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122nd Session, 2017-2018

**S. 415**

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2/14/2017	Senate	Introduced and read first time ( <a href="#">Senate Journal-page 11</a> )
2/14/2017	Senate	Referred to Committee on <b>Judiciary</b> ( <a href="#">Senate Journal-page 11</a> )

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**VERSIONS OF THIS BILL**

[2/14/2017](#)

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**A BILL**

11 TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA,  
12 1976, BY ADDING SECTION 62-1-112 SO AS TO CLARIFY  
13 THE PROBATE COURT'S AUTHORITY TO IMPOSE  
14 PENALTIES FOR CONTEMPT AND TO GRANT A MOTION  
15 FOR A PARTY TO PROCEED IN FORMA PAUPERIS; TO  
16 AMEND SECTION 8-21-800, RELATING TO RELIEF FROM  
17 FILING FEES, COURT COSTS, AND PROBATE COSTS, SO  
18 AS TO CLARIFY THAT THE PROBATE JUDGE MAY WAIVE  
19 FILING FEES FOR INDIGENT PERSONS IN THE SAME  
20 MANNER AS OTHER CIVIL CASES; TO AMEND SECTION  
21 62-1-302, AS AMENDED, RELATING TO SUBJECT MATTER  
22 JURISDICTION AND CONCURRENT JURISDICTION WITH  
23 FAMILY COURT, SO AS TO CLARIFY THE COURT'S  
24 JURISDICTION IN MATTERS INVOLVING THE  
25 ESTABLISHMENT, ADMINISTRATION, OR TERMINATION  
26 OF A SPECIAL NEEDS TRUST FOR DISABLED  
27 INDIVIDUALS AND TO REVISE OUTDATED  
28 TERMINOLOGY; TO AMEND SECTION 62-1-401, AS  
29 AMENDED, RELATING TO NOTICE, SO AS TO AUTHORIZE  
30 NOTICE TO BE MADE BY A QUALIFYING COMMERCIAL  
31 DELIVERY SERVICE AND IS SIMILAR TO NOTICE BY  
32 REGISTERED MAIL OR CERTIFIED MAIL; TO STRIKE  
33 PARTS 1, 2, 3, 4, AND 7, ARTICLE 5, TITLE 62, AND TO ADD  
34 NEW AND REVISED PROVISIONS RELATING TO THE  
35 PROTECTION OF PERSONS UNDER DISABILITY AND  
36 THEIR PROPERTY, SO AS TO PROMOTE UNIFORMITY  
37 AMONG THE STATE'S FORTY-SIX PROBATE COURTS, TO  
38 SAFEGUARD ADEQUATE DUE PROCESS PROTECTIONS  
39 FOR THE STATE'S ALLEGED INCAPACITATED  
40 INDIVIDUALS, TO ELIMINATE OVER RELIANCE UPON  
41 RESTRICTIVE FULL OR PLENARY GUARDIANSHIPS, TO  
42 REDUCE THE COSTS OF PROCEEDINGS, TO ESTABLISH

1 CONSISTENCY BETWEEN GUARDIANSHIP AND  
2 CONSERVATORSHIP PROCEEDINGS, AND TO CREATE AN  
3 ADEQUATE SYSTEM FOR MONITORING GUARDIANS  
4 AND CONSERVATORS.

5  
6 Be it enacted by the General Assembly of the State of South  
7 Carolina:

8  
9 SECTION 1. Part 1, Article 1, Title 62 of the 1976 Code is  
10 amended by adding:

11  
12 “Section 62-1-112. The inherent power of the court to impose  
13 penalties for contempt extends to all filing requirements,  
14 proceedings, judgments, and orders of the court. The court has the  
15 power to grant a motion to proceed in forma pauperis.”

16  
17 REPORTER’S COMMENTS

18  
19 This section was enacted in 2017 to clarify the probate court’s  
20 authority to impose penalties for contempt and to grant a motion  
21 for a party to proceed in forma pauperis.

22  
23 SECTION 2. Section 8-21-800 of the 1976 Code is amended to  
24 read:

25  
26 “Section 8-21-800. The Probate Judge may relieve any party to  
27 ~~any~~ a proceeding in the Probate Court from court costs in the  
28 manner provided in Section 8-21-140, but relief from filing fees  
29 and other probate costs is prohibited, except as provided in Section  
30 8-21-810.

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

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

37 (3) The Probate Judge is prohibited from waiving fees or court  
38 costs associated with the value of an estate or conservatorship as  
39 provided in Section 8-21-770(B), except as provided in Section  
40 8-21-810.”

41  
42 REPORTER’S COMMENTS

43

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

9

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

12

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

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

25 (2) subject to Part 7, Article 5, ~~and excluding jurisdiction~~  
26 ~~over the care, custody, and control of a person or minor:~~

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

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

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

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

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

40 (5) the performance of the duties of the clerk of the circuit  
41 and family courts of the county in which the probate court is held  
42 when there is a vacancy in the office of clerk of court and in  
43 proceedings in eminent domain for the acquisition of rights of way

1 by railway companies, canal companies, governmental entities, or  
2 public utilities when the clerk is disqualified by reason of  
3 ownership of or interest in lands over which it is sought to obtain  
4 the rights of way; and

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

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

13 (c) The probate court has jurisdiction to hear and determine  
14 issues relating to paternity, common-law marriage, and  
15 interpretation of marital agreements in connection with estate,  
16 trust, guardianship, and conservatorship actions pending before it,  
17 concurrent with that of the family court pursuant to Section  
18 63-3-530.

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

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

29 (2) construction of wills;

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

32 (4) matters involving the internal or external affairs of trusts  
33 as provided in Section 62-7-201, excluding matters involving the  
34 establishment of a 'special needs trust' as described in Article 7;

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

38 (6) actions concerning gifts made pursuant to the South  
39 Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title  
40 63.

41 (e) The removal to the circuit court of an action or proceeding  
42 within the exclusive jurisdiction of the probate court applies only

1 to the particular action or proceeding removed, and the probate  
2 court otherwise retains continuing exclusive jurisdiction.

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

14

15

#### REPORTER'S COMMENTS

16

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

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

34 Section 63-1-40(1) of the South Carolina Children's Code  
35 defines a "child" as a person under the age of eighteen. Section  
36 63-1-40(2) of the Children's Code defines a "Guardian" as a  
37 person who legally has the care and management of a child.  
38 Section 62-5-101(1) of the S.C. Probate Code defines an "adult" as  
39 an individual who has attained the age of eighteen or who, if under  
40 eighteen, is married or has been emancipated by a court of  
41 competent jurisdiction.

42 Therefore, the exclusive jurisdiction to appoint a guardian  
43 and/or conservator for an adult rests with the probate court,

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

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

28 The language of this section is similar to Section 14-23-1150 of  
29 the 1976 Code, which in item (a) provides that probate judges are  
30 to have jurisdiction as provided in Sections 62-1-301 and  
31 62-1-302, and other applicable sections of this South Carolina  
32 Probate Code.

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

41 The 2017 amendments re-wrote the introductory sentence of  
42 (a)(2) and removed “subject to” in order to make the language  
43 more clear. In addition, (a)(2)(iii) was added, which deals with the

1 probate court's exclusive jurisdiction in matters involving special  
2 needs trusts for disabled individuals.

3  
4 SECTION 4. Section 62-1-401 of the 1976 Code is amended to  
5 read:

6  
7 "Section 62-1-401. (a) If notice of a hearing on ~~any~~ a petition  
8 is required and, except for specific notice requirements as  
9 otherwise provided, the petitioner shall cause notice of the time  
10 and place of hearing of ~~any~~ a petition to be given to any interested  
11 person or his attorney if he has appeared by attorney or requested  
12 that notice be sent to his attorney. Notice ~~shall~~ must be given:

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

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

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

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

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

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

36  
37 REPORTER'S COMMENTS

38  
39 This section provides that, where notice of hearing on a petition  
40 is required, the petitioner shall give notice to any interested person  
41 or his attorney (1) by mailing or commercial delivery at least  
42 twenty days in advance of the hearing, or (2) by personal delivery  
43 at least twenty days in advance of the hearing, or (3) if the person's



1 address or identity is not known and cannot be ascertained, by  
2 publication as in the court of common pleas.

3 Under this Code, when a petition is filed with the court, the  
4 court is to fix a time and place of hearing and it is then the  
5 responsibility of the petitioner to give notice as provided in Section  
6 62-1-401. See, for example, Sections 62-3-402 and 62-3-403.

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

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

18

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

21

22 **“Part 1**

23

24 **General Provisions**

25

26 ~~Section 62-5-101. Unless otherwise apparent from the context,~~  
27 ~~in this Code:~~

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

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

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

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

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

5  
6 **REPORTER’S COMMENTS**  
7

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

12 Under this Code, a fiduciary appointed to manage the assets of any  
13 person under disability is referred to as a conservator. See Section  
14 62-1-201(6).

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

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

27  
28 **SOUTH CAROLINA REPORTER’S COMMENTS (2010**  
29 **REVISION)**  
30

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

35  
36 Section 62-5-102. (a) The probate court has jurisdiction over  
37 protective proceedings and guardianship proceedings.

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

41  
42 **REPORTER’S COMMENTS**  
43

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

8

9 Section 62-5-103. A person under a duty to pay or deliver  
10 money or personal property to a minor or incapacitated person may  
11 perform this duty in amounts not exceeding ten thousand dollars  
12 each year, by paying or delivering the money or property to:

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

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

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

21 This section does not apply if the person making payment or  
22 delivery has actual knowledge that a conservator has been  
23 appointed or proceedings for appointment of a conservator of the  
24 estate of the minor or incapacitated person are pending. The  
25 persons, other than the minor or incapacitated person or a financial  
26 institution under (3) above, receiving money or property for a  
27 minor or incapacitated person, are obligated to apply the money for  
28 the benefit of the minor or incapacitated person with due regard to  
29 (i) the size of the estate, the probable duration of the minority or  
30 incapacity, and the likelihood that the minor or incapacitated  
31 person, at some future time, may be able fully to manage his  
32 affairs and his estate; (ii) the accustomed standard of living of the  
33 minor or incapacitated person and members of his household; and  
34 (iii) other funds or sources used for the support of the minor or  
35 incapacitated person, but may not pay themselves except by way of  
36 reimbursement for out of pocket expenses for goods and services  
37 necessary for the minor's or incapacitated person's support. Money  
38 or other property received on behalf of a minor or incapacitated  
39 person may not be used by a person to discharge a legal or  
40 customary obligation of support that may exist between that person  
41 and the minor or incapacitated person. Excess sums must be  
42 preserved for future benefit of the minor or incapacitated person,  
43 and a balance not used and property received for the minor or

1 incapacitated person must be turned over to the minor when he  
2 attains majority or to the incapacitated person when he is no longer  
3 incapacitated. Persons who pay or deliver in accordance with  
4 provisions of this section are not responsible for the proper  
5 application of it.

6  
7 **REPORTER'S COMMENTS**  
8

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

14  
15 Section 62-5-104. A guardian of an incapacitated person, by a  
16 properly executed power of attorney, may delegate to another  
17 person, for not more than thirty days, any of his powers regarding  
18 care and custody of the incapacitated person.

19  
20 **REPORTER'S COMMENTS**  
21

22 This section allows a parent or a guardian of any incapacitated  
23 person to delegate temporarily to someone else his responsibilities  
24 with respect to the person of such incapacitated person. Such  
25 delegation cannot exceed six months and is effected by means of  
26 the execution of a power of attorney.

27 Editor's Note

28 The Reporter's Comments do not reflect the amendment made by  
29 1997 Act No. 152, Section 21, which changed the time period for a  
30 delegation of powers from six months to thirty days.

31  
32 Section 62-5-105. If a patient of a state mental health facility  
33 has no legally appointed conservator, the Director of the  
34 Department of Mental Health or his designee may receive and  
35 accept for the use and benefit of that patient a sum of money, not  
36 in excess of the sum of ten thousand dollars in one calendar year,  
37 which may be due the patient or trainee by inheritance, gift,  
38 pension, or otherwise. The director or his designee may act as  
39 conservator for the patient and his endorsement or receipt  
40 discharges the obligor for the sum received. Upon receipt of these  
41 funds the director or his designee shall use it for the proper  
42 maintenance, use, and benefit of the patient or as much of the fund  
43 as may be necessary for these purposes. In the event the patient

1 dies leaving an unexpended balance of these funds in the hands of  
2 the director or his designee, he shall apply the balance first to the  
3 funeral expenses of the patient or trainee, and any balance  
4 remaining must be held by the director or his designee for a period  
5 of six months, and if he is not within this period, contacted by the  
6 personal representative of the deceased patient, the balance in the  
7 personal fund account must be applied to the maintenance and  
8 medical care account of the deceased patient.

9  
10 Section 62-5-106. (A) For purposes of this section,  
11 "incapacitated person" has the meaning set forth in Sections  
12 62-5-101(1) and 62-5-401(2) and does not include a person  
13 protected only by reason of his minority.

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

20  
21 Part 2

22  
23 Jurisdiction

24  
25 SECTION 62-5-201. The family courts of this State have  
26 jurisdiction over the care, custody, and control of the persons of  
27 minors.

28  
29 Part 3

30  
31 Guardians of Incapacitated Persons

32  
33 Section 62-5-301. (a) The parent of an incapacitated person  
34 may by will appoint a guardian of the incapacitated person. A  
35 testamentary appointment by a parent becomes effective when,  
36 after having given twenty days prior written notice of intention to  
37 the incapacitated person and to the person having his care or to his  
38 nearest adult relative, the guardian files acceptance of appointment  
39 in the court in which the will is informally or formally probated, if  
40 prior thereto, both parents are dead or the surviving parent is  
41 adjudged incapacitated. If both parents are dead, an effective  
42 appointment by the parent who died later has priority unless it is  
43 terminated by the denial of probate in formal proceedings.

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

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

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

22  
23 ~~Section 62-5-302. The venue for guardianship proceedings for~~  
24 ~~an incapacitated person is in the place where the incapacitated~~  
25 ~~person resides or is present. If the incapacitated person is admitted~~  
26 ~~to an institution pursuant to order of a court of competent~~  
27 ~~jurisdiction, venue is also in the county in which that court sits.~~

28  
29 ~~Section 62-5-303. (a) The incapacitated person or a person~~  
30 ~~interested in his welfare may petition for a finding of incapacity~~  
31 ~~and appointment of a guardian.~~

32 (b) ~~Upon the filing and service of the summons and the petition~~  
33 ~~the court shall send a visitor to the place where the allegedly~~  
34 ~~incapacitated person resides to observe conditions and report in~~  
35 ~~writing to the court. The court shall set a date for hearing on the~~  
36 ~~issues of incapacity and unless the allegedly incapacitated person~~  
37 ~~has counsel of his own choice, it shall appoint an attorney to~~  
38 ~~represent him in the proceedings and that attorney shall have the~~  
39 ~~powers and duties of a guardian ad litem. The person alleged to be~~  
40 ~~incapacitated shall be examined by two examiners, one of whom~~  
41 ~~shall be a physician appointed by the court who shall submit their~~  
42 ~~reports in writing to the court. The person alleged to be~~  
43 ~~incapacitated is entitled to be present at the hearing in person, and~~

1 to see or hear all evidence bearing upon his condition. He is  
2 entitled to be represented by counsel, to present evidence including  
3 testimony by a physician of his own choosing, to cross-examine  
4 witnesses, including the court-appointed examiners. The issue may  
5 be determined at a closed hearing if the person alleged to be  
6 incapacitated or his counsel so requests.

7

8 SOUTH CAROLINA REPORTER'S COMMENTS (2010  
9 REVISION)

10

11 The 2010 amendment revised subsection (a) to delete "any" and  
12 replace it with "a" and revise subsection (b) to add "and service"  
13 and "the summons and the" in the first sentence to clarify that a  
14 summons and petition are required in a formal proceeding,  
15 including a guardianship proceeding. See 2010 amendments to  
16 certain definitions in S.C. Code Section 62-1-201 and also see  
17 Sections 14-23-280, 62-1-304, and Rules 1 and 81, SCRCP. (2011  
18 Act No. 2, Section 2.)

19

20 Section 62-5-304. (A) The court shall exercise the authority  
21 conferred in this part so as to encourage the development of  
22 maximum self-reliance and independence of the incapacitated  
23 person and make appointive and other orders only to the extent  
24 necessitated by the incapacitated person's mental and adaptive  
25 limitations or other conditions warranting the procedure.

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

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

34 (2) enter another appropriate order; or

35 (3) dismiss the proceeding.

36 (C) The court, at the time of appointment or later, on its own  
37 motion or on appropriate petition or motion of the incapacitated  
38 person or other interested person, may limit the powers of a  
39 guardian otherwise conferred by this article and create a limited  
40 guardianship. A limitation on the statutory power of a guardian of  
41 an incapacitated person must be endorsed on the guardian's letters  
42 or, in the case of a guardian by parental or spousal appointment,  
43 must be reflected in letters issued at the time a limitation is

1 imposed. Following the same procedure, a limitation may be  
2 removed or modified and appropriate letters issued.

3  
4 ~~Section 62-5-305. By accepting appointment, a guardian~~  
5 ~~submits personally to the jurisdiction of the court in any~~  
6 ~~proceeding relating to the guardianship that may be instituted by~~  
7 ~~any interested person. Notice of any proceeding shall be delivered~~  
8 ~~to the guardian or mailed to him by ordinary first class mail at his~~  
9 ~~address as listed in the court records and to his address as then~~  
10 ~~known to the petitioner.~~

11  
12 **SOUTH CAROLINA REPORTER'S COMMENTS (2010**  
13 **REVISION)**  
14

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

19  
20 ~~Section 62-5-306. The authority and responsibility of a~~  
21 ~~guardian for an incapacitated person terminates upon the death of~~  
22 ~~the guardian or ward, the determination of incapacity of the~~  
23 ~~guardian, or upon removal or resignation as provided in Section~~  
24 ~~62-5-307. Testamentary appointment under an informally probated~~  
25 ~~will terminates if the will is later denied probate in a formal~~  
26 ~~proceeding. Termination does not affect his liability for prior acts~~  
27 ~~nor his obligation to account for funds and assets of his ward.~~

28  
29 ~~Section 62-5-307. (a) After service of the summons and~~  
30 ~~petition of the ward or any person interested in his welfare, the~~  
31 ~~court may remove a guardian and appoint a successor if in the best~~  
32 ~~interests of the ward. On petition of the guardian, the court may~~  
33 ~~accept his resignation and make any other order which may be~~  
34 ~~appropriate.~~

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



1 transmission of this kind of request to the court or judge may be  
2 adjudged guilty of contempt of court.

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

10

11 SOUTH CAROLINA REPORTER'S COMMENTS (2010  
12 REVISION)

13

14 The 2010 amendment revised subsection (a) to delete "On" and  
15 replace it with "After service of the summons and" at the  
16 beginning of the first sentence. The intention of the amendment to  
17 subsection (a) was to clarify that a summons and petition are  
18 required in a formal proceeding, including a guardianship  
19 proceeding. See 2010 amendments to certain definitions in S.C.  
20 Code Section 62-1-201 and also see Sections 14-23-280, 62-1-304,  
21 and Rules 1 and 81, SCRPC.

22 The 2010 amendment also revised subsection (b) to delete "or any  
23 person interested in his welfare," delete "petition" and replace it  
24 with "make a request," add "from the court", and delete "or  
25 resignation." The intention of the amendment to subsection (b) was  
26 to allow only the ward to make a request for an order from the  
27 court to request that he is no longer incapacitated and to remove  
28 the guardian, which request may be made by informal letter to the  
29 court or judge.

30 The 2010 amendment also revised subsection (c) to add "or  
31 request" after petition. The 2010 amendment to subsection (c) was  
32 to make a corresponding reference to a "request" as referred to in  
33 subsection (b). (2011 Act No. 2, Section 2.)

34

35 Section 62-5-308. A visitor is, with respect to guardianship  
36 proceedings, a person who is trained in law, nursing, or social  
37 work and is an officer, employee, or special appointee of the court  
38 with no personal interest in the proceedings.

39

40 Section 62-5-309. (A) In a proceeding that is properly  
41 commenced by filing and service of the summons and petition for  
42 the appointment or removal of a guardian of an incapacitated  
43 person other than the appointment of a temporary guardian or

1 temporary suspension of a guardian, the following persons must be  
2 properly served:

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

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

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

10 (B) Notice of hearing must be given as provided in Section  
11 62-1-401. Waiver of notice by the person alleged to be  
12 incapacitated is not effective unless he attends the hearing or his  
13 waiver of notice is given by his attorneys or, in proceedings for  
14 removal, confirmed in an interview with the visitor, which may be  
15 done at any time. Representation of the alleged incapacitated  
16 person by a guardian ad litem is not necessary.

17

18 SOUTH CAROLINA REPORTER'S COMMENTS (2010  
19 REVISION)  
20

20

21 The 2010 amendment revised subsection (A) to add "that is  
22 properly commenced by filing and service of the summons and  
23 petition", delete "notice of hearing," adding "the following  
24 persons," deleting "given to each of the following", and adding  
25 "properly served." The intention of the amendment to subsection  
26 (A) was to clarify that a summons and petition are required to  
27 commence a formal proceeding, including a formal proceeding for  
28 guardianship, and also that certain persons must be properly served  
29 with the summons and petition. See 2010 amendments to certain  
30 definitions in S.C. Code Section 62-1-201 and also see Sections  
31 14-23-280, 62-1-304, and Rules 1 and 81, SCRPC. The 2010  
32 amendment also revised subsection (B) to delete "must be served  
33 personally on the alleged incapacitated person and his spouse and  
34 parents if they are found within the state. Notice to the spouse and  
35 parents, if they cannot be found within the State, and to all other  
36 persons except the alleged incapacitated person" and add "of  
37 hearing" to clarify that the notice, which is a notice of hearing,  
38 must be given as referred to in Section 62-1-401. (2011 Act No. 2,  
39 Section 2.)

