitled to be represented by his counsel of choice. If a court has not received written notification within fifteen days of service of the pleadings upon the primary respondent that counsel has been retained, the court shall appoint counsel to represent the primary respondent in the proceeding.

(5) Upon the filing of the summons and petition with the court and proof of service of the summons and petition upon the primary respondent, the court shall appoint two qualified examiners, at least one of whom shall be a physician, to examine the primary respondent and report to the court the physical and mental condition of the primary respondent. The examiners shall submit their reports in writing to the court, the petitioner, the guardian ad litem, the primary respondent, counsel for the primary respondent, and other parties to the proceeding in order that the reports shall be received by a date set by the court, but in no event less than ten days before a hearing. If a court appoints an additional examiner, the court shall set forth in its order appointing an additional examiner the basis for an additional examiner and the need for an additional examiner. All parties to the proceeding are entitled to copies of examiners' reports. An examiner's report shall evaluate the condition of the primary respondent and shall contain, to the best information and belief of the examiner:

(a) a description of the nature, type, and extent of the primary respondent's incapacity, including the primary respondent's specific functional impairments;

(b) a diagnosis and assessment of the primary respondent's mental and physical condition, including a statement as to whether the primary respondent is on any medications that may affect his actions or demeanor;

(c) where appropriate and consistent with the scope of the examiner's license, an evaluation of the primary respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement;

(d) the date or dates of the examinations, evaluations, and assessments upon which the report is based;

(e) the identity of those persons with whom the examiner met or consulted regarding the primary respondent's mental or physical condition; and

(f) the signature of the examiner and the nature of any professional license held by the examiner. Unless otherwise directed by the court, in preparing a report for the court, the

examiner may rely upon an examination conducted by the examiner within the ninety-day period immediately preceding the hearing of the petition. In the absence of bad faith or malicious intent, an examiner appointed by the court and performing an examination and submitting a report under this section shall be immune from civil liability for any breach of patient confidentiality made in furtherance of his duties under this section. A report prepared pursuant to this section shall be admissible as evidence of the facts stated therein and the results of the examination or evaluation referred to therein. /

#### **REPORTERS COMMENTS FOR § 62-5-303(4) AND (5)**

Amend the bill further, as and if amended, by striking page 252, lines 3-39 in their entirety and inserting the following:

/ Subsection (4) provides that the primary respondent is entitled to be represented by an attorney of his or her choosing. If the court hearing the proceeding has not received, within fifteen days from the service of the pleadings, written notification that the primary respondent has representation, the court shall appoint an attorney to represent the primary respondent.

Subsection (5) provides for the appointment of two examiners, one of whom must be a physician, in connection with a proceeding for a finding of incapacity or appointment of a guardian, establishes the necessary qualification of the person who will serve as an examiner, sets forth the type of report the examiner is to produce, and sets a time for the reports to be produced as either a deadline set by the court, or a time of not less than ten days prior to the hearing. Additional designated examiners may be appointed by the court. The additional examiners may be physicians or any other person the court has determined is qualified to evaluate the primary respondent's alleged impairment. The subsection also clarifies prior law, by establishing the examiner may make his report from information obtained in an examination conducted prior to the examiner's appointment. If the examiner's report references an examination conducted prior to appointment, it must have been conducted within the ninety days immediately preceding the hearing; otherwise the examination must occur subsequent to the appointment. /

**§ 62-5-306:**

Amend the bill further, as and if amended, by striking page 255, lines 19-42 and page 256, lines 1-22 in their entirety and inserting the following:

/ Section 62-5-306. ~~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.~~

(A) Every ward has the right to a guardian who acts in the best interest of the ward and, unless otherwise ordered by the court, every ward retains the following rights:

- (1) the right to a guardian who is reasonably accessible to the ward;
- (2) the right to have a ward's property utilized to provide adequately for a ward's support, care, education, health, and welfare;
- (3) the right to communicate freely and privately with persons other than the guardian;
- (4) the right to a reasonably accessible telephone or similar communication device;
- (5) the right to meet or otherwise communicate with legal counsel outside the presence of the guardian;
- (6) the right to notify the court that a ward is being unjustly denied a right or privilege retained under or granted by this section or ordered by the court. Any person who knowingly interferes with transmission of this type of notification to the court may be adjudicated guilty of contempt;
- (7) the right to request readjudication of incapacity as set forth in Section 62-5-311(3); and
- (8) the right to the least restrictive form of guardianship and living environment practicable, taking into consideration a ward's functional limitations, personal needs, and identifiable preferences.

(B) A finding of incapacity or the appointment of a guardian is not a determination that a ward lacks testamentary capacity or the capacity to create, amend or revoke a revocable trust.

**REPORTER'S COMMENTS**

Section 62-5-306 is a new section added by the 2012 amendment which lists the rights retained by the ward, unless otherwise ordered by the court. The section also addresses the common law rule that a finding of incapacity is not a determination that the ward lacks testamentary capacity.

