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Subject: SC Bar Article 5 Legislation- Comment Period



Improving the Process for Appointment of Guardians and Conservators in the South Carolina Probate Courts: Phase 2

The Elder Law Committee (ELC) of the South Carolina Bar, in cooperation with the South Carolina Association of Probate Judges Article 5 Committee, has spent the last year working on recommendations to improve the process for appointment of guardians and conservators in South Carolina Probate Courts. Starting in February of 2015 and continuing until July 2015, the SC Bar publicized the ELC's goals for amending Article 5 of the Probate Code relating to guardianships and conservatorships, along with a list of changes being considered. The public had an opportunity to comment on those goals—and the comments were overwhelmingly favorable of the goals established by the SC Bar. All comments were considered and many of the suggestions made by the public were incorporated into the drafted changes to Article 5. The completed code, with all of the drafted changes, is available [here](#).

Written comments may be sent by e-mail to article5comments@scbar.org or mailed to the South Carolina Bar, Attn. Caitlin Watson, P.O. Box 608, Columbia, SC 29202. **Comments must be submitted by March 11, 2016.**

Below is a list of the established goals with some of the recommended changes relating to each goal.

- **Simplify and clarify the process to promote uniformity throughout the state.** The committee recommends many changes to implement this goal. We learned that throughout the state, many probate courts use different processes and procedures, frequently causing confusion. The drafted code is much longer than the current code, but the committee felt that the specifics were necessary for clarity and consistency. Some of the specific recommendations are as follows:
 - Clarify that the probate court has the authority to allow indigent litigants to proceed without paying fees, known as the ability to grant a motion to proceed in forma pauperis.
 - Added definitions to Section 62-5-101 to promote clarity and consistency.
 - Established that the court may award costs and expenses, including reasonable attorney's fees.
 - Setting forth a specific procedure for emergency and temporary orders. This section is in Part 1 to not only promote consistency throughout the state but to promote consistency between guardianship procedures and conservatorship procedures.
 - Specifying the information which must be included in the petition, guardian ad litem report, and the examiner's report.
 - Setting out the powers and duties of a conservator in the administration of the estate of the protected person.
- **Ensure adequate due process protections for the allegedly incapacitated individual.** The committee attempted to appropriately balance the rights of the allegedly incapacitated individual against increasing in the cost of the process. One major recommended change is to separate the role of the attorney for the allegedly incapacitated individual and the role of the guardian ad litem. Because the role of the guardian ad litem is crucial to the process, the committee recommends that both a guardian ad litem and an attorney be appointed in every case. Additional protections for the individual are as follows:
 - Establish a clear and convincing evidentiary standard for both guardianships and conservatorships.

- o Define incapacity to make it clear that if someone can provide for their care or manage their money with supports and assistance, then they are not incapacitated to the extent they need a guardian or to the extent they need a conservator.
- o Define counsel for alleged incapacitated individual as being charged with representing the expressed wishes of the individual.
- o Set forth the duties and the responsibilities of the guardian ad litem in Part 1, meaning they apply to both guardianships and conservatorships. The detailed duties outlined will promote consistency as well as ensure that the allegedly incapacitated individual's wishes are considered and heard. Also, the guardian ad litem must investigate whether there is a less restrictive alternative to guardianship or conservatorship.
- o Specifying the information required to be in the petition, including why less restrictive alternatives to guardianship or conservatorship are not available or appropriate and what rights are requested to be removed.
- o The alleged incapacitated individual must be personally served with the summons and petition along with a notice explaining that counsel will be appointed for the individual if they do not have counsel.
- o The alleged incapacitated individual is entitled to be at the hearing and the individual's presence may not be waived by the guardian ad litem or the court.
- o As is currently the law, the court is to exercise its authority to encourage the development of maximum self-reliance and to use its authority only as necessitated by the individual's limitations.
The committee drafted the proposed legislation to hopefully provide the means to ensure that guardianships and conservatorships are only established when necessary and appropriate and when there is no less restrictive alternative.
- **Increase the availability and practicality of limited guardianships.** The recommended changes create the default of a limited guardianship rather than defaulting to a plenary guardianship by default. This is accomplished by requiring the petition to set forth what rights the petitioner is requesting that the court remove from the alleged incapacitated individual. The guardian ad litem must review these rights with the alleged incapacitated individual. The examiner must list what rights the individual should retain. Finally, the court must specify in its order which rights are removed. Even with these changes to the code, ending an overreliance on plenary guardianships will require additional work, including education of attorneys, the judiciary, and the public.
- **Reduce the cost of the process.** The committee found several ways to reduce cost of the process through changes to the code. The recommended changes to the probate code to reduce costs are listed below:
 - o Remove the requirement that the guardian ad litem must be an attorney, while ensuring that the guardian ad litem is a qualified professional—namely licensed in law, social work, nursing, medicine, or psychology or who has completed training which satisfies the court. However, because in some extreme cases the non-attorney guardian ad litem may need the advice of an attorney, the recommended code includes this option. The committee felt like exercising that option would only be necessary in contested cases. According to the experienced judges and attorneys on the committee, contested cases are on the rise, but are still relatively rare.
 - o Combine the guardian ad litem role and the visitor role.
 - o Require only one designated examiner. A second examiner may be appointed upon request or on the court's own motion.
 - o If all parties consent, a hearing is not required for a protective order, including the establishment of a special needs trust. A hearing is still required for the appointment of a conservator.
 - o Allow for the creation of a special needs trust for a competent adult with a disability, without the need for a hearing or the appointment of a conservator.
 - o Please note that the committee discussed at length whether there could be a “short-cut” process to guardianship without violating the due process rights of the allegedly incapacitated individual. After much discussion, the committee determined that if guardianship is necessary, then full due process, as outlined in the code, is recommended. To reduce the costly burden of obtaining guardianship, the committee discussed the need for additional alternatives to guardianship and the ELC will continue to review and monitor those options. Some of the alternatives discussed by the committee include supported decision making, broadening of the Adult Healthcare Consent Act, promotion of use of a Health Care Power of Attorney, and the creation of an educational representative program.
- **Create consistency between conservatorships and guardianship actions.** This goal was primarily

accomplished by moving some of the procedures applicable to both guardianship and conservatorship action Part 1, General Provisions. Uniformity is established by consistently using the same organization and language, except where a change was appropriate given the nature of the two different procedures.

- **Establish a system for adequate monitoring of guardians and conservators.** The committee makes the following recommendations to accomplish this goal:
 - o The ward or any person interested in his welfare may informally request relief, and the court may act as is reasonable and appropriate. The recommendation allows for individuals who may have concerns regarding the welfare of the ward to ask the court to investigate.
 - o Explicitly setting forth the obligation of the guardian to ensure the ward is receives appropriate care.
 - o Requiring the establishment and filing and updating of a plan of care for the ward and permitting the court to require a financial plan for a protected person.