40

41 Section 62-5-310. (A) If the court makes emergency  
42 preliminary findings that:

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

3 (2) no guardian has been appointed previously; and

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

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

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

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

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

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

27 (b) an emergency exists.

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

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

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

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

4  
5 ~~REPORTER'S COMMENTS~~

6  
7 ~~Section 62-5-310 allows the court to appoint a temporary guardian~~  
8 ~~without petition and in effect could remove or appoint a temporary~~  
9 ~~guardian without a formal hearing process.~~

10  
11 ~~SOUTH CAROLINA REPORTER'S COMMENTS (2010~~  
12 ~~REVISION)~~

13  
14 ~~The 2010 amendment revised subsection (A)(3) and (B)(2) to add~~  
15 ~~“petition or” before notice and add “petition and” in subsection~~  
16 ~~(D). The intention of the 2010 amendment was to clarify that a~~  
17 ~~summons and petition are required to commence a formal~~  
18 ~~proceeding, including a formal proceeding for temporary~~  
19 ~~guardianship. See 2010 amendments to certain definitions in S.C.~~  
20 ~~Code Section 62-1-201 and also see Sections 14-23-280, 62-1-304,~~  
21 ~~and Rules 1 and 81, SCRPC. The 2010 amendment also revised~~  
22 ~~subsection (C) by deleting “If” at the beginning and replacing it~~  
23 ~~with “The court may itself exercise the power of temporary~~  
24 ~~guardian, with or without petition or notice, if,” deleting “then the~~  
25 ~~court may itself exercise the power of a temporary guardian, with~~  
26 ~~or without notice” from subsection (C)(4), and renumbering (C).~~  
27 ~~The intention of the latter amendment was to allow the court, with~~  
28 ~~or without petition or notice, to appoint and exercise the power of a~~  
29 ~~temporary guardian, if the court makes certain emergency~~  
30 ~~preliminary findings. (2011 Act No. 2, Section 2.)~~

31  
32 ~~Section 62-5-311. (A) Any competent person or a suitable~~  
33 ~~institution may be appointed guardian of an incapacitated person.~~

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

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

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

42 ~~(3) the spouse of the incapacitated person. A person who~~  
43 ~~claims to be a common-law spouse of the incapacitated person has~~

1 the burden of proving that status in order to qualify for  
2 appointment as a guardian under this provision. A decision by the  
3 probate court regarding the status of a common law spouse is for  
4 the purpose of guardianship appointment proceedings only and is  
5 not binding in any other court of law or in any administrative  
6 proceeding;

- 7 (4) an adult child of the incapacitated person;
- 8 (5) a parent of the incapacitated person, including a person  
9 nominated by will or other writing signed by a deceased parent;
- 10 (6) another relative of the incapacitated person;
- 11 (7) a person nominated by the person who is caring for him  
12 or paying benefits to him.

13

14

#### REPORTER'S COMMENTS

15

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

18

19 Section 62-5-312. (a) A guardian of an incapacitated person  
20 has the same powers, rights, and duties respecting his ward that a  
21 parent has respecting his unemancipated minor child except that a  
22 guardian is not liable to third persons for acts of the ward solely by  
23 reason of the parental relationship. In particular, and without  
24 qualifying the foregoing, a guardian has the following powers and  
25 duties, except as modified by order of the court:

26 (1) to the extent that it is consistent with the terms of any  
27 order by a court of competent jurisdiction relating to detention or  
28 commitment of the ward, he is entitled to custody of the person of  
29 his ward and may establish the ward's place of abode within or  
30 without this State.

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

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

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

1 (i)institute proceedings to compel any person under a duty  
2 to support the ward or to pay sums for the welfare of the ward to  
3 perform his duty;

4 (ii) receive money and tangible property deliverable to the  
5 ward and apply the money and property for support, care, and  
6 education of the ward; but, he may not use funds from his ward's  
7 estate for room and board or services which he, his spouse, parent,  
8 or child have furnished the ward unless a charge for the services  
9 and/or room and board is approved by order of the court made  
10 upon notice to at least one of the next of kin of the ward, if notice  
11 is possible. He must exercise care to conserve any excess for the  
12 ward's needs.

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

17 (6) If a conservator has been appointed, all of the ward's  
18 estate received by the guardian in excess of those funds expended  
19 to meet current expenses for support, care, and education of the  
20 ward must be paid to the conservator for management as provided  
21 in this Code, and the guardian must account to the conservator for  
22 funds expended.

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

31  
32 **REPORTER'S COMMENTS**

33  
34 Section 62-5-312(1) would allow the guardian to establish the  
35 ward's place of abode within or without the State.

36  
37 Section 62-5-313. (a) The court which appointed the  
38 guardian, or in which acceptance of a testamentary appointment  
39 was filed, has jurisdiction over resignation, removal, accounting,  
40 and other proceedings relating to the guardianship.

41 (b) If the court which appointed the guardian, or in which  
42 acceptance of appointment is filed, being the court in which  
43 proceedings subsequent to appointment are commenced,

1 determines that the proceedings more appropriately belong in the  
2 court located where the ward resides, the first court shall notify the  
3 other court, in this or another state, and after consultation with the  
4 other court determine whether to retain jurisdiction or transfer the  
5 proceedings to the other court, whichever may be in the best  
6 interest of the ward. A copy of any order accepting a resignation or  
7 removing a guardian shall be sent to the court in which acceptance  
8 of appointment is filed.

9  
10 **REPORTER'S COMMENTS**

11  
12 Section 62-5-313 provides primary jurisdiction in the court which  
13 appointed the guardian and secondary jurisdiction in the court  
14 where the ward presently resides.

15  
16 **Part 4**

17  
18 **Protection of Property of Persons Under Disability and Minors**

19  
20 Section 62-5-401. After service of the summons and petition  
21 and notice of hearing in accordance with the provisions of this  
22 part, the court may appoint a conservator or make other protective  
23 order for cause as follows:

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

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

1                                   REPORTER'S COMMENTS  
2

3 ~~This is the basic section of this part providing for protective~~  
4 ~~proceedings for minors and disabled persons. "Protective~~  
5 ~~proceedings" is a generic term used to describe proceedings to~~  
6 ~~establish conservatorships and obtain protective orders. Persons~~  
7 ~~who may be subjected to the proceedings described here include a~~  
8 ~~broad category of persons who, for a variety of different reasons,~~  
9 ~~may be unable to manage their own property.~~  
10 ~~The comment to Section 62-5-304, supra, points up the different~~  
11 ~~meanings of incapacity (warranting guardianship), and disability.~~  
12

13                   SOUTH CAROLINA REPORTER'S COMMENTS (2010  
14                                   REVISION)  
15

16 ~~The 2010 amendment revised the first sentence in this section to~~  
17 ~~delete "Upon" and replace it with "After service of the summons~~  
18 ~~and," delete "after" and "and," add "of" to clarify that a summons~~  
19 ~~and petition are required to commence a formal proceeding,~~  
20 ~~including a formal proceeding for appointment of a conservator or~~  
21 ~~other protective order. See 2010 amendments to certain definitions~~  
22 ~~in S.C. Code Section 62-1-201 and also see Sections 14-23-280,~~  
23 ~~62-1-304, and Rules 1 and 81, SCRCP. (2011 Act No. 2, Section~~  
24 ~~2.)~~  
25

26       SECTION 62-5-402. ~~After the service of the summons and~~  
27 ~~petition in a proceeding seeking the appointment of a conservator~~  
28 ~~or other protective order and until termination of the proceeding,~~  
29 ~~the probate court in which the summons and petition are filed has:~~

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

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

37       (3) ~~concurrent jurisdiction to determine the validity of claims~~  
38 ~~for or against the person or estate of the protected person except as~~  
39 ~~limited by Section 62-5-433.~~  
40

41                                   REPORTER'S COMMENTS  
42



1 This section vests in the probate court, upon filing of the petition,  
2 exclusive jurisdiction over determination of the need for a  
3 conservator and the management of the protected person's estate.  
4 Concurrent jurisdiction with the circuit court is given to determine  
5 the validity of claims.

6  
7 SOUTH CAROLINA REPORTER'S COMMENTS (2010  
8 REVISION)  
9

10 The 2010 amendment revised the first sentence to delete "notice"  
11 and replace it with "the summons and petition," add "summons  
12 and," delete "is" and replace it with "are" to clarify that a  
13 summons and petition are required to commence a formal  
14 proceeding, including a formal proceeding for appointment of a  
15 conservator or other protective order. See 2010 amendments to  
16 certain definitions in S.C. Code Section 62-1-201 and also see  
17 Sections 14-23-280, 62-1-304, and Rules 1 and 81, SCRCP. (2011  
18 Act No. 2, Section 2.)

19  
20 Section 62-5-403. (1) In the place in this State where the  
21 person to be protected resides whether or not a guardian has been  
22 appointed in another place; or

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

25  
26 REPORTER'S COMMENTS  
27

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

31  
32 Section 62-5-404. (a) The person to be protected, any person  
33 who is interested in his estate, affairs, or welfare, including his  
34 parent, guardian, or custodian, or any person who would be  
35 adversely affected by lack of effective management of his property  
36 and affairs may petition for the appointment of a conservator or for  
37 other appropriate protective order.

38 (b) The petition shall set forth to the extent known, the interest  
39 of the petitioner; the name, age, residence, and address of the  
40 person to be protected; the name and address of his guardian, if  
41 any; the name and address of his nearest relative known to the  
42 petitioner; a general statement of his property with an estimate of  
43 the value of the property, including any compensation, insurance,

1 pension, or allowance to which he is entitled; and the reason why  
2 appointment of a conservator or other protective order is  
3 necessary. If the appointment of a conservator is requested, the  
4 petition also shall set forth the name and address of the person  
5 whose appointment is sought and the basis of his priority for  
6 appointment. The petition shall set forth whether the person to be  
7 protected has been rated incapable of handling his estate and  
8 monies on examination by the VA and, if so, shall state the name  
9 and address of the person to be notified on behalf of the VA.

10  
11 **REPORTER'S COMMENTS**  
12

13 ~~With the repeal of Part 6 of Article 5, the Uniform Veterans'~~  
14 ~~Guardianship Act, the requirement contained in former Section~~  
15 ~~62-5-605 that the petition show that the ward has been rated~~  
16 ~~incompetent by the VA is now included in the contents of the~~  
17 ~~initial conservatorship petition. Additionally, since the VA is~~  
18 ~~entitled to notification in the proceeding, the name and address of~~  
19 ~~the person to be notified on behalf of the VA is also to be included.~~  
20

21 ~~Section 62-5-405. (a) After filing of the summons and the~~  
22 ~~petition for appointment of a conservator or other protective order,~~  
23 ~~the person to be protected must be served personally with the~~  
24 ~~summons and petition. The following persons also must be~~  
25 ~~properly served: the spouse and the adult children of the person to~~  
26 ~~be protected, or if none, his parents or nearest adult relatives if~~  
27 ~~there are no parents, and other persons as the court may direct.~~

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

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

42  
43 **REPORTER'S COMMENTS**

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~~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.~~  
~~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, SCRPC. 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 added subsection (e) 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.~~

1 Section 62-5-406. Any interested person who desires to be  
2 notified before any order is made in a protective proceeding may  
3 file with the court a request for notice subsequent to payment of  
4 any fee required by statute or court rule. The clerk shall mail a  
5 copy of the request to the conservator if one has been appointed. A  
6 request is not effective unless it contains a statement showing the  
7 interest of the person making it and his address, or that of his  
8 attorney, and is effective only as to matters occurring after the  
9 filing. Any governmental agency paying or planning to pay  
10 benefits to the person to be protected is an interested person in  
11 protective proceedings.

12  
13 REPORTER'S COMMENTS  
14

15 This section provides for notification of any interested person prior  
16 to filing of an order.

17  
18 Section 62-5-407. (a) Upon the filing of a summons and  
19 petition for appointment of a conservator or other protective order  
20 because of minority, and after service of the summons and the  
21 petition, the court may set a date for hearing on the matters alleged  
22 in the petition. If, at any time in the proceeding, the court  
23 determines that the interests of the minor are or may be  
24 inadequately represented, it may appoint an attorney to represent  
25 the minor, giving consideration to the choice of the minor if  
26 fourteen years of age or older. A lawyer appointed by the court to  
27 represent a minor has the powers and duties of a guardian ad litem.  
28 If the minor already has an attorney, that attorney shall act as his  
29 guardian ad litem.

30 (b) Upon the filing of a summons and petition for appointment  
31 of a conservator or other protective order for reasons other than  
32 minority, and after service of the summons and the petition, the  
33 court shall set a date for hearing. Unless the person to be protected  
34 has counsel of his own choice, the court must appoint a lawyer to  
35 represent him who then has the powers and duties of a guardian ad  
36 litem. If the protected person already has representation by an  
37 attorney, that attorney shall act as his guardian ad litem. Except in  
38 cases governed by Section 62-5-436 relating to benefits from the  
39 VA, if the alleged disability is mental illness, mental deficiency,  
40 physical illness or disability, advanced age, chronic use of drugs,  
41 or chronic intoxication, the court shall direct that the person to be  
42 protected be examined by one or more physicians designated by

1 the court, preferably physicians who are not connected with an  
2 institution in which the person is a patient or is detained.

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

7  
8 **REPORTER'S COMMENTS**  
9

10 The 2010 amendment revised subsections (a) and (b) to delete  
11 certain language and replace it with language to clarify that a  
12 summons and petition are required to commence a formal  
13 proceeding, including a formal proceeding seeking appointment of  
14 a conservator or other protective order. See 2010 amendments to  
15 certain definitions in S.C. Code Section 62-1-201 and also see  
16 Sections 14-23-280, 62-1-304, and Rules 1 and 81, SCRPC.

17 The 2016 amendment recognized the repeal of Part 6 of Article 5,  
18 the Uniform Veterans' Guardianship Act, and the enactment of  
19 new Section 62-5-436 to provide an overlay to proceedings  
20 involving the appointment of a conservator to receive VA benefits.

21  
22 Section 62-5-408. The court has the following powers which  
23 may be exercised directly or through a conservator in respect to the  
24 estate and affairs of protected persons:

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

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

39 (3)(a) After hearing and upon determining that a basis for an  
40 appointment or other protective order exists with respect to a  
41 person for reasons other than minority, the court has, for the  
42 benefit of the person and of his estate and fulfillment of his legal  
43 obligations of support of dependents, all the powers over his estate

1 ~~and affairs which he could exercise if present and not under~~  
2 ~~disability, except the power to make a will. These powers include,~~  
3 ~~but are not limited to, the power to:~~  
4 ~~(i) make gifts as the court, in its discretion, believes would~~  
5 ~~be made by the person if he were competent;~~  
6 ~~(ii) convey or release the person's contingent and~~  
7 ~~expectant interests in property including material property rights~~  
8 ~~and any right of survivorship incident to joint tenancy;~~  
9 ~~(iii) exercise or release the person's powers as trustee,~~  
10 ~~personal representative, custodian for minors, conservator, or~~  
11 ~~donee of a power of appointment;~~  
12 ~~(iv) enter into contracts;~~  
13 ~~(v) create or amend revocable trusts or create irrevocable~~  
14 ~~trusts of property of the estate which may extend beyond the~~  
15 ~~person's disability or life;~~  
16 ~~(vi) fund trusts;~~  
17 ~~(vii) exercise options of the disabled person to purchase~~  
18 ~~securities or other property;~~  
19 ~~(viii) exercise the person's right to elect options and~~  
20 ~~change beneficiaries under insurance and annuity policies and to~~  
21 ~~surrender the policies for their cash value;~~  
22 ~~(ix) exercise the person's right to an elective share in the~~  
23 ~~estate of the person's deceased spouse;~~  
24 ~~(x) renounce any interest by testate or intestate succession~~  
25 ~~or by inter vivos transfer; and~~  
26 ~~(xi) ratify any such actions taken on the person's behalf.~~  
27 ~~(b) In order to exercise, or direct the exercise of the court's~~  
28 ~~authority in any powers set forth in item (a), the court must~~  
29 ~~entertain a petition in which the specific relief sought is set forth,~~  
30 ~~the incapacitated person, his known heirs, devisees, donees, and~~  
31 ~~beneficiaries are made parties to the action, and which contains a~~  
32 ~~statement that the person either is incapable of consenting or has~~  
33 ~~consented to the proposed exercise of power.~~  
34 ~~(c) In exercising the powers set forth in item (b), the court~~  
35 ~~also must inquire into and consider any known lifetime gifts or the~~  
36 ~~estate plan of the person, the terms of any revocable trust of which~~  
37 ~~he is grantor, and any contract, transfer, or joint ownership~~  
38 ~~arrangements with provisions for payment or transfer of benefits or~~  
39 ~~interests at his death to another which he may have originated. In~~  
40 ~~exercising the court's authority set forth in item (b), the court must~~  
41 ~~set forth in the record specific findings upon which it has based its~~  
42 ~~ruling.~~

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

5  
6 REPORTER'S COMMENTS

7 This section gives specific powers to the court to take action with  
8 respect to the estate and affairs of a person if necessary even if that  
9 person has not yet been judged incompetent.

10  
11 Section 62-5-409. (a) If it is established in a proper  
12 proceeding that a basis exists as described in Section 62-5-401 for  
13 affecting the property and affairs of a person the court, without  
14 appointing a conservator, may authorize, direct, or ratify any  
15 transaction necessary or desirable to achieve any security, service,  
16 or care arrangement meeting the foreseeable needs of the protected  
17 person. Protective arrangements include, but are not limited to,  
18 payment, delivery, deposit, or retention of funds or property, sale,  
19 mortgage, lease, or other transfer of property, entry into an annuity  
20 contract, a contract for life care, a deposit contract, a contract for  
21 training and education, or addition to or establishment of a suitable  
22 trust.

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

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

40  
41 Section 62-5-410. (a) The court may appoint an individual, or  
42 a corporation with general power to serve as trustee, as conservator

1 of the estate of a protected person. The following are entitled to  
2 consideration for appointment in the order listed:

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

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

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

12 (4) the spouse of the protected person;

13 (5) an adult child of the protected person;

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

16 (7) any other relative of the protected person;

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

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

25 (c) A probate judge or an employee of the probate court shall  
26 not serve as a conservator of an estate of a protected person;  
27 however, a probate judge or an employee of the probate court may  
28 serve as a conservator of the estate of a family member if such  
29 service does not interfere with the proper performance of the  
30 probate judge's or the employee's official duties. For purposes of  
31 this subsection, "family member" means a spouse, parent, child,  
32 brother, sister, niece, nephew, mother-in-law, father-in-law,  
33 son-in-law, daughter-in-law, grandparent, or grandchild.

34

35 REPORTER'S COMMENTS

36

37 This section sets forth in detail the tiered system prioritizing those  
38 who may be appointed conservator.

39

40 Section 62-5-411. The court, unless for good cause stated, shall  
41 require a conservator to furnish a bond conditioned upon faithful  
42 discharge of all duties of the trust according to law and will  
43 approve all sureties. If bond is required, the person qualifying shall



1 file a statement under oath with the court indicating his best  
2 estimate of the value of the personal estate of the protected person  
3 and of the income expected from the personal estate during the  
4 next year, and he shall execute and file a bond with the court, or  
5 give other suitable security, in an amount not less than the  
6 estimate. The court shall determine that the bond is duly executed  
7 by a corporate surety, or one or more individual sureties whose  
8 performance is secured by pledge of personal property, mortgage  
9 on real property, or other adequate security. The court may permit  
10 the amount of the bond to be reduced by the value of assets of the  
11 estate deposited with a domestic financial institution, as defined in  
12 Section 62-6-101, in a manner that prevents their unauthorized  
13 disposition. Upon application of the conservator or another  
14 interested person, or upon the court's own motion, the court may  
15 increase or reduce the amount of the bond, release sureties,  
16 dispense with security or securities, or permit the substitution of  
17 another bond with the same or different sureties. A denial of an  
18 application by the court is not an adjudication and does not  
19 preclude a formal proceeding.

20  
21 SOUTH CAROLINA REPORTER'S COMMENTS (2010  
22 REVISION)  
23

24 The 2010 amendment revised this section to move the term "shall"  
25 in the first sentence, which made no substantive change. The 2010  
26 amendment also revised the next to last sentence to delete "On  
27 petition" and replace it with "Upon application." The 2010  
28 amendment also added a new sentence at the end allowing the  
29 conservator or another interested person to make application for an  
30 informal proceeding regarding bond and also to allow the court on  
31 its own motion to pursue matters regarding the bond as set forth in  
32 this section. Unlike a petition, an application does not require a  
33 summons or petition. See 2010 amendments to certain definitions  
34 in Section 62-1-201. (2011 Act No. 2, Section 2.)  
35

36 Section 62-5-412. (a) The following requirements and  
37 provisions apply to any bond required under Section 62-5-411:

38 (1) Sureties shall be jointly and severally liable with the  
39 conservator and with each other;

40 (2) By executing an approved bond of a conservator, the  
41 surety consents to the jurisdiction of the court which issued letters  
42 to the primary obligor in any proceeding pertaining to the fiduciary  
43 duties of the conservator and naming the surety as a party

1 defendant. Notice of any proceeding shall be delivered to the  
2 surety or mailed to him by registered or certified mail at his  
3 address as listed with the court where the bond is filed and to his  
4 address as then known to the petitioner;

5 (3) After service of a summons and petition by a successor  
6 conservator or any interested person, or upon the court's own  
7 motion, a proceeding may be initiated against a surety for breach  
8 of the obligation of the bond of the conservator;

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

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

16  
17 REPORTER'S COMMENTS

18  
19 Section 62-5-412 amplifies 62-5-411.