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**§ 62-5-307**

Amend the bill further, as and if amended, by striking page 257, lines 4-40 in their entirety and inserting the following:

/ (A) Unless a court's order specifies otherwise, the appointment of a guardian without limitation shall remove from a ward the following rights and powers:

- (1) the right to marry;
- (2) the right to reside in a place of a ward's choosing;
- (3) the right to travel without the consent of a guardian;
- (4) except as otherwise provided in Section 62-5-306(A)(6) and (7), the right to bring or defend any action at law or equity;
- (5) the power to make, modify, or terminate contracts;
- (6) the power to refuse or consent to medical treatment.

(B) Upon appointment of a guardian with limitation, a court must set forth in its order which rights enumerated in subsection (A) are retained by a ward and which are removed from a ward.

(C) Unless a court's order specifies otherwise, the appointment of a guardian suspends the authority of an agent who was previously appointed by a ward to act as an agent under a durable power of attorney for health care or other advance medical directive. The suspension of the authority of an agent does not abrogate any other directives included in a properly executed advance medical directive.

**REPORTER'S COMMENTS**

Section 62-5-307 is a new section added by the 2012 amendment that lists the rights which are lost when guardianship without limitation or full guardianship is sought. The court may specify that some or all of these rights are retained even in a guardianship without limitation, but the rights are lost if the court does not specify the rights are retained. For limited guardianship, the court must list the specific rights which are lost. For example, an individual may not have the capacity to understand his health care needs to the extent necessary to consent to treatment, but he may be able to understand and appreciate the benefits of one living arrangement over another. In that circumstance, a ward may lose the right to make health care decisions but may maintain the right to make decisions about where he resides. /

**§62-5-403 (E)**

Amend the bill further, as and if amended, by striking page 278, lines 26-40 in their entirety and inserting the following:

/ (E) The primary respondent is entitled to be represented by his counsel of choice. If a court has not received written notification within fifteen days of service of the pleadings upon the primary respondent that counsel has been retained, the court shall appoint counsel to represent the primary respondent in the proceeding. /

**REPORTERS COMMENTS FOR § 62-5-403(E)**

Amend the bill further, as and if amended, by striking page 282, lines 21-39 in their entirety and inserting the following:

/ Subsection (E) provides that the primary respondent is entitled to be represented by an attorney of his or her choosing. If a court has not received, within fifteen days of service of the pleadings, written notification that the primary respondent has legal representation, the court shall appoint an attorney to represent the primary respondent. /

**§ 62-5-432**

Amend the bill further, as and if amended, by striking page 331, lines 15-43, page 332, lines 1-43, and page 333, lines 1-42, in their entirety and inserting the following:

/ (B)(1) The settlement of a claim in favor of or against any minor or incapacitated person, for whom a conservator has previously been appointed and is serving, only may be effected by the conservator for such minor or incapacitated person.

(2) If no conservator has previously been appointed, only claims that do not exceed five thousand dollars in favor of or against any minor or incapacitated person may be effected by: (i) the parent or guardian of the minor; (ii) a guardian appointed under Part 3 of this article for an incapacitated person; or (iii) a guardian ad litem appointed by the court for the minor or incapacitated person. The settlement of the claim may be effected without court approval and without the subsequent appointment of a conservator for the minor or incapacitated person. If the settlement requires the payment of money or the delivery of personal property for the benefit of the minor or incapacitated person, the payment or delivery must be made to a conservator previously appointed for the minor or incapacitated person or, if no conservator has been previously appointed, shall be made in accordance with Section 62-5-103, in which case the person receiving the money or personal property on behalf of the minor or incapacitated person shall be authorized to execute a proper receipt and release or covenant not to sue, which shall be binding upon the minor or incapacitated person.

(3) If a conservator has been appointed for a minor or an incapacitated person, then the settlement of a claim that is less than ten thousand dollars in favor of or against any minor or incapacitated person shall be effected only by the conservator for the minor or incapacitated person. The settlement may be effected without court approval. The settlement of a claim that is more than ten thousand dollars but less than twenty-five thousand dollars in favor of or against a minor or incapacitated person requires the appointment of a conservator for the minor or incapacitated person unless one has been previously appointed and is serving. Settlement of a claim with a value of more than ten thousand dollars requires court approval that the conservator may attain only as follows:

(a) The conservator must file with the court an application or motion 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 conservator, the proposed settlement is fair and reasonable and should be approved by the court. The application or motion must include a statement by the conservator that, in his opinion, the proposed settlement is in the best interests of the minor or incapacitated person. Notice of hearing must be given to the minor or incapacitated person's guardian, the spouse, any adult children whose whereabouts are known or reasonably ascertainable, and if there is no spouse or adult children, the parents whose whereabouts are known or reasonably ascertainable. The court may approve or deny any application or motion for approval of a settlement filed by the conservator after notice and a hearing, or may in its discretion require the commencement of a formal proceeding under Section 62-5-428.