20  
21 SOUTH CAROLINA REPORTER'S COMMENTS (2010  
22 REVISION)

23  
24 The 2010 amendment revised subsection (a)(3) to delete "On" at  
25 the beginning and replace it with "After service of a summons  
26 and" to clarify that a summons and petition are required to  
27 commence a formal proceeding, including a formal proceeding  
28 regarding bond matters as set forth in this section. See 2010  
29 amendments to certain definitions in S.C. Code Section 62-1-201  
30 and also see Sections 14-23-280, 62-1-304, and Rules 1 and 81,  
31 SCRPC. The 2010 amendment also revised subsection (a)(3) to  
32 add "or upon the court's own motion" so the court could pursue  
33 such a proceeding by way of motion. (2011 Act No. 2, Section 2.)

34  
35 Section 62-5-413. By accepting appointment, a conservator  
36 submits personally to the jurisdiction of the court in any  
37 proceeding relating to the estate that may be instituted by any  
38 interested person. Notice of any proceeding shall be delivered to  
39 the conservator, or mailed to him by registered or certified mail at  
40 his address as listed in the petition for appointment or as thereafter  
41 reported to the court and to his address as then known to the  
42 petitioner.

1                                 REPORTER'S COMMENTS

2  
3 ~~This section specifies the jurisdiction of the court over a~~  
4 ~~conservator who accepts appointment and provides for notice to~~  
5 ~~him.~~

6  
7     ~~Section 62-5-414. If not otherwise compensated for services~~  
8 ~~rendered, any visitor, lawyer, physician, conservator, or special~~  
9 ~~conservator appointed in a protective proceeding is entitled to~~  
10 ~~reasonable compensation from the estate, as determined by the~~  
11 ~~court.~~

12  
13                                 REPORTER'S COMMENTS

14  
15 ~~Section 62-5-414 entitles those who have served the estate to~~  
16 ~~reasonable compensation.~~

17  
18     ~~Section 62-5-415. The court may remove a conservator for~~  
19 ~~good cause, upon notice and hearing, or accept the resignation of a~~  
20 ~~conservator. After his death, resignation, or removal, the court may~~  
21 ~~appoint another conservator. A conservator so appointed succeeds~~  
22 ~~to the title and powers of his predecessor.~~

23  
24     ~~Section 62-5-416. (a) Upon filing a petition and summons~~  
25 ~~with the appointing court, a person interested in the welfare of a~~  
26 ~~person for whom a conservator has been appointed may request an~~  
27 ~~order (1) requiring bond or security or additional bond or security,~~  
28 ~~or reducing bond, (2) requiring an accounting for the~~  
29 ~~administration of the trust, (3) directing distribution, (4) removing~~  
30 ~~the conservator and appointing a temporary or successor~~  
31 ~~conservator, or (5) granting other appropriate relief. The petition~~  
32 ~~and summons must be served upon the conservator and other~~  
33 ~~persons as the court may direct.~~

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

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

40  
41                                 REPORTER'S COMMENTS

1 ~~This permits any interested person to petition the court for~~  
2 ~~subsequent orders including instructions.~~

3  
4 ~~SOUTH CAROLINA REPORTER'S COMMENTS (2010~~  
5 ~~REVISION)~~

6  
7 ~~The 2010 amendment revised subsection (a) to delete "Any" and~~  
8 ~~replace it with "Upon filing a petition and summons with the~~  
9 ~~appointing court" and also delete "file a petition in the~~  
10 ~~appointment court" in order to clarify that a summons and petition~~  
11 ~~are required to commence a formal proceeding, including formal~~  
12 ~~proceeding by an interested person for certain requests subsequent~~  
13 ~~to appointment as set forth in this section. See 2010 amendments~~  
14 ~~to certain definitions in S.C. Code Section 62-1-201 and also see~~  
15 ~~Sections 14-23-280, 62-1-304, and Rules 1 and 81, SCRCP. The~~  
16 ~~2010 amendment also revised subsection (b) by deleting "A~~  
17 ~~conservator may petition" and replacing it with "Upon application~~  
18 ~~to," deleting "for" and adding "a conservator may request," and~~  
19 ~~adding a new sentence at the end of subsection (b). The latter~~  
20 ~~amendment was intended to allow the conservator to request~~  
21 ~~instructions concerning his fiduciary responsibility by making~~  
22 ~~application and clarifies the effect of a denial by the court. The~~  
23 ~~2010 amendment also revised subsection (c) to provide for notice~~  
24 ~~and hearing as the court may direct. (2011 Act No. 2, Section 2.)~~

25  
26 ~~Section 62-5-417. In the exercise of his powers, a conservator~~  
27 ~~is to act as a fiduciary and shall observe the standards of care~~  
28 ~~applicable to trustees as described by Section 62-7-933.~~

29  
30 ~~REPORTER'S COMMENTS~~

31  
32 ~~This section imposes the standard of care applicable to trustees, the~~  
33 ~~"prudent man dealing with the property of another" rule.~~

34  
35 ~~Section 62-5-418. Within thirty days after his appointment,~~  
36 ~~every conservator shall prepare and file with the appointing court a~~  
37 ~~complete inventory of the estate of the protected person together~~  
38 ~~with his oath or affirmation that it is complete and accurate so far~~  
39 ~~as he is informed. The court may, for good cause shown, increase~~  
40 ~~the allotted time. The conservator shall provide a copy thereof to~~  
41 ~~the protected person if he can be located, has attained the age of~~  
42 ~~fourteen years, and has sufficient mental capacity to understand~~  
43 ~~these matters, and to any parent or guardian with whom the~~

1 ~~protected person resides. The conservator shall keep suitable~~  
2 ~~records of his administration and exhibit the same on request of~~  
3 ~~any interested person.~~

4  
5 ~~REPORTER'S COMMENTS~~

6  
7 ~~Section 62-5-418 requires the conservator to file a verifiable~~  
8 ~~inventory of the protected estate within thirty days after his~~  
9 ~~appointment.~~

10  
11 ~~Section 62-5-419. Every conservator shall account to the court~~  
12 ~~for his administration of the trust annually and upon his resignation~~  
13 ~~or removal, and at other times as the court may direct. On~~  
14 ~~termination of the protected person's minority or disability a~~  
15 ~~conservator shall account to the court. Upon the filing and service~~  
16 ~~of summons and petition for approval of accounting, an order,~~  
17 ~~made upon notice and hearing, allowing an intermediate account of~~  
18 ~~a conservator, adjudicates as to his liabilities concerning the~~  
19 ~~matters shown in connection with it and an order, made upon~~  
20 ~~notice and hearing, allowing a final account adjudicates as to all~~  
21 ~~unsettled liabilities of the conservator to the protected person or his~~  
22 ~~successors relating to the conservatorship concerning the matters~~  
23 ~~shown. In connection with an account, the court may require a~~  
24 ~~conservator to submit to a physical check of the estate in his~~  
25 ~~control, to be made in a manner the court may specify.~~

26  
27 ~~REPORTER'S COMMENTS~~

28  
29 ~~This section requires every conservator to account to the court~~  
30 ~~annually and at the time of his resignation or removal. It also~~  
31 ~~establishes protection for those dealing with the conservator.~~

32  
33 ~~SOUTH CAROLINA REPORTER'S COMMENTS (2010~~  
34 ~~REVISION)~~

35  
36 ~~The 2010 amendment revised this section by changing "must" to~~  
37 ~~"shall" in the first sentence, deleting "Subject to appeal within the~~  
38 ~~same time permitted" and replacing it with "Upon the filing and~~  
39 ~~service of summons and petition for approval of accounting," as~~  
40 ~~well as certain grammatical changes thereafter to clarify that a~~  
41 ~~summons and petition are required to commence a formal~~  
42 ~~proceeding, including a formal proceeding for court approval of an~~  
43 ~~intermediate and final account. See 2010 amendments to certain~~

1 definitions in S.C. Code Section 62-1-201 and also see Sections  
2 14-23-280, 62-1-304, and Rules 1 and 81, SCRPC. (2011 Act No.  
3 2, Section 2.)  
4

5 ~~Section 62-5-420. The appointment of a conservator vests in~~  
6 ~~him title as trustee to all property of the protected person, presently~~  
7 ~~held or thereafter acquired, including title to any property~~  
8 ~~theretofore held for the protected person by custodians or attorneys~~  
9 ~~in fact. Neither the appointment of a conservator nor the~~  
10 ~~establishment of a trust in accordance with Title 44, Chapter 6,~~  
11 ~~Article 6, is a transfer or alienation within the meaning of general~~  
12 ~~provisions of any federal or state statute or regulation, insurance~~  
13 ~~policy, pension plan, contract, will, or trust instrument, imposing~~  
14 ~~restrictions upon or penalties for transfer or alienation by the~~  
15 ~~protected person of his rights or interest, but this section does not~~  
16 ~~restrict the ability of persons to make specific provision by~~  
17 ~~contract or dispositive instrument relating to a conservator.~~

18  
19 **REPORTER'S COMMENTS**  
20

21 ~~This section permits independent administration of the property of~~  
22 ~~protected persons once the appointment of a conservator has been~~  
23 ~~obtained. Any interested person may require the conservator to~~  
24 ~~account in accordance with Section 62-5-419. As a trustee, a~~  
25 ~~conservator holds title to the property of the protected person.~~  
26 ~~Once appointed, he is free to carry on his fiduciary responsibilities.~~  
27 ~~If he should default in these in any way, he may be made to~~  
28 ~~account to the court.~~  
29 ~~Unlike a situation involving appointment of a guardian, the~~  
30 ~~appointment of a conservator has no bearing on the capacity of the~~  
31 ~~disabled person to contract or engage in other transactions.~~

32  
33 ~~Section 62-5-421. Letters of conservatorship transfer all assets~~  
34 ~~of a protected person to the conservator. An order terminating a~~  
35 ~~conservatorship transfers all assets of the estate from the~~  
36 ~~conservator to the protected person or his successors. Letters of~~  
37 ~~conservatorship, and orders terminating conservatorships, shall be~~  
38 ~~filed and recorded in the office where conveyances of real estate~~  
39 ~~are recorded for the county in which the protected person resides~~  
40 ~~and in the other counties where the protected person owns real~~  
41 ~~estate.~~

42  
43 **REPORTER'S COMMENTS**

1  
2 ~~Since the legal title to the real property is transferred to the~~  
3 ~~conservator, in order to prevent fraudulent conveyances and to~~  
4 ~~inhibit erroneous conveyances letters of conservatorship should be~~  
5 ~~recorded.~~

6  
7 ~~Section 62-5-422. Any sale or encumbrance to a conservator,~~  
8 ~~his spouse, agent, or attorney, or any corporation or trust in which~~  
9 ~~he has a substantial beneficial interest, or any transaction which is~~  
10 ~~affected by a substantial conflict of interest is void unless the~~  
11 ~~transaction is approved by the court after notice to interested~~  
12 ~~persons and others as directed by the court.~~

13  
14 ~~REPORTER'S COMMENTS~~

15  
16 ~~This section allows court authorized sales and purchases of~~  
17 ~~protected property.~~

18  
19 ~~Section 62-5-423. A person who in good faith either assists a~~  
20 ~~conservator or deals with him for value in any transaction other~~  
21 ~~than those requiring a court order as provided in Sections~~  
22 ~~62-5-408 and 62-5-422, is protected as if the conservator properly~~  
23 ~~exercised the power. The fact that a person knowingly deals with a~~  
24 ~~conservator does not alone require the person to inquire into the~~  
25 ~~existence of a power or the propriety of its exercise, except that~~  
26 ~~restrictions on powers of conservators which are endorsed on~~  
27 ~~letters as provided in Section 62-5-426 are effective as to third~~  
28 ~~persons. A person is not bound to see to the proper application of~~  
29 ~~estate assets paid or delivered to a conservator. The protection here~~  
30 ~~expressed extends to instances in which some procedural~~  
31 ~~irregularity or jurisdictional defect occurred in proceedings leading~~  
32 ~~to the issuance of letters. The protection here expressed is not by~~  
33 ~~substitution for that provided by comparable provisions of the laws~~  
34 ~~relating to commercial transactions and laws simplifying transfers~~  
35 ~~of securities by fiduciaries.~~

36  
37 ~~REPORTER'S COMMENTS~~

38  
39 ~~Section 62-5-423 carries Section 62-5-422 one step further by~~  
40 ~~affording protection to bona fide purchasers for value of protected~~  
41 ~~property.~~

42

1 ~~Section 62-5-424. (A) A conservator has power without court~~  
2 ~~authorization or confirmation to invest and reinvest funds of the~~  
3 ~~estate as would a trustee.~~

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

7 ~~(1) collect, hold, and retain assets of the estate including~~  
8 ~~land in another state, until, in his judgment, disposition of the~~  
9 ~~assets should be made, and the assets may be retained even though~~  
10 ~~they include an asset in which he personally is interested;~~

11 ~~(2) receive additions to the estate;~~

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

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

16 ~~(5) make ordinary or extraordinary repairs or alterations in~~  
17 ~~buildings or other structures, to demolish improvement, to raze~~  
18 ~~existing or erect new party walls or buildings;~~

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

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

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

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

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

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

39 ~~(12) pay or contest a claim except as limited by Section~~  
40 ~~62-5-433; settle a claim by or against the estate of the protected~~  
41 ~~person by compromise, arbitration, or otherwise except as limited~~  
42 ~~by Section 62-5-433; and release, in whole or in part, a claim~~  
43 ~~belonging to the estate to the extent that the claim is uncollectible;~~



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

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

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

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

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

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

25       ~~(C) A conservator acting reasonably in efforts to accomplish~~  
26 ~~the purpose for which he was appointed may act with court~~  
27 ~~approval to:~~

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

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

33       ~~(3) acquire or dispose of an estate asset including land in~~  
34 ~~another state for cash or on credit, at public or private sale; and to~~  
35 ~~manage, develop, improve, exchange, partition, change the~~  
36 ~~character of, or abandon an estate asset;~~

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

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

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

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

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

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

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

21  
22                                   REPORTER'S COMMENTS

23  
24 ~~Section 62-5-424 sets out the powers of a conservator in~~  
25 ~~administration. Subsection (a) provides that a conservator has all~~  
26 ~~powers conferred in this section and also any additional powers~~  
27 ~~granted by law to trustees in South Carolina. In subsection (b) a~~  
28 ~~conservator is expressly granted power to invest and reinvest funds~~  
29 ~~of the estate "as would a trustee," without court authorization or~~  
30 ~~confirmation. Subsection (c) contains a list of eighteen specifically~~  
31 ~~itemized powers which a conservator has and may exercise without~~  
32 ~~court authorization or confirmation, where "acting reasonably in~~  
33 ~~efforts to accomplish the purpose for which he was appointed."~~  
34 ~~Subsection (d) contains a list of nine specifically itemized powers~~  
35 ~~which a conservator may exercise with court approval.~~

36  
37       Section 62-5-425. (a) ~~A conservator may expend or distribute~~  
38 ~~sums from the principal of the estate without court authorization or~~  
39 ~~confirmation for the support, education, care, or benefit of the~~  
40 ~~protected person and his dependents in accordance with the~~  
41 ~~following principles:~~

42       (1) ~~The conservator is to consider recommendations relating~~  
43 ~~to the appropriate standard of support, education, and benefit for~~

1 the protected person made by a parent or guardian, if any. He may  
2 not be surcharged for sums paid to persons or organizations  
3 actually furnishing support, education, or care to the protected  
4 person pursuant to the recommendations of a parent or guardian of  
5 the protected person unless he knows that the parent or guardian is  
6 deriving personal financial benefit therefrom, including relief from  
7 any personal duty of support, or unless the recommendations are  
8 clearly not in the best interests of the protected person.

9 (2) The conservator is to expend or distribute sums  
10 reasonably necessary for the support, education, care, or benefit of  
11 the protected person with due regard to (i) the size of the estate, the  
12 probable duration of the conservatorship and the likelihood that the  
13 protected person, at some future time, may be fully able to manage  
14 his affairs and the estate which has been conserved for him; (ii) the  
15 accustomed standard of living of the protected person and  
16 members of his household; (iii) other funds or sources used for the  
17 support of the protected person.

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

20 (4) Funds expended under this subsection may be paid by  
21 the conservator to any person, including the protected person, to  
22 reimburse for expenditures which the conservator might have  
23 made, or in advance for services to be rendered to the protected  
24 person when it is reasonable to expect that they will be performed  
25 and where advance payments are customary or reasonably  
26 necessary under the circumstances.

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

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

42 (2) When the conservator is satisfied that a protected  
43 person's estate has a value of less than five thousand dollars, then

1 he may petition the court, and after determination by the court that  
2 the protected person's estate has a value of less than five thousand  
3 dollars, the court in its discretion may terminate the  
4 conservatorship and order the conservator, after meeting all prior  
5 claims and expenses of administration, to pay over and distribute  
6 all funds and properties to or for the protected person as soon as  
7 possible and in accordance with Section 62-5-103.

8 (d) If a protected person dies, the conservator shall deliver to  
9 the court for safekeeping any will of the deceased protected person  
10 which may have come into his possession, inform the executor or a  
11 beneficiary named therein that he has done so, and retain the estate  
12 for delivery to a duly appointed personal representative of the  
13 decedent or other persons entitled thereto. If after thirty days from  
14 the death of the protected person no other person has been  
15 appointed personal representative and no application or petition for  
16 appointment is before the court, the conservator may apply to  
17 exercise the powers and duties of a personal representative so that  
18 he may proceed to administer and distribute the decedent's estate.  
19 Upon application for an order granting the powers of a personal  
20 representative to a conservator, after notice to any person  
21 demanding notice under Section 62-3-204 and to any person  
22 nominated executor in any will of which the applicant is aware, the  
23 court may order the conferral of the power upon determining that  
24 there is no objection, and endorse the letters of the conservator to  
25 note that the formerly protected person is deceased and that the  
26 conservator has acquired all of the powers and duties of a personal  
27 representative. The making and entry of an order under this section  
28 shall have the effect of an order of appointment of a personal  
29 representative as provided in Section 62-3-308 and Parts 6 through  
30 10 of Article 3 [Sections 62-3-601 et seq. through Sections  
31 62-3-1001 et seq.] except that estate in the name of the  
32 conservator, after administration, may be distributed to the  
33 decedent's successors without prior retransfer to the conservator as  
34 personal representative.

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

38

39

#### REPORTER'S COMMENTS

40

41 Section 62-5-425 sets out the distributive duties and powers of a  
42 conservator. Subsection (a) provides that a conservator may  
43 expend or distribute sums from the principal of the estate without

1 court authorization or confirmation for the support, care, or benefit  
2 of the protected person and his dependents in accordance with  
3 principles stated in paragraphs (1) through (4). Subsection (b)  
4 simply directs distribution to a former minor when he attains  
5 majority, unless he has been adjudged disabled under Section  
6 62-5-401(2). Subsection (c) directs a conservator for a disabled  
7 person to petition the court when the conservator is satisfied that  
8 disability has ceased, and upon determination that the disability  
9 has ceased, to make distribution to the formerly disabled person.  
10 Subsection (d) provides for distribution in case of the death of the  
11 protected person. Subsection (e) merely provides that previous  
12 service as a conservator for a protected person does not disqualify  
13 the previous conservator from serving as executor of the protected  
14 person.

15  
16 Section 62-5-426. The court may, at the time of appointment or  
17 later, limit the powers of a conservator otherwise conferred by  
18 Sections 62-5-424 and 62-5-425, or previously conferred by the  
19 court, and may at any time relieve him of any limitation. If the  
20 court limits any power conferred on the conservator by Section  
21 62-5-424 or Section 62-5-425, the limitation shall be endorsed  
22 upon his letters of appointment and upon any certificate evidencing  
23 his appointment.

24  
25 **REPORTER'S COMMENTS**

26  
27 Section 62-5-426 permits the court to limit the powers of a  
28 conservator which he otherwise would have pursuant to Sections  
29 62-5-424 and 62-5-425 and also to relieve him of any limitation at  
30 any time.

31  
32 Section 62-5-427. In investing the estate, and in selecting assets  
33 of the estate for distribution under subsections (a) and (b) of  
34 Section 62-5-425, in utilizing powers of revocation or withdrawal  
35 available for the support of the protected person, and exercisable  
36 by the conservator or the court, the conservator and the court  
37 should take into account any known estate plan of the protected  
38 person, any revocable trust of which he is settlor, and any contract,  
39 transfer, or joint ownership arrangement with provisions for  
40 payment or transfer of benefits or interests at his death to another  
41 or others which he may have originated.

42  
43 **REPORTER'S COMMENTS**

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~~This section 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.~~

~~Section 62-5-428. (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.~~

REPORTER’S COMMENTS

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~~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 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, SCRPC. (2011 Act No. 2, Section 2.)~~

~~Section 62-5-429. (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.~~

**REPORTER’S COMMENTS**

1 ~~Section 62-5-429~~ relieves a conservator of personal liability for  
2 contracts properly entered into in his fiduciary capacity unless he  
3 fails to reveal his representative capacity and identify the estate in  
4 the contract, and also relieves him from obligations arising from  
5 ownership or control of property and tort liability unless he is  
6 personally at fault. Claims may be asserted by proceeding against  
7 the conservator in his fiduciary capacity, whether or not he is  
8 individually liable. Questions of liability between the conservator  
9 and the estate may be determined in a proceeding for accounting or  
10 other appropriate proceeding.

11  
12 ~~Section 62-5-430.~~ (A) ~~The protected person, the conservator,~~  
13 ~~or any other interested person, by service of a summons and~~  
14 ~~petition, may request that the court terminate the conservatorship.~~  
15 ~~A protected person seeking termination is entitled to the same~~  
16 ~~rights and procedures as in an original proceeding for a protective~~  
17 ~~order. The court, upon determining after notice and hearing, that~~  
18 ~~the disability of the protected person has ceased, may terminate the~~  
19 ~~conservatorship.~~

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

25  
26 **REPORTER'S COMMENTS**  
27

28 ~~Section 62-5-430~~ provides that the conservatorship may be  
29 terminated upon determination, after notice and hearing, that the  
30 minority or disability of the protected person has ceased.

31  
32 **SOUTH CAROLINA REPORTER'S COMMENTS (2010**  
33 **REVISION)**  
34

35 The 2010 amendment essentially rewrote this section to divide it  
36 into two subsections. Subsection (A) clarifies that a summons and  
37 petition are required to commence a formal proceeding, including  
38 a formal proceeding to terminate the conservatorship when the  
39 disability of the protected person has ceased and procedure for  
40 same. See 2010 amendments to certain definitions in S.C. Code  
41 Section 62-1-201 and also see Sections 14-23-280, 62-1-304, and  
42 Rules 1 and 81, SCRPC. Subsection (B) allows the protected  
43 person, his personal representative, or the conservator to terminate



1 the conservatorship by way of an application, instead of a petition,  
2 when the protected person has attained his majority or if the  
3 protected person is deceased. Unlike a petition, an application does  
4 not require a summons and petition. See Section 62-1-201(1).  
5 (2011 Act No. 2, Section 2.)

6  
7 SECTION 62-5-431. Any person indebted to a protected  
8 person, or having possession of property of or an instrument  
9 evidencing a debt, stock, or chose in action belonging to a  
10 protected person may pay or deliver to a conservator, guardian of  
11 the estate, or other like fiduciary appointed by a court of the state  
12 of residence of the protected person, upon being presented with  
13 proof of his appointment and an affidavit made by him or on his  
14 behalf stating:

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

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

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

23  
24 REPORTER'S COMMENTS

25  
26 Section 62-5-431 provides that any debtor (or person having  
27 possession of property) of a protected person may pay the debt (or  
28 deliver the property) to any conservator or other fiduciary  
29 appointed by a court of the state of residence of the protected  
30 person, upon presentation by the fiduciary of proof of appointment  
31 and his affidavit that there is no protective proceeding relating to  
32 the protected person pending in this State and that the foreign  
33 fiduciary is entitled to payment or receive delivery. The person  
34 making payment or delivery is then discharged.

35  
36 Section 62-5-432. If no local conservator has been appointed  
37 and no petition in a protective proceeding is pending in this State,  
38 then, except as provided in Section 62-5-431, a domiciliary foreign  
39 conservator may file with the court in this State in all counties in  
40 which property belonging to the protected person is located,  
41 authenticated copies of his appointment and of any official bond he  
42 has given. Thereafter, he may exercise as to assets in this State all  
43 powers of a local conservator and maintain actions and

1 ~~proceedings in this State subject to any conditions imposed upon~~  
2 ~~nonresident parties generally.~~

3  
4 **REPORTER'S COMMENTS**

5  
6 ~~This section provides that a foreign conservator may file~~  
7 ~~authenticated copies of his appointment in all counties where the~~  
8 ~~protected person has property and exercise all powers of a local~~  
9 ~~conservator, if no local conservator has been appointed and no~~  
10 ~~petition is pending.~~

11  
12 ~~Section 62-5-433. (A)(1) For purposes of this section and for~~  
13 ~~any claim exceeding twenty five thousand dollars in favor of or~~  
14 ~~against any minor or incapacitated person, "court" means the~~  
15 ~~circuit court of the county in which the minor or incapacitated~~  
16 ~~person resides or the circuit court in the county in which the suit is~~  
17 ~~pending. For purposes of this section and for any claim not~~  
18 ~~exceeding twenty five thousand dollars in favor of or against any~~  
19 ~~minor or incapacitated person, "court" means either the circuit~~  
20 ~~court or the probate court of the county in which the minor or~~  
21 ~~incapacitated person resides or the circuit court or probate court in~~  
22 ~~the county in which the suit is pending.~~

23 ~~(2) "Claim" means the net or actual amount accruing to or~~  
24 ~~paid by the minor or incapacitated person as a result of the~~  
25 ~~settlement.~~

26 ~~(3) "Petitioner" means either a conservator appointed by the~~  
27 ~~probate court for the minor or incapacitated person or the guardian~~  
28 ~~or guardian ad litem of the minor or incapacitated person if a~~  
29 ~~conservator has not been appointed.~~

30 ~~(B) The settlement of any claim over twenty five thousand~~  
31 ~~dollars in favor of or against any minor or incapacitated person for~~  
32 ~~the payment of money or the possession of personal property must~~  
33 ~~be effected on his behalf in the following manner:~~

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

42 ~~(2) If, upon consideration of the petition and after hearing~~  
43 ~~the testimony as it may require concerning the matter, the court~~

1 concludes that the proposed settlement is proper and in the best  
2 interests of the minor or incapacitated person, the court shall issue  
3 its order approving the settlement and authorizing the petitioner to  
4 consummate it and, if the settlement requires the payment of  
5 money or the delivery of personal property for the benefit of the  
6 minor or incapacitated person, to receive the money or personal  
7 property and execute a proper receipt and release or covenant not  
8 to sue therefor, which is binding upon the minor or incapacitated  
9 person.

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

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

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

35 (2) If a conservator has not been appointed, the guardian or  
36 guardian ad litem must petition the court for approval of the  
37 settlement, as provided in items (1) and (2) of subsection (B), and  
38 without the appointment of a conservator. The payment or delivery  
39 of money or personal property to or for a minor or incapacitated  
40 person must be made in accordance with Section 62-5-103. If a  
41 party subject to the court order fails or refuses to pay the money or  
42 deliver the personal property, as required by the order and in  
43 accordance with Section 62-5-103, he is liable and punishable as

1 for contempt of court, but failure or refusal does not affect the  
2 validity or conclusiveness of the settlement.

3 (D) ~~The settlement of any claim that does not exceed two  
4 thousand five hundred dollars in favor of or against any minor or  
5 incapacitated person for the payment of money or the possession  
6 of personal property may be effected by the parent or guardian of  
7 the minor or incapacitated person without court approval of the  
8 settlement and without the appointment of a conservator. If the  
9 settlement requires the payment of money or the delivery of  
10 personal property for the benefit of the minor or incapacitated  
11 person, the parent or guardian shall receive the money or personal  
12 property and execute a proper receipt and release or covenant not  
13 to sue therefor, which is binding upon the minor or incapacitated  
14 person. The payment or delivery of money or personal property to  
15 or for a minor or incapacitated person must be made in accordance  
16 with Section 62-5-103.~~

17  
18 ~~Section 62-5-434. The settlement of any claim involving a  
19 minor completed between July 1, 1987, and September 24, 1987, is  
20 presumed facially valid whether effectuated with or without court  
21 approval.~~

22  
23 ~~Section 62-5-435. Neither the court which may have approved  
24 a settlement nor a person who completed the settlement of a  
25 minor's claim but did not seek court approval during this time  
26 period is liable for their good faith exercise of discretion in  
27 approving or completing the settlement.~~

28  
29 ~~Section 62-5-436. (a) For purposes of this section:~~

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

33 ~~(2) "Benefits" means all monies payable by the United  
34 States through the VA.~~

35 ~~(3) "Secretary" means the Secretary of the United States  
36 Department of Veterans Affairs (VA) or his successor.~~

37 ~~(4) "Protected person" means a beneficiary of the VA.~~

38 ~~(5) "Conservator" has the same meaning as provided in  
39 Section 62-1-201 but only as to benefits from the VA.~~

40 ~~(b) Whenever, pursuant to a law of the United States or  
41 regulation of the VA, the Secretary requires that a conservator be  
42 appointed for a protected person before payment of benefits, the  
43 appointment must be made in the manner provided in this part,~~

1 except to the extent this section requires otherwise. The petition  
2 shall show that the person to be protected has been rated incapable  
3 of handling his estate and monies on examination by the VA in  
4 accordance with the laws and regulations governing the VA.

5 ~~(e) When a petition is filed for the appointment of a  
6 conservator and a certificate of the Secretary or his representative  
7 is filed setting forth the fact that the appointment of a conservator  
8 is a condition precedent to the payment of benefits due the  
9 protected person by the VA, the certificate is prima facie evidence  
10 of the necessity for the appointment and no examiner's report is  
11 required.~~

12 ~~(d) Except as provided or as otherwise permitted by the VA, a  
13 person may not serve as conservator of a protected person if the  
14 proposed conservator at that time is acting simultaneously as  
15 conservator for five protected persons. Upon presentation of a  
16 petition by an attorney for the VA alleging that a person is serving  
17 simultaneously as a conservator for more than five protected  
18 persons and requesting that person's termination as a conservator  
19 for that reason, upon proof substantiating the petition, the court  
20 shall restrain that person from acting as a conservator for the  
21 affected protected person and shall require a final accounting from  
22 the conservator. After the appointment of a successor conservator  
23 if one is warranted under the circumstances, the court shall  
24 terminate the appointment of the person as conservator in all  
25 requested cases. The limitations of this section do not apply when  
26 the conservator is a bank or trust company.~~

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

31 ~~(f) Every conservator shall invest the surplus funds in his  
32 protected person's estate in securities, or otherwise, as allowed by  
33 law, and in which the conservator has no interest. These funds may  
34 be invested, without prior court authorization, in direct  
35 interest-bearing obligations of this State or of the United States and  
36 in obligations in which the interest and principal are both  
37 unconditionally guaranteed by the United States Government.~~

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

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

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

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

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

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

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

24  
25 **REPORTER'S COMMENTS**

26  
27 This section is a distillation of provisions of the Uniform Veterans'  
28 Guardianship Act, which was formerly Part 6 of Title 62. This  
29 section should be considered whenever the minor or incapacitated  
30 person is receiving or will receive benefits from the Veterans  
31 Administration. In general, the requirements for commencing the  
32 proceeding remain the same as with a person who is not receiving  
33 VA benefits except that a certificate of the Secretary or his  
34 representative that the appointment is necessary replaces the  
35 necessity for an examiner. Additionally, this section imposes a  
36 limit on the number of persons for whom an individual conservator  
37 may act, unless permitted by the VA. The VA is a necessary party  
38 in some proceedings and an interested party in other proceedings.

39  
40

Former Section	Recodified Section
41 62-5-101	62-5-101
42 62-5-102(a)	62-5-201
43 62-5-102(b)	62-5-102

1	62-5-103	62-5-103
2	62-5-104	62-5-309(c)
3	62-5-105	62-5-104
4		62-5-105 (new)
5	62-5-106 (A)	62-5-101
6	62-5-106 (B)	62-5-306, 62-5-307 (A), 62-5-428
7		62-5-106 (new)
8		62-5-107 (new)
9	62-5-201	62-5-201
10	62-5-301	62-5-301
11	62-5-302	62-5-302
12	62-5-303	62-5-303, 62-5-303A, 62-5-303B, 62-5-303C,
13		62-5-303D
14	62-5-304	62-5-304
15		62-5-304A (new)
16	62-5-305	62-5-305
17	62-5-306	62-5-306
18	62-5-307	62-5-307, 62-5-307A
19	62-5-308	removed
20	62-5-309(A)	62-5-303A
21	62-5-309(B)	62-5-303C
22	62-5-310	62-5-108
23	62-5-311	62-5-308
24	62-5-312	62-5-309
25	62-5-313	62-5-310
26	62-5-401(1)	62-5-402
27	62-5-401(2)	62-5-403
28	62-5-402	62-5-426, see also 62-5-201
29	62-5-403	62-5-401
30	62-5-404	62-5-403
31	62-5-405	62-5-403A, 62-5-403C
32	62-5-406	62-5-403C
33	62-5-407(a)	62-5-402
34	62-5-407(b)	62-5-403B, 62-5-403C, 62-5-403D
35		62-5-407 (new)
36	62-5-408	62-5-107,62-5-108, 62-5-404, 62-5-405,
37		62-5-414, 62-5-422, 62-5-423
38	62-5-409	62-5-405
39	62-5-410	62-5-408
40	62-5-411	62-5-409
41	62-5-412	62-5-410
42	62-5-413	62-5-411
43		62-5-413 (new)

1	62-5-414	62-5-105, 62-5-412
2	62-5-415	62-5-428
3	62-5-416	62-5-428
4	62-5-417	62-5-414
5	62-5-418	62-5-415
6	62-5-419	62-5-416
7	62-5-420	62-5-417
8	62-5-421	62-5-418
9	62-5-422	62-5-419
10	62-5-423	62-5-420
11		62-5-421 (new)
12	62-5-424	62-5-422
13	62-5-425	62-5-423
14	62-5-426	62-5-404, 62-5-428
15	62-5-427	62-5-425
16	62-5-428	62-5-426
17	62-5-429	62-5-427
18	62-5-430	62-5-428
19	62-5-431	62-5-429
20	62-5-432	62-5-430
21		62-5-432 (new)
22	62-5-433	62-5-433
23	62-5-434	removed
24	62-5-435	removed
25	62-5-436	62-5-431

26  
27  
28  
29  
30  
31  
32

Part 1

General Provisions

GENERAL COMMENT

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



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

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

12

13 Section 62-5-101. Unless otherwise apparent from the context,  
14 in this Article:

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

18 (2) 'Alleged incapacitated individual' means:

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

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

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

24 (3) 'Conservator' means a person appointed by the court to  
25 manage the estate of a protected person.

26 (4) 'Counsel for alleged incapacitated individual' means a  
27 person authorized to practice law in the State of South Carolina  
28 who represents the alleged incapacitated individual in a  
29 guardianship proceeding or a protective proceeding. Counsel shall  
30 represent the expressed wishes of the alleged incapacitated  
31 individual to the extent consistent with the rules regulating the  
32 practice of law in the State of South Carolina.

33 (5) 'Court' means the probate court.

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

37 (7) 'Emergency' means circumstances that are likely to result  
38 in substantial harm to the alleged incapacitated individual's health,  
39 safety, or welfare or in substantial economic loss to the alleged  
40 incapacitated individual.

41 (8) 'Foreign conservator' means a conservator or a person with  
42 the powers of a conservator of another jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

6 (a) an incapacitated individual;

7 (b) a minor;

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

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

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

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

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

21 (23) ‘Supports and assistance’ includes:

22 (a) systems in place for the alleged incapacitated individual  
23 to make decisions in advance or to have another person to act on  
24 his behalf, including, but not limited to, having an agent under a  
25 durable power of attorney, a health care power of attorney, a  
26 trustee under a trust, a representative payee to manage social  
27 security funds, a Declaration of Desire for Natural Death (living  
28 will), a designated health care decision maker under Section  
29 44-66-30, or an educational representative designated under  
30 Section 55-33-310 to Section 55-33-370; and

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

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

41

42 REPORTER’S COMMENTS

43

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

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

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

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

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

33 The definition of ‘incapacity’ and ‘incapacitated individual’  
34 have changed significantly. These definitions are modified  
35 versions of the definition contained in the Uniform Guardianship  
36 and Protective Proceedings Act (1997) drafted by the Uniform  
37 Law Commission. The requirement that the person be unable to  
38 make ‘responsible’ decisions is deleted, as is the requirement that  
39 the person have an impairment by reason of a specified disability  
40 or other cause, a requirement which may have led the trier of fact  
41 to focus unduly on the nature of the respondent’s disabling  
42 condition, as opposed to the respondent’s actual ability to  
43 effectively receive and evaluate information. The 2017 definition

1 is based upon an individual's ability to understand and evaluate  
2 choices rather than the individual's disability. The definition of  
3 incapacity acknowledges that many individuals need both  
4 accommodations and supports and assistance in order to make a  
5 decision. Therefore, an individual is not incapacitated even though  
6 he may need help with making decisions, take longer to make  
7 decisions, require more explanation to make decisions, or have  
8 difficulty communicating the decision. If the individual can make  
9 his own decisions with supports and assistance, then the individual  
10 is not incapacitated. A finding that an individual displays poor  
11 judgment alone shall not be considered sufficient evidence that the  
12 individual is incapacitated within the meaning of this definition. In  
13 addition, the definition acknowledges that the capacity must be  
14 limited to the extent the individual cannot adequately provide for  
15 his health or safety necessitating the need for a guardian or cannot  
16 adequately manage his financial affairs necessitating a need for a  
17 protective order. Under this definition, a guardianship would not  
18 be necessary for an individual whose health, safety, well-being, or  
19 property is not at risk of harm.

20 'Less restrictive alternatives' are to be explored and considered,  
21 and guardianship is appropriate only when the alternatives are not  
22 available or appropriate, as noted by Sections 62-5-303(B)(6) and  
23 62-5-403(B)(6). For example, an individual may have access to a  
24 representative payee to manage his social security funds. This  
25 would be a less restrictive alternative to a conservatorship to  
26 manage those funds. Likewise, an individual may be able to make  
27 his own decisions regarding health care by having a relative attend  
28 doctor's appointments and assist him in understanding the  
29 information being presented at those appointments. This support is  
30 a less restrictive alternative to guardianship. Those alternatives  
31 which maximize the alleged incapacitated individual's  
32 self-determination must be ruled out prior to appointment of a  
33 guardian or conservator.

34 'Supports and assistance' are defined to acknowledge that any  
35 person may have planned in advance for their incapacity or have a  
36 system already in place to address his need to rely upon another to  
37 make decisions. These systems are listed, and they are all  
38 considered less restrictive alternatives which maximize the  
39 individual's self-determination, whether planned in advance or  
40 relied upon as an alternative to guardianship or conservatorship.  
41 The definition also acknowledges that reasonable accommodations  
42 must be made for people who are alleged to be incapacitated, but  
43 who in fact have the means to independently make decisions if

1 they are able to access accommodations that assist them in making  
2 decisions.

3 ‘Net aggregate amount’ was defined to clarify how calculations  
4 are to be made in Sections 62-5-103, 62-5-104, 62-5-423, and  
5 62-5-428. For example, the facility of payment provision, Section  
6 62-5-103, could be used to distribute sixteen thousand dollars to  
7 the minor in income, if after deducting taxes, the amount actually  
8 distributed was less than fifteen thousand dollars. Payments can be  
9 spread throughout the year, but dividing more than fifteen  
10 thousand dollars into multiple payments does not eliminate the  
11 need for a protective order.

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

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

18  
19 Section 62-5-102. When both guardianship proceedings and  
20 protective proceedings as to the same person are commenced or  
21 pending in the same court, the proceedings may be consolidated.

#### 22 23 REPORTER’S COMMENTS

24  
25 The 2017 amendments to this section moved the jurisdiction  
26 provisions to Section 62-5-201. The 2017 amendments kept the  
27 provision which allows guardianship and conservatorship  
28 proceedings to be consolidated when they involve the same alleged  
29 incapacitated individual and are in the same court.

30  
31 Section 62-5-103. (A) A person under a duty to pay or deliver  
32 money or personal property to a minor or incapacitated individual  
33 may perform this duty in amounts not exceeding a net aggregate  
34 amount of fifteen thousand dollars each year by paying or  
35 delivering the money or property to the conservator for the minor  
36 or incapacitated person, if the person under a duty to pay or deliver  
37 money or personal property has actual knowledge that a  
38 conservator has been appointed or an appointment is pending. If  
39 the person under a duty to pay or deliver money or personal  
40 property to a minor or incapacitated person does not have actual  
41 knowledge that a conservator has been appointed or that  
42 appointment of a conservator is pending, the person may pay or

1 deliver the money or property in amounts not exceeding a net  
2 aggregate of fifteen thousand dollars each year to:

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

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

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

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

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

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

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

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

42 (D) An employer may fulfill his duties to a minor or  
43 incapacitated individual by delivering a check to or depositing

1 payment into an account in the name of the minor or incapacitated  
2 employee.

3  
4 REPORTER'S COMMENTS

5  
6 The 2017 amendments changed this section in the following  
7 ways:

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

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

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

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

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

35  
36 Section 62-5-104. If a patient of a state mental health facility  
37 has no legally appointed conservator, the Director of the  
38 Department of Mental Health or his designee, may receive and  
39 accept, for the use and benefit of the patient, assets which may be  
40 due the patient by inheritance, gift, pension, or otherwise with a  
41 net aggregate amount not exceeding fifteen thousand dollars in one  
42 calendar year. The director or his designee may act as conservator  
43 for the patient and his endorsement or receipt discharges the



1 obligor for any assets received. Upon receipt, the director or his  
2 designee shall apply the assets for the proper maintenance, use,  
3 and benefit of the patient. In the event the patient dies leaving an  
4 unexpended balance of assets in the hands of the director or his  
5 designee, the director or his designee shall apply the balance first  
6 to the funeral expenses of the patient, and any balance remaining  
7 must be held by the director or his designee for a period of six  
8 months; if within that period, the director or his designee is not  
9 contacted by the personal representative of the deceased patient,  
10 the balance of the assets may be applied to the maintenance and  
11 medical care account of the deceased patient. The director or his  
12 designee must, within thirty days following the death of the  
13 patient, notify the court in the county in which the patient resided  
14 at the time of admission to the department's facility of the death of  
15 the patient and provide a list of any property belonging to the  
16 patient and held by the department. Upon appointment of a  
17 conservator for a patient of a state mental health facility, the  
18 director shall deliver any assets of the protected person to the  
19 conservator and provide an accounting of the management of those  
20 assets.