(b) If, upon consideration of the application or motion 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 conservator to consummate it and execute a proper receipt and release or covenant not to sue, which shall be binding upon the minor or incapacitated person.

(c) Except as provided in subitem (d), the order authorizing the settlement must require that payment or delivery of the money or personal property to or in favor of a minor or incapacitated person be paid to the conservator for the benefit of the minor or incapacitated person.

(d) If based upon the facts set forth in the application or motion or presented during the hearing, the probate court finds it is in the best interest of the minor or incapacitated person, the court may order any settlement proceeds placed in a special needs trust which complies with the provisions of 42 U.S.C. 1396p(d)(4)(A) or in a pooled fund trust which complies with the provisions of 42 USC 1396p(d)(4)(C).

(4) Settlement of a claim with a value exceeding twenty-five thousand dollars requires circuit court approval, which the conservator may attain only as follows:

(a) The conservator must file with the circuit court a motion 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 conservator, the proposed settlement is fair and reasonable and should be approved by the circuit court. The motion must include a statement by the conservator that, in his opinion, the proposed settlement is in the best interests of the minor or incapacitated person. Notice of hearing must be given to the minor or incapacitated person's guardian, the spouse, any adult children whose whereabouts are known or reasonably ascertainable, and if there is no spouse or adult children, the parents whose whereabouts are known or reasonably ascertainable. The circuit court may approve or deny any motion for approval of a settlement filed by the conservator after notice and a hearing.

(b) If, upon consideration of the petition and after hearing the testimony as it may require concerning the matter, the circuit court concludes that the proposed settlement is proper and in the best interests of the minor or incapacitated person, the circuit court shall issue its order approving the settlement and authorizing the conservator to consummate it and execute a proper receipt and release or covenant not to sue, which shall be binding upon the minor or incapacitated person.

(c) Except as provided in subitem (d), the order authorizing the settlement must require that payment or delivery of the money or personal property to or in favor of a minor or incapacitated person be paid to the conservator for the benefit of the minor or incapacitated person.

(d) If based upon the facts set forth in the application or motion or presented during the hearing, the circuit court finds it is in the best interest of the minor or incapacitated person, the circuit court may order any settlement proceeds placed in a special needs trust which complies

with the provisions of 42 U.S.C. 1396p(d)(4)(A) or in a pooled fund trust which complies with the provisions of 42 USC 1396p(d)(4)(C).

(5) If a party subject to a court order fails or refuses to pay the money or deliver the personal property as required by the order, the party may be found to be liable and punishable for contempt of court, but failure or refusal does not affect the validity or conclusiveness of the settlement.

#### REPORTER'S COMMENTS

As revised by the 2012 amendment, this section was formerly Section 62-5-433 which has been substantially modified. It addresses the settlement of claims in favor of or against a minor or incapacitated person.

Item (A) contains definitions applicable to this section.

Item (B)(1) states that if a conservatorship is in place, only the conservator may settle the claim.

Item (B)(2) provides that claims not in excess of \$5,000.00 may be settled by a parent, guardian, or guardian ad litem without court approval, if no conservator has been appointed. If there is a conservator, any funds or property would be delivered to the conservator. If there is no conservator, funds or property could be delivered in accordance with Section 62-5-103.

Item (B)(3) provides that claims not in excess of \$10,000 may be settled by a conservator without court approval. Claims over \$10,000.00 but less than \$25,000 require the appointment of a conservator and either probate or circuit court approval to effect the settlement.

Item (B)(4) addresses claims over \$25,000.00 and requires the conservator to obtain circuit court approval to effect the settlement.

Item (B)(5) addresses the jurisdiction of a probate or circuit court to hold in contempt a party who refuses to pay or deliver the personal property and continues the provision in previous law that the failure or refusal of a party does not affect the validity or conclusiveness of the settlement. /



**§ 62-5-516:**

Amend the bill further, as and if amended, by striking page 370, lines 29-40 in their entirety and inserting the following:

/ (1) the instrument contains the following provision or a substantially similar provision:

‘No person who may act in reliance upon the representations of my agent for the scope of authority granted to the agent shall incur any liability as to me or to my estate as a result of permitting the agent to exercise this authority, nor is any such person who deals with my agent responsible to determine or insure the proper application of funds or property.’; or

(2) the agent signs and presents to the third person a written certificate as provided in Section 62-5-517. /

**§ 62-5-524 (Paragraph 8-Statement of Desires Regarding Tube Feeding)**

Amend the bill further, as and if amended, by striking page 386, lines 29-33 in their entirety and inserting the following:

/ IF YOU DO NOT INITIAL ANY OF THE STATEMENTS IN PARAGRAPH 8, YOUR  
AGENT WILL NOT HAVE THE AUTHORITY TO DIRECT THAT NUTRITION AND  
HYDRATION NECESSARY FOR COMFORT, CARE, OR ALLEVIATION OF PAIN BE  
WITHDRAWN. /