21

#### 22 REPORTER'S COMMENTS

23

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

28

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

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

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

42

#### 43 REPORTER'S COMMENTS

1

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

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

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

28

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

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

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

42 (a) obtaining and reviewing relevant documents;

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

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

6 (d) interviewing all parties;

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

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

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

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

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

16 (i) proposed fiduciary's knowledge of the fiduciary's  
17 duties, requirements, and limitations; and

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

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

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

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

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

31 (ii) plans to manage the alleged incapacitated  
32 individual's assets; and

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

36 (m) interviewing any persons known to the guardian ad  
37 litem having knowledge of the alleged incapacitated individual's  
38 financial circumstances or the integrity and financial capabilities of  
39 the conservator, or both, and reviewing pertinent documents.

40 (3) advocating for the best interests of the alleged  
41 incapacitated individual by making specific recommendations  
42 regarding resources as may be appropriate and available to benefit  
43 the alleged incapacitated individual, the appropriateness of the

1 appointment of a guardian or conservator, and any limitations to be  
2 imposed;

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

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

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

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

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

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

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

27 (2) a description of the alleged incapacitated individual;

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

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

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

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

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

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

- 1 (9) any other information relevant to the matter.
- 2 (D) The report shall contain recommendations including:
- 3 (1) whether a guardian or conservator is needed;
- 4 (2) the propriety and suitability of the proposed fiduciary
- 5 after consideration of his geographic location, his familial or other
- 6 relationship, his ability to carry out the duties of the proposed
- 7 fiduciary, his commitment to promoting the welfare of the alleged
- 8 incapacitated individual, his financial capabilities and integrity ,
- 9 his potential conflicts of interests, the wishes of the alleged
- 10 incapacitated individual, and the recommendations of the relatives
- 11 of the alleged incapacitated individual;
- 12 (3) approval or disapproval by the alleged incapacitated
- 13 individual of the proposed fiduciary;
- 14 (4) an evaluation of the future care and treatment needs of
- 15 the alleged incapacitated individual;
- 16 (5) if there is a proposed residential plan for the alleged
- 17 incapacitated individual, whether that plan is in the best interest of
- 18 the alleged incapacitated individual;
- 19 (6) a recommendation regarding any rights in Section
- 20 62-5-304A, which should be retained by the alleged incapacitated
- 21 individual;
- 22 (7) whether the matter should be heard in a formal hearing
- 23 even if all parties are in agreement; and
- 24 (8) any other recommendations relevant to the matter.
- 25 (E) The court in its discretion may extend or limit the
- 26 responsibilities or authority of the guardian ad litem.

27

28 REPORTER'S COMMENTS

29

30 The 2017 amendments were added this section to provide

31 guidance with specificity for the responsibilities and duties of the

32 guardian ad litem as part of the guardianship and conservatorship

33 process to insure that the highest level of integrity and dignity was

34 applied to the process. In doing so, the alleged incapacitated

35 individual's best interests would be protected to the maximum

36 extent possible while establishing evidence of the alleged

37 incapacitated individual's capacity to manage his personal and

38 financial matters and at what level he may require assistance or can

39 manage using a less restrictive alternative. These provisions have

40 incorporated some of the previous responsibilities of the visitor in

41 these proceedings. The duties and responsibilities of the guardian

42 ad litem as set forth also provide a paradigm for addressing

43 potential legal issues which may arise in the course of the guardian

1 ad litem’s appointment. Section 62-5-106 is also broad enough to  
2 allow the court to instruct the guardian ad litem on issues which  
3 have not been stated in any of the provisions of this section that  
4 could be unforeseen. This section further addresses how hearings  
5 should be treated whether in an informal or formal manner, and  
6 allows the court discretion in extending or limiting the express  
7 authority of a guardian ad litem in conformity with the authority  
8 originally granted to the guardian ad litem. The notes of the  
9 guardian ad litem are to be treated in the same manner as materials  
10 made in preparation for trial and are generally not discoverable  
11 unless the party seeking discovery can meet the test. For example,  
12 if the guardian ad litem interviewed a neighbor of the alleged  
13 incapacitated person, and that neighbor moved out of state before  
14 the party had a chance to conduct their own interview, then the  
15 party seeking the notes of the interview could potentially show a  
16 need for the notes and an inability to get that information except  
17 from the guardian ad litem.

18

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

23

24 REPORTER’S COMMENTS

25

26 The 2017 amendments to this section expand former Section  
27 62-5-408(4) to clarify that an adjudication of incapacity is not a  
28 determination of the protected person’s testamentary capacity and  
29 codifies the common law distinction between incapacity and  
30 testamentary capacity. See e.g., *In re Estate of Weeks*, 329 S.C.  
31 251, 495 S.E. 2d 454 (Ct. App. 1997).

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

38

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

42 (1) Emergency orders without notice must not be issued  
43 unless the moving party files a summons, motion for emergency

1 order with supporting affidavit(s), verified pleading, notice of  
2 emergency hearing, and any other document required by the court.  
3 The verified pleading, motions, and affidavits shall set forth  
4 specific facts supporting the allegation that an immediate and  
5 irreparable injury, loss, or damage will result before notice can be  
6 served on adverse parties and a hearing held pursuant to subsection  
7 (B).

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

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

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

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

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

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

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

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

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

40 (7) On two days' notice to the party who obtained the  
41 emergency order without notice or on such shorter notice to that  
42 party as the court may prescribe, the adverse party may appear and  
43 move for the emergency order's dissolution or modification, and in

1 that event, the court shall proceed to hear and determine the  
2 motion as expeditiously as possible and may consolidate motions.

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

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

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

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

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

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

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

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

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

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



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

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

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

12 (C) In an emergency, the court may exercise the power of a  
13 guardian with or without notice if the court makes emergency  
14 findings as required by the Adult Health Care Consent Act, Section  
15 44-66-30.

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

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

25

#### 26 REPORTER'S COMMENTS

27

28 The 2017 amendment added this section and was patterned after  
29 South Carolina Rule of Civil Procedure 65 and is in Part 1 of  
30 Article 5 because it applies to both guardianship and protective  
31 proceedings. It distinguishes between the requirements for  
32 emergency vis-à-vis temporary relief and expands prior statutory  
33 counterparts, Section 62-5-310 (temporary guardians) and Section  
34 62-5-408(1) (permissible court orders for conservatorships). The  
35 distinction between the two forms of relief is whether there is a  
36 true emergency that supports the issuance of an ex parte order.  
37 Such an emergency in the guardianship context might consist of an  
38 urgently needed medical procedure where there is no ability for an  
39 individual to give informed consent and there is no health care  
40 power of attorney in place. In a protective proceeding, it could be  
41 needed because of alleged financial malfeasance likely to result in  
42 immediate loss of assets.

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

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

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

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

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

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

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

5  
6 Part 2

7  
8 Jurisdiction

9  
10 Section 62-5-201. Exclusive jurisdiction of the court is set forth  
11 in Sections 62-1-302 and 62-5-701 as to appointment of a guardian  
12 or issuance of a protective order. Pursuant to the court's authority  
13 to appoint a guardian, and Section 62-5-309, the guardian has the  
14 authority to maintain custody of the person of the ward and to  
15 establish the ward's place of abode, unless otherwise specified in  
16 the court's order. The court does not have jurisdiction over the  
17 care, custody, and control of the person of a minor, but does have  
18 jurisdiction over the property of a minor if the court determines  
19 that the minor owns property that requires management or  
20 protection.

21  
22 REPORTER'S COMMENTS

23  
24 The 2017 amendments revised this section to make the reference  
25 to exclusive jurisdiction consistent with Section 62-1-302, and as a  
26 foundation for distinguishing the probate court's authority  
27 regarding incapacitated adults versus the authority of any other  
28 court to make decisions regarding a guardianship for an  
29 incapacitated adult, even if that court previously entered a decision  
30 regarding the care, custody, and control of the same individual  
31 when he was a minor.

32  
33 Part 3

34  
35 Guardians of Incapacitated Individuals

36  
37 Section 62-5-301. (A) The parent of an alleged incapacitated  
38 individual may by will nominate a guardian for an alleged  
39 incapacitated individual. A testamentary nomination by a parent  
40 gives the nominee priority pursuant to Section 62-5-308 in any  
41 proceeding to determine incapacity and appoint a guardian. A  
42 testamentary nomination by a parent gives priority to the nominee  
43 to make health care decisions for the alleged incapacitated

1 individual pursuant to Section 44-66-30. Such nomination creates  
2 priority under Sections 62-5-308 and 44-66-30 when the will is  
3 informally or formally probated, if prior to the will being probated,  
4 both parents are deceased or the surviving parent is adjudged  
5 incapacitated. If both parents are deceased, the nomination by the  
6 parent who died later has priority unless it is terminated by the  
7 denial of probate in formal proceedings.

8 (B) The spouse of an alleged incapacitated individual may by  
9 will nominate a guardian for an alleged incapacitated individual.  
10 A testamentary nomination by a spouse gives the nominee priority  
11 pursuant to Section 62-5-308 in any proceeding to determine  
12 incapacity and appoint a guardian. A testamentary nomination by  
13 a spouse gives priority to the nominee to make health care  
14 decisions for the alleged incapacitated individual pursuant to  
15 Section 44-66-30. Such nomination creates priority under Sections  
16 62-5-308 and 44-66-30 when the will is informally or formally  
17 probated. An effective nomination by a spouse has priority over a  
18 nomination by a parent unless the nomination is terminated by the  
19 denial of probate in formal proceedings.

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

#### 22 23 REPORTER'S COMMENTS 24

25 The 2017 amendments made significant changes to this section.  
26 This section now sets forth a procedure by which a testator may  
27 nominate a guardian for the testator's alleged incapacitated adult  
28 child or spouse. (Prior law treated the naming of a guardian as an  
29 'appointment.') The nominee has priority for appointment similar  
30 to priority bestowed on a nominee as personal representative;  
31 however, appointment is not automatic. The nominee must file a  
32 petition for appointment with the Court, and the Court will follow  
33 the usual procedures for vetting the nominee and determining  
34 incapacity. The nomination also gives the nominee tertiary  
35 priority to make decisions pursuant to the Adult Healthcare  
36 Consent Act as set forth in Section 44-66-30(A)(3). Based on the  
37 facts of the case and the filings of the parties, pursuant to Section  
38 62-1-100 of the Probate Code, it is within the discretion of the  
39 court to determine whether a testamentary guardian designation in  
40 a will executed by a parent or spouse prior to the effective date of  
41 this Article will fall under the processes and procedures of the  
42 1987 Probate Code or under the process and procedures enacted by  
43 the 2017 amendments.

1

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

8

9

#### REPORTER'S COMMENTS

10

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

14

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

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

21 (1) interest of the petitioner;

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

25 (3) physical location of the alleged incapacitated individual  
26 during the six-month period immediately preceding the filing of  
27 the summons and petition; and, if the alleged incapacitated  
28 individual was not physically present in South Carolina for that  
29 period, sufficient information upon which the court may make a  
30 determination that it has initial jurisdiction pursuant to Section  
31 62-5-707;

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

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

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

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

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

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

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

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

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

20

21

#### REPORTER'S COMMENTS

22

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

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

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

11

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

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

16 (2) a copy of the summons and petition upon all  
17 correspondents and the petitioner in any pending guardianship  
18 proceeding; and

19 (3) any affidavits or physician's reports filed with the  
20 petition.

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

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

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

36

37

#### REPORTER'S COMMENTS

38

39 Sections 62-5-303A(A) and 62-5-303A(B) specify that the  
40 alleged incapacitated individual and the persons named as  
41 correspondents pursuant to Section 62-5-303(B)(4) must be served  
42 within one hundred twenty days of filing or the action may be  
43 dismissed without prejudice. SCRCP 5(d) requires the filing of

1 proof of service of the summons and petition within ten days of  
2 service.

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

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

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

20

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

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

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

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

33 (b) one examiner, who must be a physician, to examine  
34 the alleged incapacitated individual and file a notarized report  
35 setting forth his evaluation of the condition of the alleged  
36 incapacitated individual in accordance with the provisions set forth  
37 in Section 62-5-303D. Unless the guardian ad litem or the alleged  
38 incapacitated individual objects, if a physician's notarized report is  
39 filed with the petition and served upon the alleged incapacitated  
40 individual and all interested parties with the petition, then the court  
41 may appoint such physician as the examiner. Upon the court's  
42 own motion or upon request of the initial examiner, the alleged  
43 incapacitated individual, or his guardian ad litem, the court may



1 appoint a second examiner, who must be a physician, nurse, social  
2 worker, or psychologist.

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

6 (C) At the attorney's discretion, the attorney for the alleged  
7 incapacitated individual may file a motion requesting that the court  
8 relieve him as the attorney if the alleged incapacitated individual is  
9 incapable of communicating, with or without reasonable  
10 accommodations, his wishes, interests, or preferences regarding  
11 the appointment of a guardian. The attorney must file an affidavit  
12 in support of the motion. If the court is satisfied that the alleged  
13 incapacitated individual is incapable of communicating, with or  
14 without reasonable accommodations, his wishes, interests, or  
15 preferences regarding the appointment of a guardian, then the court  
16 may relieve the attorney from his duties as attorney for the alleged  
17 incapacitated individual. If the former attorney requests to be  
18 appointed as the guardian ad litem, the court may appoint him to  
19 serve as the guardian ad litem. An attorney cannot serve as both  
20 an attorney and as a guardian ad litem in a guardianship action.

21

#### 22 REPORTER'S COMMENTS

23

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

36 The 2017 amendments are an important departure from the prior  
37 statute, Section 62-5-303(b), which required the appointment of a  
38 lawyer "who then has the powers and duties of a guardian ad  
39 litem." Traditionally, a guardian ad litem not only has a duty to  
40 the alleged incapacitated individual but also a duty to the court to  
41 discern and report what is in the best interest of the individual  
42 regardless of the individual's preferences, although by statute those  
43 preferences must be considered by the court. With the 2017

1 amendments, the alleged incapacitated individual must have a  
2 lawyer who argues for the individual's expressed wishes regardless  
3 of what may be in his best interests, and a guardian ad litem who  
4 acts as the eyes and ears of the court to discern the best outcome  
5 for the alleged incapacitated individual and to advise the court  
6 thereof.

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

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

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

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

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

13  
14 Section 62-5-303C. (A) As soon as the interests of justice  
15 may allow, but after the time for filing a response to the petition  
16 has elapsed as to all parties, the court shall hold a hearing on the  
17 merits of the petition. The alleged incapacitated individual, all  
18 parties, and any person who has filed a demand for notice, shall be  
19 given notice of the hearing. The alleged incapacitated individual is  
20 entitled to be present at the hearing, to conduct discovery, and to  
21 review all evidence bearing upon his condition. The hearing may  
22 be closed at the request of the alleged incapacitated individual or  
23 his guardian ad litem. The alleged incapacitated individual may  
24 waive notice of a hearing and his presence at the hearing. If there  
25 is an agreement among all the parties and the guardian ad litem's  
26 report indicates that a hearing would not further the interests of  
27 justice, the alleged incapacitated individual may waive his right to  
28 a hearing. If the alleged incapacitated individual waives his right  
29 to a hearing, the court may:

- 30 (1) require a formal hearing;  
31 (2) require an informal proceeding as the court shall direct;  
32 or  
33 (3) proceed without a hearing.

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

41  
42  
43

REPORTER'S COMMENTS

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

6 Section 62-5-303C(A) states that a hearing must be held after  
7 the time for all parties to file responsive pleadings has elapsed.  
8 Unlike previous law, the term ‘party’ is now defined in Section  
9 62-5-101(16) and the court may allow certain designated  
10 individuals, and any person or party it deems appropriate, to  
11 participate in the proceedings. The alleged incapacitated  
12 individual and the proposed guardian should attend the hearing  
13 unless excused by the court for good cause. The hearing may be  
14 closed at the request of counsel for the alleged incapacitated  
15 individual or his guardian ad litem.

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

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

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

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

40 The purpose of the language allowing waivers of hearing and  
41 the issuance of thirty-day consent orders is to reduce costs, but  
42 only where possible to do so fairly and without jeopardizing the  
43 due process rights of the alleged incapacitated individual. The

1 court should scrutinize any waivers of notice and hearing closely  
2 to insure that they are willingly and voluntarily given.

3  
4 Section 62-5-303D. (A) Each examiner shall complete a  
5 notarized report setting forth an evaluation of the condition of the  
6 alleged incapacitated individual. The original report must be filed  
7 with the court by the court's deadline, but not less than forty-eight  
8 hours prior to any hearing in which the report is introduced as  
9 evidence. For good cause, the court may admit an examiner's  
10 report filed less than forty-eight hours prior to the hearing. All  
11 parties are entitled to review the reports after filing, which must be  
12 admissible as evidence. The evaluation shall contain, to the best of  
13 the examiner's knowledge and belief:

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

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

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

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

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

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

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

32 (B) Unless otherwise directed by the court, the examiner may  
33 rely upon an examination conducted within the ninety-day period  
34 immediately preceding the filing of the petition. In the absence of  
35 bad faith, an examiner appointed by the court pursuant to Section  
36 62-5-303B, is immune from civil liability for breach of patient  
37 confidentiality made in furtherance of his duties.

38  
39 REPORTER'S COMMENTS

40  
41 The 2017 amendments to this section expand upon former  
42 Section 62-5-303 in regard to the examiner's duties, the content

1 and timing of the examiner's report, and the immunity of the  
2 examiner from civil liability.

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

12 Subsection (A) also prescribes the content of the examiner's  
13 report, the purpose of which is to evaluate the functional  
14 limitations of the alleged incapacitated individual. Among the  
15 factors to be addressed are a diagnosis of the level of functioning  
16 and assessment of the alleged incapacitated individual's current  
17 condition and prognosis, the degree of personal care the alleged  
18 incapacitated individual can manage alone, an evaluation of the  
19 individual's ability to exercise the rights outlined in Section  
20 62-5-304A, and whether current medication affects the  
21 individual's demeanor or ability to participate in the proceedings.  
22 It should include the dates of all examinations.

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

29  
30 Section 62-5-304. (A) The court shall exercise its authority to  
31 encourage maximum self-reliance and independence of the  
32 incapacitated individual and issue orders only to the extent  
33 necessitated by the incapacity of the individual.

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

- 38 (1) enter an appropriate order;  
39 (2) treat the petition as one for a protective order and  
40 proceed accordingly; or  
41 (3) dismiss the proceeding.

42 (C) The court may appoint co-guardians if the appointment is in  
43 the best interest of the incapacitated individual. The compensation

1 of co-guardians in the aggregate shall not exceed the compensation  
2 that would have been allowed to a sole guardian. Unless the order  
3 of appointment provides otherwise:

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

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

7 (D) The court, on its own motion or on the petition or motion of  
8 the incapacitated individual or other interested person, may limit  
9 the powers of a guardian and create a limited guardianship. A  
10 limitation on the statutory power of a guardian of an incapacitated  
11 individual shall be endorsed on the guardian's letters. A limitation  
12 may be removed, modified, or restored pursuant to Sections  
13 62-5-307 and 62-5-307A.

14 (E) Unless the court order specifies otherwise:

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

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

21

#### 22 REPORTER'S COMMENTS

23

24 Consistent with the former version of this section, the 2017  
25 amendments require that guardianship be limited to ensure  
26 maximum independence of the alleged incapacitated individual.  
27 However, the 2017 amendments made multiple changes to provide  
28 the tools needed to ensure that the only rights that are removed  
29 from the ward are those that are justified by the ward's incapacity  
30 and necessary for the ward's health, safety, and welfare.  
31 Therefore, a guardianship should be limited to address the ward's  
32 incapacity, which is defined in Section 62-5-101(13). An  
33 individual with supports and assistance reasonably available to  
34 ensure health, safety, and welfare and to manage property would  
35 not need those rights removed which have already been addressed.  
36 Supports and assistance, defined in Section 62-5-101(23), includes  
37 both advance planning and reasonable accommodations that allow  
38 the individual to act on their own behalf. For example, an  
39 individual who has addressed end of life decisions in advance of  
40 his incapacity through a duly executed Declaration of Desire for  
41 Natural Death, living will, or an agent named under a health care  
42 power of attorney, does not need a guardian to be appointed for the  
43 purpose of end of life decisions. End of life decisions made by the

1 individual in advance should not be overruled through the  
2 guardianship process. In contrast, if an individual has a Health  
3 Care Power of Attorney, but the agent is unavailable or unable to  
4 act on the individual's behalf, then that support is unavailable, and  
5 if the individual is incapacitated, guardianship would be  
6 appropriate to address health care needs.

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

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

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

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

35

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

- 40 (1) marry or divorce;
- 41 (2) reside in a place of the ward's choosing, and consent or  
42 withhold consent to any residential or custodial placement;
- 43 (3) travel without the consent of the guardian;



1 (4) give, withhold, or withdraw consent and make other  
2 informed decisions relative to medical, mental, and physical  
3 examinations, care, treatment and therapies;  
4 (5) make end-of-life decisions including, but not limited to,  
5 a ‘do not resuscitate’ order or the application of any medical  
6 procedures intended solely to sustain life, and consent or withhold  
7 consent to artificial nutrition and hydration;  
8 (6) consent or refuse to consent to hospitalization and  
9 discharge or transfer to a residential setting, group home, or other  
10 facility for additional care and treatment;  
11 (7) authorize disclosures of confidential information;  
12 (8) operate a vehicle;  
13 (9) vote;  
14 (10) be employed without the consent of a guardian;  
15 (11) consent to or refuse educational services;  
16 (12) participate in social, religious or political activities;  
17 (13) buy, sell, or transfer real or personal property or transact  
18 business of any type including, but not limited to, those powers  
19 conferred upon the conservator under Section 62-5-422;  
20 (14) make, modify, or terminate contracts;  
21 (15) bring or defend any action at law or equity; and  
22 (16) any other rights and powers that the court finds necessary  
23 to address.  
24 (B) The court shall set forth the rights and powers vested in the  
25 guardian. These rights and powers include, but are not limited to,  
26 the rights and powers to:  
27 (1) determine the place where the ward shall reside and  
28 consent or withhold consent to any residential or custodial  
29 placement;  
30 (2) consent to travel;  
31 (3) consent or refuse to consent to visitation with family,  
32 friends and others;  
33 (4) give, withhold, or withdraw consent and make other  
34 informed decisions relative to medical, mental, and physical  
35 examinations, care, treatment and therapies;  
36 (5) make end-of-life decisions, including, but not limited, to  
37 a ‘do not resuscitate’ order or the application of any medical  
38 procedures intended solely to sustain life, and consent or withhold  
39 consent to artificial nutrition and hydration;  
40 (6) consent or refuse to consent to hospitalization and  
41 discharge or transfer to a residential setting, group home, or other  
42 facility for additional care and treatment;  
43 (7) authorize disclosures of confidential information;

- 1 (8) consent to or refuse educational services;  
2 (9) consent to employment;  
3 (10) make, modify, or terminate contracts related to the duties  
4 of the guardian;  
5 (11) bring or defend any action at law or equity; and  
6 (12) exercise any other rights and powers that the court finds  
7 necessary to address.  
8 (C) Nothing in this section must be construed as removing any  
9 rights guaranteed by the Bill of Rights for Residents of Long-Term  
10 Care Facilities under Chapter 81, Title 44.  
11 (D) The attorney-client privilege between the ward and the  
12 ward's counsel must not be removed by the appointment of a  
13 guardian.

14  
15 REPORTER'S COMMENTS  
16

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

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

42 With regard to end-of-life decisions, if that right is vested in the  
43 guardian, the guardian must act consistently with the most recent

1 advance directive executed by the ward prior to the adjudication of  
2 incapacity, pursuant to Section 62-5-304A.

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

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

11  
12 Section 62-5-305. By accepting appointment, a guardian  
13 submits personally to the jurisdiction of the court in any  
14 proceeding relating to the guardianship that may be instituted by  
15 any interested person. Notice of any proceeding must be given or  
16 waived pursuant to Sections 62-1-401 and 62-1-402.

#### 17 18 REPORTER'S COMMENTS

19  
20 The 2017 amendment revised this section by adopting the notice  
21 and waiver requirements in Sections 62-1-401 and 62-1-402.

22  
23 Section 62-5-306. (A) Upon the death of the ward, the  
24 guardian shall notify the court and file a death certificate  
25 confirming the ward's death. The court may then issue an order  
26 terminating the guardianship and the appointment of the guardian.

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

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

43

1 REPORTER'S COMMENTS

2  
3 The 2017 amendments clarify the procedure for terminating a  
4 guardianship upon the death of the ward. The guardian must  
5 notify the court of the ward's death and file a death certificate with  
6 the court. Subsection (B) has been added to give the guardian the  
7 ability to seek approval of use of the ward's funds for final  
8 disposition of the ward's remains when no conservator has been  
9 appointed.

10  
11 Section 62-5-307. (A) The ward or another person interested  
12 in his welfare, may make an informal request for relief by  
13 submitting a written request to the court. The court may take such  
14 action as considered reasonable and appropriate to protect the  
15 ward.

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

18  
19 REPORTER'S COMMENTS

20  
21 This section was added in 2017 to allow the court to respond to  
22 concerns of the ward or another person interested in his welfare  
23 without requiring filing of a formal action. It mirrors Section  
24 62-5-413. The court may dismiss an informal request for relief. If  
25 readjudication is requested informally and the court denies the  
26 request, a formal petition for readjudication must be heard  
27 pursuant to Section 62-5-307A. The 2017 amendment reflects a  
28 change from the 2010 revision, which required the court to hear an  
29 informal request made by the ward.

30  
31 Section 62-5-307A. (A) Upon filing of a summons and  
32 petition with the appointing court, the ward or any person  
33 interested in his welfare may, for good cause, request an order to:

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

41 (2) appoint a successor guardian due to death, incapacity,  
42 resignation, or dereliction of duty of the guardian. The  
43 appointment of a successor guardian does not affect the guardian's

1 liability for prior acts nor his obligation to account for any funds or  
2 assets of the ward. The petition shall name a willing and qualified  
3 person to serve as successor guardian in the petition or set forth  
4 why no such successor is available; or

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

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

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

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

17

18

#### REPORTER'S COMMENTS

19

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

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

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

1 The court may allow any of the actions under Section  
2 62-5-307A to be treated as an informal request as set forth in  
3 Section 62-5-307.

4

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

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

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

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

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

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

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

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

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

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

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

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

40 (C) Other than as provided in Section 62-5-108, a probate judge  
41 or an employee of the court shall not serve as a guardian of a ward;  
42 except, a probate judge or an employee of the court may serve as a  
43 guardian of a family member if such service does not interfere with

1 the proper performance of the probate judge's or the employee's  
2 official duties. For purposes of this subsection, 'family member'  
3 means a spouse, parent, child, brother, sister, niece, nephew,  
4 mother-in-law, father-in-law, son-in-law, daughter-in-law,  
5 grandparent, or grandchild.

6  
7 REPORTER'S COMMENTS  
8

9 This section sets forth the priority of who may be appointed  
10 guardian and provides the standards to be utilized in appointing  
11 those of equal or lesser priority. A 'person' is defined in Section  
12 62-5-101(17), and may include a suitable entity as noted.

13  
14 Section 62-5-309. (A) Subject to the rights and powers  
15 retained by the ward and except as modified by order of the court,  
16 the guardian has the following duties, rights, and powers:

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

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

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

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

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

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

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

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

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

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

18 (8) if a conservator has been appointed:

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

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

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

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

34 (B) A guardian, within thirty days of his appointment, shall file  
35 a plan of care. The plan must be based on the actual needs of the  
36 ward, taking into consideration the best interest of the ward. The  
37 guardian shall revise the plan as the needs and circumstances of the  
38 ward require. The guardian shall include in the plan a statement of  
39 the extent to which the ward may be able to develop or recover  
40 ability for independent decision making and any proposed steps to  
41 develop or restore the ward's ability for independent decision  
42 making. The court shall approve, disapprove, or modify the plan



1 in informal or formal proceedings, as the court deems appropriate.  
2 Nothing herein shall require the court to oversee the plan of care.

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

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

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

17  
18 **REPORTER'S COMMENTS**  
19

20 The 2017 amendments expand upon former Sections 62-5-104  
21 and 62-5-312.

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

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

38 Section 62-5-309(A)(4) addresses the guardian's duties to take  
39 reasonable care of the ward's personal effects.

40 Section 62-5-309(A)(5) expands the guardian's authority to  
41 execute documents on behalf of the ward if no conservator is in  
42 place.

1 Section 62-5-309(A)(6)(c) allows the guardian to exercise the  
2 ward's rights as trust beneficiary to the extent provided in Article  
3 7, Title 62.

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

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

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

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

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

18 An independent monitoring system is crucial for a court to  
19 adequately safeguard against abuses in guardianship cases.  
20 Monitors can be paid court personnel, court appointees, or  
21 volunteers. For a comprehensive discussion of the various  
22 methods for monitoring guardianships, see Sally Balch Hurme,  
23 *Steps to Enhance Guardianship Monitoring* (A.B.A. 1991). The  
24 National Probate Court Standards also provide for the filing of  
25 reports and procedures for monitoring guardianships. See National  
26 Probate Court Standards, Standards 3.3.14 'Reports by the  
27 Guardian,' and 3.3.15 'Monitoring of the Guardian' (1993). The  
28 National Probate Court Standards additionally contain  
29 recommendations relating to the need for periodic review of  
30 guardianships and sanctions for failures of guardians to comply  
31 with reporting requirements. See National Probate Court  
32 Standards, Standards 3.3.16 'Revaluation of Necessity for  
33 Guardianship,' and 3.3.17 'Enforcement.' UGPPA Section 5-317  
34 (2010).

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

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

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

10

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

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

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

17 (3) the court transfers the proceeding to another county's  
18 jurisdiction;

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

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

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

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

31

## 32 REPORTER'S COMMENTS

33

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

38

### 39 Part 4

40

## 41 Protection of Property of Persons Under 42 Disability and Minors

43

1 Section 62-5-401. Subject to the provisions of Section  
2 62-5-701, et seq., venue for proceedings under this part is:  
3 (1) in the county where the alleged incapacitated individual  
4 resides; or  
5 (2) if the alleged incapacitated individual does not reside in this  
6 State, in any county in the state where the alleged incapacitated  
7 individual has property or has the right to take legal action.

8  
9 REPORTER'S COMMENTS

10  
11 The 2017 amendment revised Section 62-5-401 because of  
12 changes in the definitions and choice of words throughout Part 3  
13 and Part 4. For an individual who does not reside in this State,  
14 venue is permissible in any county where the alleged incapacitated  
15 individual has property or in any county where he has the right to  
16 take legal action, broadening the options for venue from the  
17 previous version of the section.

18  
19 Section 62-5-402. (A) The appointment of a conservator or  
20 issuance of a protective order may be made in relation to the estate  
21 and affairs of a minor if:

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

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

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

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

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

32 (a) the interest of the applicant;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37

38

#### REPORTER'S COMMENTS

39

40 This section was substantially amended in 2017 to provide an  
41 informal procedure for the appointment of a minor's conservator or  
42 for the issuance of a protective order for a minor where the court  
43 determines the informal procedure is adequate to protect the

1 minor's interests while eliminating any unnecessary depletion of  
2 the minor's assets. The cases where this is appropriate are  
3 typically uncontested and interested persons are in agreement as to  
4 the person to be appointed or the order to be issued. Section  
5 62-5-402(C), however, clarifies that the court may require formal  
6 proceedings at any time including after the informal application is  
7 made, and as in the prior statute the court may appoint a guardian  
8 ad litem for the minor in any proceeding pursuant to Section  
9 62-5-402(F) if it deems the interests of the minor are not  
10 adequately protected.

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

13 Section 62-5-402(B) outlines the informal application process  
14 and information which must be provided to the court, including a  
15 statement of priority for appointment as described in Section  
16 62-5-408, so the court may make an appropriate selection of a  
17 conservator or issue a protective order without the filing and  
18 service of a summons and petition. The court may also dispense  
19 with a hearing if it determines it unnecessary to protect the  
20 interests of the minor.

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

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

27

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

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

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

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

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

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

6 (1) interest of the petitioner;

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

10 (3) physical location of the alleged incapacitated individual  
11 during the six-month period immediately preceding the filing of  
12 the summons and petition; and, if the alleged incapacitated  
13 individual was not physically present in South Carolina for that  
14 period, sufficient information upon which the court may make a  
15 determination that it has initial jurisdiction pursuant to Section  
16 62-5-707;

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

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

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

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

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

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

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

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

41 (7) a statement of any rights the petitioner is requesting be  
42 removed from the alleged incapacitated individual, any restrictions  
43 to be placed on the alleged incapacitated individual, and any

1 restrictions sought to be imposed on the conservator’s powers and  
2 duties;

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

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

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

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

16

17

#### REPORTER’S COMMENTS

18

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

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

41 Section 62-5-403(A)(1) describes the circumstances under  
42 which a conservator may be needed, and Section 62-5-403(A)(2) is



1 new to the 2017 amendments and is an express authorization for  
2 the court to create a special needs trust for a disabled individual.

3 In order to make an informed decision, the court must have as  
4 much information as possible. Section 62-5-403(B) specifies the  
5 data which must be included in each petition including the persons  
6 to be named as co-respondents. The purpose of Section  
7 62-5-403(B)(4)(d) is to provide notice to persons who may be  
8 likely to have an interest in protecting the alleged incapacitated  
9 individual even though they are not family members. The petition  
10 also must include a statement as to why less restrictive alternatives  
11 such as limited conservatorship are or are not sufficient, and  
12 requires the enumeration of rights to be removed.

13 With the repeal of Part 6 of Article 5, the Uniform Veterans'  
14 Guardianship Act, the requirement contained in former Section  
15 62-5-605 that the petition show that the ward has been rated  
16 incompetent by the VA is now included in the contents of the  
17 initial conservatorship petition. Additionally, since the VA is  
18 entitled to notification of the proceeding, the name and address of  
19 the person to be notified on behalf of the VA is also to be included.  
20 If a conservatorship is for the purpose of receiving VA benefits,  
21 the petitioner must comply with the requirements of Sections  
22 62-5-431(B), 62-5-431(H), and 62-5-431(I).

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

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

30  
31 Section 62-5-403A. (A) As soon as reasonably possible after  
32 the filing of the summons and petition, the petitioner shall serve:

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

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

38 (3) any affidavits or physicians' reports filed with the  
39 petition.

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

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

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

13

14

#### REPORTER'S COMMENTS

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16 Sections 62-5-403A(A) and 62-5-403A(B) specify that the  
17 alleged incapacitated individual and the persons named as  
18 co-respondents pursuant to Section 62-5-403(B)(4) must be served  
19 within one hundred twenty days of filing or the action may be  
20 dismissed without prejudice. In cases governed by Section  
21 62-5-431, relating to VA benefits, the VA will be named as a  
22 corespondent and will receive a copy of the summons and petition.  
23 SCRCF 5(d) requires the filing of proof of service of the summons  
24 and petition within ten days of service.

25 The 2017 amendments to Sections 62-5-403A(A) and  
26 62-5-403A(C) require that the alleged incapacitated individual be  
27 served with notice that he has the right to hire counsel, and Section  
28 62-5-403A(C) requires a lawyer to be appointed by the court  
29 within fifteen days of receipt of proof of service unless the court  
30 receives a notice of appearance from private counsel hired by the  
31 alleged incapacitated individual. An alleged incapacitated  
32 individual may have prior experience with an attorney who he  
33 prefers to retain, and this section specifies the privately retained  
34 attorney must enter an appearance within fifteen days of filing of  
35 the proof of service of the summons and petition.

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

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

42

1 Section 62-5-403B. (A) Except in cases governed by Section  
2 62-5-431 relating to veterans benefits, upon receipt by the court of  
3 proof of service of the summons, petition, and notice of right to  
4 counsel upon the alleged incapacitated individual, the court shall:

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

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

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

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

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

33 (C) At the attorney's discretion, the attorney for the alleged  
34 incapacitated individual may file a motion requesting that the court  
35 relieve him as the attorney if the alleged incapacitated individual is  
36 incapable of communicating, with or without reasonable  
37 accommodations, his wishes, interests, or preferences regarding  
38 the appointment in a protective proceeding. The attorney must file  
39 an affidavit in support of the motion. If the court is satisfied that  
40 the alleged incapacitated individual is incapable of  
41 communicating, with or without reasonable accommodations, his  
42 wishes, interests, or preferences regarding the appointment in a  
43 protective proceeding, then the court may relieve the attorney from

1 his duties as attorney for the alleged incapacitated individual. If  
2 the former attorney requests to be appointed as the guardian ad  
3 litem, the court may appoint him to serve as the guardian ad litem.  
4 An attorney cannot serve as both an attorney and as a guardian ad  
5 litem in a protective proceeding.

6  
7 REPORTER'S COMMENTS  
8

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

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

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

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

38 Pursuant to Section 62-5-403B(A)(2)(b), the examiner must be a  
39 physician. Although a physician may provide valuable  
40 information, incapacity is a multifaceted issue and the court may  
41 consider using, in addition to the physician, other professionals  
42 whose expertise and training give them greater insight into  
43 incapacity. The court on its own motion or if requested by the

1 initial examiner, the guardian ad litem, or the alleged incapacitated  
2 individual, may appoint a second examiner. The second examiner  
3 is not required to be a physician, but if not, should be a nurse,  
4 social worker, or psychologist. A qualified examiner's additional  
5 experience in physical and occupational therapy, developmental  
6 disabilities or habilitation and community mental health  
7 considerations may also be helpful, though is not required.

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

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

24 If a conservatorship is for the purpose of receiving VA benefits,  
25 the petitioner must comply with the requirements of Sections  
26 62-5-431(B), 62-5-431(H), and 62-5-431(I).

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

39

40 Section 62-5-403C. (A) As soon as the interests of justice  
41 may allow, but after the time for filing a response to the petition  
42 has elapsed as to all parties, the court shall hold a hearing on the  
43 merits of the petition. The alleged incapacitated individual, all

1 parties, and any person who has filed a request or demand for  
2 notice must be given notice of the hearing. The alleged  
3 incapacitated individual is entitled to be present at the hearing, to  
4 conduct discovery, and to review all evidence bearing upon his  
5 condition. The hearing may be closed at the request of the alleged  
6 incapacitated individual or his guardian ad litem. The alleged  
7 incapacitated individual may waive notice of a hearing and his  
8 presence at the hearing. If there is an agreement among all the  
9 parties and the guardian ad litem's report indicates that a hearing  
10 would not further the interests of justice, the alleged incapacitated  
11 individual may waive his right to a hearing. If the alleged  
12 incapacitated individual waives his right to a hearing, the court  
13 may:

- 14 (1) require a formal hearing;
- 15 (2) require an informal proceeding as the court shall direct;
- 16 or
- 17 (3) proceed without a hearing.

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

25  
26  
27

#### REPORTER'S COMMENTS

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

32 Section 62-5-403C(A) states that a hearing must be held after  
33 the time for all parties to file responsive pleadings has elapsed.  
34 Unlike previous law, the term 'party' is now defined in Section  
35 62-5-101(16) and the court may allow certain designated  
36 individuals, and any person or party it deems appropriate to  
37 participate in the proceedings. The alleged incapacitated  
38 individual and the proposed guardian should attend the hearing  
39 unless excused by the court for good cause. The hearing may be  
40 closed at the request of counsel for the alleged incapacitated  
41 individual or his guardian ad litem.

42 Section 62-5-403C(A) also states that any person who has filed  
43 a demand for notice must be given notice of hearing. In the estate

1 context, Section 62-3-204 allows ‘interested persons’ to file  
2 demands for notice so by analogy, a person must fit within that  
3 definition in order to have standing to file a demand for notice  
4 pursuant to Article 5.

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

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

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

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

30  
31 Section 62-5-403D. (A) Each examiner shall complete a  
32 notarized report setting forth an evaluation of the condition of the  
33 alleged incapacitated individual. The original report must be filed  
34 with the court by the court’s deadline, but not less than forty-eight  
35 hours prior to any hearing in which the report will be introduced as  
36 evidence. For good cause, the court may admit an examiner’s  
37 report filed less than forty-eight hours prior to the hearing. All  
38 parties are entitled to review the reports, which are admissible as  
39 evidence. The evaluation shall contain, to the best of the  
40 examiner’s knowledge and belief:

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

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

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

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

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

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

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

17 (B) Unless otherwise directed by the court, the examiner may  
18 rely upon an examination conducted within the ninety-day period  
19 immediately preceding the filing of the petition. In the absence of  
20 bad faith, an examiner appointed by the court pursuant to Section  
21 62-5-403B is immune from civil liability for any breach of patient  
22 confidentiality made in furtherance of his duties.

#### 23 24 REPORTER'S COMMENTS

25  
26 The 2017 amendments to this section expand upon former  
27 Section 62-5-407 in regard to the examiner's duties, the content  
28 and timing of the examiner's report, and the immunity of the  
29 examiner from civil liability.

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

39 Subsection (A) also prescribes content of the examiner's report,  
40 the purpose of which is to evaluate the functional limitations of the  
41 alleged incapacitated individual. Among the factors to be  
42 addressed are a diagnosis of the level of functioning and  
43 assessment of the alleged incapacitated individual's current



1 condition and prognosis, the degree of personal care the alleged  
2 incapacitated individual can manage alone, an evaluation of the  
3 individual's ability to exercise the rights outlined in Section  
4 62-5-407, and whether current medication affects the individual's  
5 demeanor or ability to participate in the proceedings. It should  
6 include the dates of all examinations.

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

13

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

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

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

34

35

#### REPORTER'S COMMENTS

36

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

39 The ability for the court to create a limited conservatorship is  
40 new to the 2017 amendments. For example, a limited  
41 conservatorship might be appropriate for an individual who is  
42 capable of managing his income and day to day expenses, but who  
43 is susceptible to fraud if he has access to the bulk of his estate.

1 The conservatorship may be granted control over savings accounts  
2 and other large assets, while the protected person remains in  
3 control of his earned income and checking account. The scenario  
4 assumes that there is not an available or appropriate less restrictive  
5 means to protect the estate.

6

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

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

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

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

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

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

32 (d) fund trusts;

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

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

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

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

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

- 4 (1) wishes of the protected person;
- 5 (2) financial needs and legal obligations of the protected  
6 person and those who are dependent upon him for support;
- 7 (3) tax consequences;
- 8 (4) protected person's eligibility or potential eligibility for  
9 governmental assistance;
- 10 (5) protected person's previous pattern of giving or level of  
11 support;
- 12 (6) protected person's gifting and estate plan; and
- 13 (7) protected person's life expectancy and the probable  
14 duration of incapacity.

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

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

25  
26 **REPORTER'S COMMENTS**

27  
28 This section gives specific powers to the court to take action  
29 with respect to the estate and affairs of a minor or incapacitated  
30 individual, when there has been a formal proceeding and a  
31 protective arrangement has been offered to or ordered by the court.  
32 The court has broad authority to authorize protective arrangements  
33 which benefit the minor or incapacitated individual. In addition,  
34 the court may authorize a conservator, or a special conservator, to  
35 exercise a broad range of acts. For any protective arrangement or  
36 action by a conservator, the court may consider the wishes of the  
37 protected person.

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

40  
41 Section 62-5-406. RESERVED.

42

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

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

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

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

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

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

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

24

#### 25 REPORTER'S COMMENTS

26

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

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

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

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

6

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

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

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

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

21 (4) the spouse of the alleged incapacitated individual;

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

23 (6) a parent of the alleged incapacitated individual;

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

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

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

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

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

40 (C) Except when authorizing, directing, or ratifying the  
41 implementations of provisions of protective arrangements,  
42 pursuant to Section 62-5-405, a probate judge or an employee of  
43 the court shall not serve as a conservator of an estate of a protected

1 person; except, a probate judge or an employee of the court may  
2 serve as a conservator of the estate of a family member if such  
3 service does not interfere with the proper performance of the  
4 probate judge's or the employee's official duties. For purposes of  
5 this subsection, 'family member' means a spouse, parent, child,  
6 brother, sister, niece, nephew, mother-in-law, father-in-law, son-  
7 in-law, daughter-in-law, grandparent, or grandchild.

8

9

#### REPORTER'S COMMENTS

10

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

14

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

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

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

41 (3) release sureties;

42 (4) dispense with security or securities; or

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

3  
4 REPORTER'S COMMENTS

5  
6 The language of this section has been revised for flow and  
7 clarity. In addition, it now contains specific language authorizing  
8 the use of a restricted account, while protecting the requirement  
9 that the activities of the conservator regarding such an account  
10 must be reported as required by the court.

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

15  
16 Section 62-5-410. (A) The following requirements and  
17 provisions apply to any bond required under Section 62-5-409:

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

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

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

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

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

38  
39 REPORTER'S COMMENTS

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

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

6

7

#### REPORTER'S COMMENTS

8

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

14

15 Section 62-5-412. Any conservator or special conservator  
16 appointed in a protective proceeding is entitled to reasonable  
17 compensation from the protected person's estate, as determined by  
18 the court.

19

20

#### REPORTER'S COMMENTS

21

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

26

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

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

34

35

#### REPORTER'S COMMENTS

36

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



1

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

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

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

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

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

22 (3) projections of expenses and resources; and

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

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

36  
37 REPORTER'S COMMENTS  
38

39 Subsection (A) is based on UGPPA (1982) Section 2-316  
40 (UGPPA Section 62-5-416 (1982)), and subsection (D) on UGPPA  
41 (1982) Section 62-2-326 (UGPPA Section 62-5-426 (1982)).

42 Subsections (B), (C) and (D) are based on UGPPA Section  
43 62-5-418(b)(c) and (d) 1997, which reflect the dual roles of a

1 conservator as fiduciary charged with management of another's  
2 property with obligations directly to the protected person while  
3 observing the standard of care applicable to trustees as further  
4 stated in new Section 62-5-422(A)(1).

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

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

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

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

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

40 Subsection (D) allows a conservator access to and the right to  
41 examine the protected person's will and other documents  
42 comprising the protected person's estate plan. Such access is  
43 essential for the conservator to carry out the obligation, as stated in

1 subsection (B) and (C)(4), to consider the protected person's views  
2 when making decisions. For example, by allowing the conservator  
3 access to the estate plan, the risk of inadvertent sales of  
4 specifically devised property and the difficult redemption problems  
5 that these types of sales often create may be avoided. Access to  
6 the estate plan also facilitates, where appropriate, the filing of a  
7 petition with respect to the protected person's estate plan as  
8 authorized by Section 62-5-405 and preserves the protected  
9 person's estate plan in accordance with the 2017 amendments to  
10 Section 62-5-425.

11

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

21

#### 22 REPORTER'S COMMENTS

23

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

30

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

36 (B) The report must include:

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

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

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

42 and

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

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

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

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

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

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

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

21

#### 22 REPORTER’S COMMENTS

23

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

34

35 Section 62-5-417. The appointment of a conservator vests in  
36 him title as trustee to all property of the protected person, presently  
37 held or thereafter acquired, including title to any property  
38 previously held by custodians or agents, unless otherwise provided  
39 in the court’s order. Neither the appointment of a conservator nor  
40 the establishment of a trust in accordance with Article 6, Chapter  
41 6, Title 44 is a transfer or alienation by the protected person of his  
42 rights or interest, within the meaning of any federal or state statute  
43 or regulation, insurance policy, pension plan, contract, will, or trust

1 instrument imposing restrictions upon or penalties for transfer or  
2 alienation by the protected person of his rights or interest.

3  
4 REPORTER'S COMMENTS

5  
6 This section, formerly Section 62-5-4204, permits independent  
7 administration of the property of protected persons once the  
8 appointment of a conservator has been obtained. Any interested  
9 person may require the conservator to account in accordance with  
10 Section 62-5-416. As a trustee, a conservator holds title to the  
11 property of the protected person, unless otherwise stated in a court  
12 order. Once appointed, he is free to carry on his fiduciary  
13 responsibilities. If he should default in these in any way, he may  
14 be made to account to the court. This section provides protection  
15 with respect to transfers or alienations made by virtue of a  
16 conservatorship or protective order involving a Medicaid  
17 qualifying trust.

18  
19 Section 62-5-418. (A) Fiduciary letters of conservatorship are  
20 evidence of transfer of all title of the assets of a protected person to  
21 the conservator unless otherwise provided in the court's order. An  
22 order terminating a conservatorship transfers all assets of the estate  
23 from the conservator to the protected person or his successors.  
24 Fiduciary letters and terminations of appointment must be filed and  
25 recorded in the office where conveyances of real estate are  
26 recorded for the county in which the protected person resides and  
27 in the counties of this State or other jurisdictions where the  
28 protected person owns real estate.

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

32  
33 REPORTER'S COMMENTS

34  
35 The language has been revised in the 2017 amendments to  
36 specifically state that conservators may file their fiduciary letters  
37 with credit reporting agencies or other entities or persons, as  
38 appropriate. Prior to the 2017 amendments, the court might  
39 request that the conservator take such action, but it was not  
40 specifically codified so the conservator could take independent  
41 action when necessary.

42

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

9

#### 10 REPORTER'S COMMENTS

11

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

16

17 Section 62-5-420. A person, who in good faith either assists a  
18 conservator or deals with him for value in any transaction, other  
19 than those requiring a court order as required in this part is  
20 protected as if the conservator properly exercised the power. The  
21 fact that a person knowingly deals with a conservator does not  
22 alone require the person to inquire into the existence of a power or  
23 the propriety of its exercise, except that restrictions on powers of  
24 conservators which are endorsed on letters as provided in Section  
25 62-5-424 are effective as to third persons. A person is not bound  
26 to see to the proper application of estate assets paid or delivered to  
27 a conservator. This protection extends to instances in which some  
28 procedural irregularity or jurisdictional defect occurred in  
29 proceedings leading to the issuance of letters. This protection is  
30 not a substitution for that provided by comparable provisions of  
31 the laws relating to commercial transactions and laws simplifying  
32 transfers of securities by fiduciaries.

33

#### 34 REPORTER'S COMMENTS

35

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

39

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

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

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

9

#### 10 REPORTER'S COMMENTS

11

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

29

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

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

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

39 (3) receive additions to the estate;

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

1 (5) make ordinary or extraordinary repairs or alterations to  
2 buildings or other structures, demolish, improve, raze or erect  
3 existing or new party walls or buildings;  
4 (6) vote a security in person or by general or limited proxy;  
5 (7) pay calls, assessments, and other sums chargeable or  
6 accruing against or on account of securities;  
7 (8) sell or exercise stock subscription or conversion rights;  
8 consent directly or through a committee or other agent, to the  
9 reorganization, consolidation, merger, dissolution, or liquidation of  
10 a corporation or other business enterprise whose stock or shares  
11 are publicly held;  
12 (9) hold a security in the name of a nominee or in other form  
13 without disclosure of the conservatorship so that title to the  
14 security may pass by delivery, but the conservator is liable for an  
15 act of the nominee in connection with the stock so held;  
16 (10) insure the assets of the estate against damage or loss, and  
17 the conservator against liability with respect to third persons;  
18 (11) borrow money to be repaid from estate assets or  
19 otherwise; advance money for the protection of the estate or the  
20 protected person and for all expenses, losses, and liability  
21 sustained in the administration of the estate or because of the  
22 holding or ownership of estate assets; and the conservator shall  
23 have a lien on the estate as against the protected person for  
24 advances so made;  
25 (12) pay or contest a claim except as limited by Section  
26 62-5-433; settle a claim by or against the estate of the protected  
27 person by compromise, arbitration, or otherwise except as limited  
28 by Section 62-5-433; and release, in whole or in part, a claim  
29 belonging to the estate to the extent that the claim is uncollectible;  
30 (13) pay taxes, assessments, and other expenses incurred in  
31 the collection, care, administration, and protection of the estate;  
32 (14) allocate items of income or expense to either estate  
33 income or principal, as provided by law, including creation of  
34 reserves out of income for depreciation, obsolescence, or  
35 amortization, or for depletion in mineral or timber properties;  
36 (15) pay a sum distributable to a protected person or his  
37 dependent without liability to the conservator, by paying the sum  
38 to the protected person or the distributee or by paying the sum for  
39 the use of the protected person or the distributee either to his  
40 guardian or, if none, to a relative or other person with custody of  
41 his person;  
42 (16) employ persons including attorneys, auditors, investment  
43 advisors, or agents even though they are associated with the



1 conservator to advise or assist the conservator in the performance  
2 of his administrative duties; to act upon their recommendation  
3 without independent investigation; and instead of acting  
4 personally, to employ one or more agents to perform an act of  
5 administration, whether or not discretionary;

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

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

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

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

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

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

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

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

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

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

40 (4) subdivide, develop, or dedicate land to public use; make  
41 or obtain the vacation of plats and adjust boundaries; adjust  
42 differences in valuation on exchange or partition by giving or

1 receiving considerations; or dedicate easements to public use  
2 without consideration;

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

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

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

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

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

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

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

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

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

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

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

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

36 (D) The attorney-client privilege between the protected person  
37 and the protected person's counsel must not be removed by the  
38 appointment of a conservator.

39

#### 40 REPORTER'S COMMENTS

41

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

1 Section (A)(4) replaced the word ‘bank’ with ‘financial  
2 institution’ in Section 62-5-424(A)(4) and UGPPA Section  
3 62-5-425(b)(6)(2010).

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

7 Section (A)(20) amends the terms of the conservator entering  
8 into a residential lease agreement previously specified in Section  
9 62-5-424(c)(5).

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

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

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

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

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

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

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

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

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

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

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

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

38

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

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

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

14 (3) The conservator shall consider:

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

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

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

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

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

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

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

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

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

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

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

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

16

17

#### REPORTER'S COMMENTS

18

19 The introduction of Section 62-5-423(A) refers to the protected  
20 person's dependents. UGPPA Section 62-5-427 (2010) clarifies  
21 the definition and authority to distribute to dependents.  
22 'Dependents' is not limited to dependents whom the protected  
23 person is legally obligated to support, but refers to individuals who  
24 are in fact dependent on the protected person, such as children in  
25 college and adult children with developmental disabilities. Child  
26 and spousal support payments are now specifically included within  
27 permitted distributions to dependents. Former Section 62-5-425(3)  
28 is now incorporated within the introductory paragraph of Section  
29 62-5-423.

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

32 Section (A)(2) added 'health' and 'maintenance,' but deleted  
33 'care.' This was based on UGPPA Section 62-5-427 (upon which  
34 that section was based on subsections (a) and (b) of UGPPA  
35 (1982) Section 62-2-324 (subsections (a) and (b) of UGPPA  
36 Section 62-5-424 (1982)) but with several changes.

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

39 Section (B) addresses conservatorships established based on  
40 minority.

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

1 Section (B)(2) extrapolates from former Section 62-5-425(c)(1).  
2 Section (B)(3) increases the net distributive amount to  
3 \$15,000.00 to be paid to the protected person upon a determination  
4 by the court that the estate consists of that amount in the net  
5 aggregate.

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

9 Section 62-5-423(B)(4) more directly states the identity of the  
10 protected person's personal representative.

11

12 Section 62-5-424. RESERVED.

13

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

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

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

23

#### 24 REPORTER'S COMMENTS

25

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

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

36

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

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

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

3 (3) Every claim that is disallowed in whole or part by the  
4 conservator is barred so far as not allowed unless the claimant files  
5 and properly serves a summons and petition for allowance not later  
6 than thirty days after the mailing of the notice of disallowance or  
7 partial disallowance if the notice warns the claimant of the  
8 impending bar.

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

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

27

28

#### REPORTER'S COMMENTS

29

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

40 Subsection 62-5-426(A) addresses the procedure relative to the  
41 internal affairs of a conservatorship, and specifies that after the  
42 disallowance of a claim the claimant has thirty days to file and  
43 serve a summons and petition for allowance. This is the same

1 requirement of filing and serving the pleadings within the thirty  
2 days as in the elective share, omitted spouse and pretermitted  
3 children statutes. Internal affairs of a conservatorship estate relate  
4 to how the estate of a protected person is managed, expended or  
5 distributed, and could include questions about the costs of housing  
6 for the protected person, payments to guardians or to advisors  
7 employed by the conservator, or conservator commissions.  
8 Subsection 62-5-426(C) gives priority to claims made by  
9 caregivers and expenses of administration.

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

19

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

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

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

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

39

#### 40 REPORTER'S COMMENTS

41

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



1

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

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

6 (b) requiring an accounting;

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

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

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

15 (f) approving payment of the protected person's funeral  
16 expenses;

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

20 (h) adjudicating the restoration of the protected person's  
21 capacity.

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

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

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

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

4 (a) terminating a conservatorship;

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

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

9 (d) limiting or expanding the conservatorship;

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

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

14 (g) granting other appropriate relief.

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

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

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

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

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

42 (C) The court may specify a minimum period, not exceeding  
43 one year, during which no application or petition for readjudication

1 may be filed without leave of court. Subject to this restriction, the  
2 protected person or the conservator may petition the court for a  
3 termination of incapacity or of the protective order, which must be  
4 proved by a preponderance of the evidence.

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

8

9

#### REPORTER'S COMMENTS

10

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

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

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

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

38

39 Section 62-5-429. (A) A person indebted to a protected  
40 person, or having possession of property of or an instrument  
41 evidencing a debt, stock, or chose in action belonging to a  
42 protected person may pay or deliver to a conservator, guardian of  
43 the estate, or other like fiduciary appointed by a court of the state

1 of residence of the protected person, upon being presented with  
2 proof of his appointment and an affidavit made by him or on his  
3 behalf stating that:

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

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

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

12

13

#### REPORTER'S COMMENTS

14

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

24

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

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

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

4  
5 REPORTER'S COMMENTS  
6

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

12 The 2017 amendment modifies former Section 62-5-432 to be  
13 consistent with Section 62-5-716.

14  
15 Section 62-5-431. (A) For purposes of this section:

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

19 (2) 'Benefits' means all monies payable by the United States  
20 through the VA.

21 (3) 'Secretary' means the Secretary of the United States  
22 Department of Veterans Affairs (VA) or his successor.

23 (4) 'Protected person' means a beneficiary of the VA.

24 (5) 'Conservator' has the same meaning as provided in  
25 Section 62-1-201 but only as to benefits from the VA.

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

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

41 (D) Except as provided or as otherwise permitted by the VA, a  
42 person may not serve as conservator of a protected person if the  
43 proposed conservator at that time is acting simultaneously as

1 conservator for five protected persons. Upon presentation of a  
2 petition by an attorney for the VA alleging that a person is serving  
3 simultaneously as a conservator for more than five protected  
4 persons and requesting that person's termination as a conservator  
5 for that reason, upon proof substantiating the petition, the court  
6 shall restrain that person from acting as a conservator for the  
7 affected protected person and shall require a final accounting from  
8 the conservator. After the appointment of a successor conservator  
9 if one is warranted under the circumstances, the court shall  
10 terminate the appointment of the person as conservator in all  
11 requested cases. The limitations of this section do not apply when  
12 the conservator is a bank or trust company.

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

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

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

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

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

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

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

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

42 (J) For services as conservator of funds paid from the VA, a  
43 conservator may be paid an amount not to exceed five percent of

1 the income of the protected person during any year. If  
2 extraordinary services are rendered by a conservator, the court  
3 may, upon application of the conservator and notice to the VA,  
4 authorize additional compensation payable from the estate of the  
5 protected person. No compensation is allowed on the corpus of an  
6 estate derived from payments from the VA. The conservator may  
7 be allowed reimbursement from the estate of the protected person  
8 for reasonable premiums paid to a corporate surety upon the bond  
9 furnished by the conservator.

10  
11 REPORTER'S COMMENTS  
12

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

27  
28 Section 62-5-432. (A) The court has authority to create and  
29 establish a special needs trust for an incapacitated individual in  
30 compliance with 42 U.S.C. Section 1396p(d)(4)(A), as amended,  
31 and to order the placement of the incapacitated individual's funds  
32 into such a trust or into a pooled trust in compliance with 42  
33 U.S.C. Section 1396p(d)(4)(C), as amended, for the benefit of  
34 incapacitated individuals under its authority to issue protective  
35 orders pursuant to the procedure set forth in Section 62-5-401, et  
36 seq.

37 (B) In the case of a disabled minor, the court has authority to  
38 create and establish a special needs trust in compliance with 42  
39 U.S.C. Section 1396p(d)(4)(A), as amended, if the court  
40 determines it is in the disabled minor's best interest. The court  
41 also has the authority to order the placement of the minor's funds  
42 into a special needs trust or into a pooled trust in compliance with  
43 42 U.S.C. Section 1396p(d)(4)(C), as amended, for the benefit of a

1 minor under its authority to implement provisions of protective  
2 orders pursuant to the procedure set forth in Section 62-5-401, et  
3 seq., even though the terms of the trust extend beyond the age of  
4 majority.

5  
6 REPORTER'S COMMENTS  
7

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

17  
18 Section 62-5-433. (A)(1) For purposes of this section and for  
19 any claim exceeding twenty-five thousand dollars in favor of or  
20 against any minor or incapacitated individual, 'court' means the  
21 circuit court of the county in which the minor or incapacitated  
22 individual resides or the circuit court in the county in which the  
23 suit is pending. For purposes of this section and for any claim not  
24 exceeding twenty-five thousand dollars in favor of or against any  
25 minor or incapacitated individual, 'court' means either the circuit  
26 court or the probate court of the county in which the minor or  
27 incapacitated individual resides or the circuit court or probate court  
28 in the county in which the suit is pending.

29 (2) 'Claim' means the net or actual amount accruing to or  
30 paid by the minor or incapacitated individual as a result of the  
31 settlement.

32 (3) 'Petitioner' means either a conservator appointed by the  
33 court for the minor or incapacitated individual or the guardian or  
34 guardian ad litem of the minor or incapacitated individual if a  
35 conservator has not been appointed.

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

40 (1) The petitioner must file with the court a verified petition  
41 setting forth all of the pertinent facts concerning the claim,  
42 payment, attorney's fees, and expenses, if any, and the reasons  
43 why, in the opinion of the petitioner, the proposed settlement



1 should be approved. For all claims that exceed twenty-five  
2 thousand dollars, the verified petition must include a statement by  
3 the petitioner that, in his opinion, the proposed settlement is in the  
4 best interests of the minor or incapacitated individual.

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

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

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

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

40 (2) If a conservator has not been appointed, the guardian or  
41 guardian ad litem must petition the court for approval of the  
42 settlement, as provided in items (1) and (2) of subsection (B), and  
43 without the appointment of a conservator. The payment or

1 delivery of money or personal property to or for a minor or  
2 incapacitated individual must be made in accordance with Section  
3 62-5-103. If a party subject to the court order fails or refuses to  
4 pay the money or deliver the personal property, as required by the  
5 order and in accordance with Section 62-5-103, he is liable and  
6 punishable as for contempt of court, but failure or refusal does not  
7 affect the validity or conclusiveness of the settlement.

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

22  
23 REPORTER'S COMMENTS  
24

25 No substantive changes were made to this section in the 2017  
26 amendments. The only changes involved changes in terms, like  
27 use of the term 'incapacitated individual' rather than 'incapacitated  
28 person.' Actions initiated by agents acting within the scope of  
29 authority granted in a properly executed durable power of attorney  
30 are not subject to the requirements of this section.”

31  
32 B.Part 7, Article 5, Title 62 of the 1976 Code is amended to read:

33  
34 ~~“Part 7~~

35  
36 ~~South Carolina Adult Guardianship and Protective Proceedings~~  
37 ~~Jurisdiction Act~~

38  
39 ~~—Section 62-5-700. This act may be cited as the “South Carolina~~  
40 ~~Adult Guardianship and Protective Proceedings Jurisdiction Act”.~~

41  
42 ~~—Section 62-5-701. Notwithstanding another provision of law,~~  
43 ~~this part provides the exclusive jurisdictional basis for a court of~~

1 ~~this State to appoint a guardian or issue a protective order for an~~  
2 ~~adult.~~

3

4 ~~—Section 62-5-702. As used in this part, the term:~~

5 ~~—(1) “Adult” means an individual who has attained eighteen~~  
6 ~~years of age or who has been emancipated by a court of competent~~  
7 ~~jurisdiction.~~

8 ~~—(2) “Conservator” means a person appointed by a court to~~  
9 ~~manage an estate of a protected person.~~

10 ~~—(3) “Court” means a probate court in this State or a court in~~  
11 ~~another state with the same jurisdiction as a probate court in this~~  
12 ~~State.~~

13 ~~—(4) “Emergency” means circumstances that will likely result in~~  
14 ~~substantial harm to a respondent’s health, safety, or welfare or~~  
15 ~~substantial economic loss or expense.~~

16 ~~—(5) “Guardian” means a person who has qualified as a guardian~~  
17 ~~of an incapacitated person pursuant to a court appointment, but~~  
18 ~~excludes one who is a guardian ad litem or a statutory guardian.~~

19 ~~—(6) “Guardianship order” means an order appointing a~~  
20 ~~guardian.~~

21 ~~—(7) “Guardianship proceeding” means a judicial proceeding in~~  
22 ~~which an order for the appointment of a guardian is sought or has~~  
23 ~~been issued.~~

24 ~~—(8) “Home state” means the state in which the respondent was~~  
25 ~~physically present, including a period of temporary absence, for at~~  
26 ~~least six consecutive months immediately before the filing of a~~  
27 ~~petition for a protective order or the appointment of a guardian; or~~  
28 ~~if none, the state in which the respondent was physically present,~~  
29 ~~including a period of temporary absence, for at least six~~  
30 ~~consecutive months ending within the six months prior to the filing~~  
31 ~~of the petition.~~

32 ~~—(9) “Incapacitated person” means an adult for whom a guardian~~  
33 ~~or conservator has been appointed.~~

34 ~~—(10) “Party” means the respondent, petitioner, guardian,~~  
35 ~~conservator, or other person allowed by the court to participate in a~~  
36 ~~guardianship or protective proceeding.~~

37 ~~—(11) “Person”, except in the term “incapacitated person” or~~  
38 ~~“protected person”, means an individual, corporation, business~~  
39 ~~trust, estate, trust, partnership, limited liability company,~~  
40 ~~association, joint venture, public corporation, government or~~  
41 ~~governmental subdivision, agency, or instrumentality, or another~~  
42 ~~legal or commercial entity.~~

1 —(12) “Protected person” means an adult for whom a protective  
2 order has been issued.  
3 —(13) “Protective order” means an order appointing a conservator  
4 or a court order relating to the management of property of an  
5 incapacitated person.  
6 —(14) “Protective proceeding” means a judicial proceeding in  
7 which a protective order is sought or has been issued.  
8 —(15) “Record” means information that is inscribed on a tangible  
9 medium or that is stored in an electronic or other medium and is  
10 retrievable in perceivable form.  
11 —(16) “Respondent” means an adult for whom a protective order  
12 or the appointment of a guardian is sought.  
13 —(17) “Significant connection state” means a state, other than the  
14 home state, with which a respondent has a significant connection  
15 other than mere physical presence and in which substantial  
16 evidence concerning the respondent is available. In determining  
17 pursuant to Sections 62-5-707 and 62-5-714(E) whether a  
18 respondent has a significant connection with a particular state, the  
19 court shall consider the:  
20 — (a) location of the respondent’s family and other persons  
21 required to be notified of the guardianship or protective  
22 proceeding;  
23 — (b) length of time the respondent at any time was physically  
24 present in the state and the duration of any absence;  
25 — (c) location of the respondent’s property; and  
26 — (d) extent to which the respondent has ties to the state such  
27 as voting registration, state or local tax return filing, vehicle  
28 registration, driver’s license, social relationship, and receipt of  
29 services.  
30 —(18) “State” means a state of the United States, the District of  
31 Columbia, Puerto Rico, the United States Virgin Islands, a  
32 federally recognized Indian tribe, or a territory or insular  
33 possession subject to the jurisdiction of the United States.  
34 —(19) “Ward” means a person for whom a guardian has been  
35 appointed.  
36  
37 —Section 62-5-703. The court may treat a foreign country as if it  
38 were a state for the purpose of applying this part.  
39  
40 —Section 62-5-704. (A)The court may communicate with a court  
41 in another state concerning a proceeding arising pursuant to this  
42 article. The court shall allow the parties to participate in a  
43 discussion between courts on the merits of a proceeding. Except as

1 otherwise provided in subsection (B), the court shall make a record  
2 of the communication. When a discussion on the merits of a  
3 proceeding between courts is held, the record must show that the  
4 parties were given an opportunity to participate, must summarize  
5 the issues discussed, and must list the participants to the  
6 discussion. In all other matters except as provided in subsection  
7 (B), the record may be limited to the fact that the communication  
8 occurred.

9 —(B) Courts may communicate concerning schedules, calendars,  
10 court records, and other administrative matters without making a  
11 record. A court may allow the parties to a proceeding to participate  
12 in any communications held pursuant to this subsection.

13  
14 —Section 62-5-705. (A) In a guardianship or protective  
15 proceeding in this State, the court may request the appropriate  
16 court of another state to do any of the following:

- 17 —(1) hold an evidentiary hearing;
- 18 —(2) order a person in that state to produce evidence or give  
19 testimony pursuant to procedures of that state;
- 20 —(3) order that an evaluation or assessment be made of the  
21 respondent;
- 22 —(4) order an appropriate investigation of a person involved in  
23 a proceeding;
- 24 —(5) forward to the court a certified copy of the transcript or  
25 other record of a hearing pursuant to item (1) or another  
26 proceeding, evidence otherwise produced pursuant to item (2), and  
27 an evaluation or assessment prepared in compliance with an order  
28 pursuant to item (3) or (4);
- 29 —(6) issue an order necessary to assure the appearance in the  
30 proceeding of a person whose presence is necessary for the court to  
31 make a determination, including the respondent or the  
32 incapacitated or protected person; and
- 33 —(7) issue an order authorizing the release of medical,  
34 financial, criminal, or other relevant information in that state,  
35 including protected health information as defined in 45 C.F.R.  
36 Section 164.504.

37 —(B) If a court of another state in which a guardianship or  
38 protective proceeding is pending requests assistance of the kind  
39 provided in subsection (A), the court has jurisdiction for the  
40 limited purpose of granting the request or making reasonable  
41 efforts to comply with the request.

42

1 ~~—Section 62-5-706. (A) In a guardianship or protective~~  
2 ~~proceeding, in addition to other procedures that may be available,~~  
3 ~~testimony of a witness who is located in another state may be~~  
4 ~~offered by deposition or other means allowable in this State for~~  
5 ~~testimony taken in another state. The court on its own motion may~~  
6 ~~order that the testimony of a witness be taken in another state and~~  
7 ~~may prescribe the manner in which and the terms upon which the~~  
8 ~~testimony is to be taken.~~

9 ~~—(B) In a guardianship or protective proceeding, a court in this~~  
10 ~~State may permit a witness located in another state to be deposed~~  
11 ~~or to testify by telephone or audiovisual or other electronic means.~~  
12 ~~The court shall cooperate with the court of the other state in~~  
13 ~~designating an appropriate location for the deposition or testimony.~~

14 ~~—(C) Documentary evidence transmitted from another state to a~~  
15 ~~court of this State by technological means that do not produce an~~  
16 ~~original writing may not be excluded from evidence on an~~  
17 ~~objection based on the means of transmission.~~

18  
19 ~~—Section 62-5-707. The court has jurisdiction to appoint a~~  
20 ~~guardian or issue a protective order for a respondent if:~~

21 ~~—(1) this State is the respondent's home state;~~

22 ~~—(2) on the date the petition is filed, this State is a~~  
23 ~~significant connection state; and~~

24 ~~—(a) the respondent does not have a home state or a court of~~  
25 ~~the respondent's home state has declined to exercise jurisdiction~~  
26 ~~because this State is a more appropriate forum; or~~

27 ~~—(b) the respondent has a home state, a petition for an~~  
28 ~~appointment or order is not pending in a court of that state or~~  
29 ~~another significant connection state and, before the court makes~~  
30 ~~the appointment or issues the order:~~

31 ~~—(i) a petition for an appointment or order is not filed in the~~  
32 ~~respondent's home state;~~

33 ~~—(ii) an objection to the court's jurisdiction is not filed by a~~  
34 ~~person required to be notified of the proceeding; and~~

35 ~~—(iii) the court concludes that it is an appropriate forum~~  
36 ~~pursuant to the factors provided in Section 62-5-710(C);~~

37 ~~—(3) this State does not have jurisdiction pursuant to either item~~  
38 ~~(1) or (2), the respondent's home state and all~~  
39 ~~significant connection states have declined to exercise jurisdiction~~  
40 ~~because this State is the more appropriate forum, and jurisdiction~~  
41 ~~in this State is consistent with the constitutions of this State and the~~  
42 ~~United States; or~~

1 ~~—(4) the requirements for special jurisdiction pursuant to Section~~  
2 ~~62-5-708 are met.~~

3  
4 ~~—Section 62-5-708. (A) The court lacking jurisdiction pursuant~~  
5 ~~to Section 62-5-707(1) through (3) has special jurisdiction to do~~  
6 ~~any of the following:~~

7 ~~—(1) appoint a guardian in an emergency pursuant to this~~  
8 ~~article for a term not exceeding ninety days for a respondent who~~  
9 ~~is physically present in this State;~~

10 ~~—(2) issue a protective order with respect to real or tangible~~  
11 ~~personal property located in this State; or~~

12 ~~—(3) appoint a guardian or conservator for an incapacitated or~~  
13 ~~protected person for whom a provisional order to transfer the~~  
14 ~~proceeding from another state has been issued pursuant to~~  
15 ~~procedures similar to Section 62-5-714.~~

16 ~~—(B) If a petition for the appointment of a guardian in an~~  
17 ~~emergency is brought in this State pursuant to this article and this~~  
18 ~~State was not the respondent's home state on the date the petition~~  
19 ~~was filed, the court shall dismiss the proceeding at the request of~~  
20 ~~the court of the home state, if any, whether dismissal is requested~~  
21 ~~before or after the emergency appointment.~~

22  
23 ~~—Section 62-5-709. Except as otherwise provided in Section~~  
24 ~~62-5-708, a court that has appointed a guardian or issued a~~  
25 ~~protective order consistent with this article has exclusive and~~  
26 ~~continuing jurisdiction over the proceeding until it is terminated by~~  
27 ~~the court or the appointment or order expires by its own terms.~~

28  
29 ~~—Section 62-5-710. (A) The court having jurisdiction pursuant~~  
30 ~~to Section 62-5-707 to appoint a guardian or issue a protective~~  
31 ~~order may decline to exercise its jurisdiction if it determines at any~~  
32 ~~time that a court of another state is a more appropriate forum.~~

33 ~~—(B) If the court declines to exercise its jurisdiction pursuant to~~  
34 ~~subsection (A), it shall either dismiss or stay the proceeding. The~~  
35 ~~court may impose any condition the court considers just and~~  
36 ~~proper, including the condition that a petition for the appointment~~  
37 ~~of a guardian or issuance of a protective order be filed promptly in~~  
38 ~~another state.~~

39 ~~—(C) In determining whether it is an appropriate forum, the court~~  
40 ~~shall consider all relevant factors, including:~~

41 ~~—(1) the expressed preference of the respondent;~~

1 ~~—(2) whether abuse, neglect, or exploitation of the respondent~~  
2 ~~has occurred or is likely to occur and which state could best protect~~  
3 ~~the respondent from the abuse, neglect, or exploitation;~~  
4 ~~—(3) the length of time the respondent was physically present~~  
5 ~~in or was a legal resident of this or another state;~~  
6 ~~—(4) the distance of the respondent from the court in each~~  
7 ~~state;~~  
8 ~~—(5) the financial circumstances of the respondent's estate;~~  
9 ~~—(6) the nature and location of the evidence;~~  
10 ~~—(7) the ability of the court in each state to decide the issue~~  
11 ~~expeditiously and the procedures necessary to present evidence;~~  
12 ~~—(8) the familiarity of the court of each state with the facts~~  
13 ~~and issues in the proceeding; and~~  
14 ~~—(9) if an appointment is made, the court's ability to monitor~~  
15 ~~the conduct of the guardian or conservator.~~  
16  
17 ~~—Section 62-5-711. (A) If at any time the court determines that~~  
18 ~~it acquired jurisdiction to appoint a guardian or issue a protective~~  
19 ~~order because of unjustifiable conduct, the court may:~~  
20 ~~—(1) decline to exercise jurisdiction;~~  
21 ~~—(2) exercise jurisdiction for the limited purpose of fashioning~~  
22 ~~an appropriate remedy to ensure the health, safety, and welfare of~~  
23 ~~the respondent or the protection of the respondent's property or~~  
24 ~~prevent a repetition of the unjustifiable conduct, including staying~~  
25 ~~the proceeding until a petition for the appointment of a guardian or~~  
26 ~~issuance of a protective order is filed in a court of another state~~  
27 ~~having jurisdiction; or~~  
28 ~~—(3) continue to exercise jurisdiction after considering:~~  
29 ~~—(a) the extent to which the respondent and all persons~~  
30 ~~required to be notified of the proceedings have acquiesced in the~~  
31 ~~exercise of the court's jurisdiction;~~  
32 ~~—(b) whether it is a more appropriate forum than the court~~  
33 ~~of any other state pursuant to the factors provided in Section~~  
34 ~~62-5-710(C); and~~  
35 ~~—(c) whether the court of any other state would have~~  
36 ~~jurisdiction under factual circumstances in substantial conformity~~  
37 ~~with the jurisdictional standards of Section 62-5-708.~~  
38 ~~—(B) If the court determines that it acquired jurisdiction to~~  
39 ~~appoint a guardian or issue a protective order because a party~~  
40 ~~seeking to invoke its jurisdiction engaged in unjustifiable conduct,~~  
41 ~~it may assess against that party necessary and reasonable expenses,~~  
42 ~~including attorney's fees, investigative fees, court costs,~~  
43 ~~communication expenses, witness fees and expenses, and travel~~



1 expenses. The court may not assess fees, costs, or expenses of any  
2 kind against this State or a governmental subdivision, agency, or  
3 instrumentality of this State unless authorized by law other than  
4 this article.

5

6 ~~—Section 62-5-712. If a petition for the appointment of a~~  
7 ~~guardian or issuance of a protective order is brought in this State~~  
8 ~~and this State was not the respondent's home state on the date the~~  
9 ~~petition was filed, in addition to complying with the notice~~  
10 ~~requirements of this State, notice of the petition must be given to~~  
11 ~~those persons who would be entitled to notice of the petition if a~~  
12 ~~proceeding were brought in the respondent's home state. The~~  
13 ~~notice must be given in the same manner as notice is required to be~~  
14 ~~given in this State.~~

15

16 ~~—Section 62-5-713. Except for a petition for the appointment of a~~  
17 ~~guardian in an emergency or issuance of a protective order limited~~  
18 ~~to property located in this State pursuant to Section 62-5-708(A)(1)~~  
19 ~~or (2), if a petition for the appointment of a guardian or issuance of~~  
20 ~~a protective order is filed in this State and in another state and~~  
21 ~~neither petition has been dismissed or withdrawn, the following~~  
22 ~~rules apply:~~

23 ~~—(1) if the court has jurisdiction pursuant to Section 62-5-707, it~~  
24 ~~may proceed with the case unless a court in another state acquires~~  
25 ~~jurisdiction under provisions similar to Section 62-5-707 before~~  
26 ~~the appointment or issuance of the order.~~

27 ~~—(2) if the court does not have jurisdiction pursuant to Section~~  
28 ~~62-5-707, whether at the time the petition is filed or at any time~~  
29 ~~before the appointment or issuance of the order, the court shall stay~~  
30 ~~the proceeding and communicate with the court in the other state.~~  
31 ~~If the court in the other state has jurisdiction, the court in this State~~  
32 ~~shall dismiss the petition unless the court in the other state~~  
33 ~~determines that the court in this State is a more appropriate forum.~~

34

35 ~~—Section 62-5-714. (A) A guardian or conservator appointed in~~  
36 ~~this State may petition the court to transfer the guardianship or~~  
37 ~~conservatorship to another state.~~

38 ~~—(B) Notice of a petition pursuant to subsection (A) must be~~  
39 ~~given to the persons that would be entitled to notice of a petition in~~  
40 ~~this State for the appointment of a guardian or conservator.~~

41 ~~—(C) On the court's own motion or on request of the guardian or~~  
42 ~~conservator, the incapacitated or protected person, or other person~~  
43 ~~required to be notified of the petition, the court shall hold a hearing~~

1 on a petition filed pursuant to subsection (A), except that no  
2 hearing shall be required if a consent order is signed by all parties  
3 who have pled, defended, or otherwise participated in the  
4 proceeding, as provided by the South Carolina Rules of Civil  
5 Procedure.

6 ~~—(D) The court shall issue an order provisionally granting a~~  
7 ~~petition to transfer a guardianship and shall direct the guardian to~~  
8 ~~petition for guardianship in the other state if the court is satisfied~~  
9 ~~that the guardianship will be accepted by the court in the other~~  
10 ~~state and the court finds that:~~

11 ~~—(1) the incapacitated person is physically present in or is~~  
12 ~~reasonably expected to move permanently to the other state;~~

13 ~~—(2) an objection to the transfer has not been made or, if an~~  
14 ~~objection has been made, the objector has not established that the~~  
15 ~~transfer would be contrary to the interests of the incapacitated~~  
16 ~~person; and~~

17 ~~—(3) plans for care and services for the incapacitated person in~~  
18 ~~the other state are reasonable and sufficient.~~

19 ~~—(E) The court shall issue a provisional order granting a petition~~  
20 ~~to transfer a conservatorship and shall direct the conservator to~~  
21 ~~petition for conservatorship in the other state if the court is~~  
22 ~~satisfied that the conservatorship will be accepted by the court of~~  
23 ~~the other state and the court finds that:~~

24 ~~—(1) the protected person is physically present in or is~~  
25 ~~reasonably expected to move permanently to the other state, or the~~  
26 ~~protected person has a significant connection to the other state~~  
27 ~~considering the factors provided in Section 62-5-707(2)(b);~~

28 ~~—(2) an objection to the transfer has not been made or, if an~~  
29 ~~objection has been made, the objector has not established that the~~  
30 ~~transfer would be contrary to the interests of the protected person;~~  
31 ~~and~~

32 ~~—(3) adequate arrangements will be made for management of~~  
33 ~~the protected person's property.~~

34 ~~—(F) The court shall issue a final order confirming the transfer~~  
35 ~~and terminating the guardianship or conservatorship upon its~~  
36 ~~receipt of:~~

37 ~~—(1) a provisional order accepting the proceeding from the~~  
38 ~~court to which the proceeding is to be transferred which is issued~~  
39 ~~under provisions similar to Section 62-5-715; and~~

40 ~~—(2) the documents required to terminate a guardianship or~~  
41 ~~conservatorship in this State.~~

42

1 ~~—Section 62-5-715. (A) To confirm transfer of a guardianship or~~  
2 ~~conservatorship transferred to this State under provisions similar to~~  
3 ~~Section 62-5-714, the guardian or conservator must petition the~~  
4 ~~court in this State to accept the guardianship or conservatorship.~~  
5 ~~The petition must include a certified copy of the other state's~~  
6 ~~provisional order of transfer.~~  
7 ~~—(B) Notice of a petition pursuant to subsection (A) must be~~  
8 ~~given to those persons that would be entitled to notice if the~~  
9 ~~petition were a petition for the appointment of a guardian or~~  
10 ~~issuance of a protective order in both the transferring state and this~~  
11 ~~State. The notice must be given in the same manner as notice is~~  
12 ~~required to be given in this State.~~  
13 ~~—(C) On the court's own motion or on request of the guardian or~~  
14 ~~conservator, the incapacitated or protected person, or other person~~  
15 ~~required to be notified of the proceeding, the court shall hold a~~  
16 ~~hearing on a petition filed pursuant to subsection (A).~~  
17 ~~—(D) The court shall issue an order provisionally granting a~~  
18 ~~petition filed pursuant to subsection (A) unless:~~  
19 ~~—(1) an objection is made and the objector establishes that~~  
20 ~~transfer of the proceeding would be contrary to the interests of the~~  
21 ~~incapacitated or protected person; or~~  
22 ~~—(2) the guardian or conservator is ineligible for appointment~~  
23 ~~in this State.~~  
24 ~~—(E) The court shall issue a final order accepting the proceeding~~  
25 ~~and appointing the guardian or conservator as guardian or~~  
26 ~~conservator in this State upon its receipt from the court from which~~  
27 ~~the proceeding is being transferred of a final order issued pursuant~~  
28 ~~to provisions similar to Section 62-5-714 transferring the~~  
29 ~~proceeding to this State.~~  
30 ~~—(F) Not later than ninety days after issuance of a final order~~  
31 ~~accepting transfer of a guardianship or conservatorship, the court~~  
32 ~~shall determine whether the guardianship or conservatorship needs~~  
33 ~~to be modified to conform to the laws of this State.~~  
34 ~~—(G) In granting a petition pursuant to this section, the court~~  
35 ~~shall recognize a guardianship or conservatorship order from the~~  
36 ~~other state, including the determination of the incapacitated or~~  
37 ~~protected person's incapacity and the appointment of the guardian~~  
38 ~~or conservator.~~  
39 ~~—(H) The denial by the court of a petition to accept a~~  
40 ~~guardianship or conservatorship transferred from another state~~  
41 ~~does not affect the ability of the guardian or conservator to seek~~  
42 ~~appointment as guardian or conservator in this State pursuant to~~  
43 ~~another provision of this article if the court has jurisdiction to~~

1 make an appointment other than by reason of the provisional order  
2 of transfer.

3  
4 ~~—Section 62-5-716. (A) If a guardian has been appointed in  
5 another state and a petition for the appointment of a guardian is not  
6 pending in this State, the guardian appointed in the other state,  
7 after giving notice to the appointing court of an intent to register,  
8 may register the guardianship order in this State by filing as a  
9 foreign judgment in a court, in any appropriate county of this State,  
10 certified copies of the order and letters of office.~~

11 ~~—(B) If a conservator has been appointed in another state and a  
12 petition for a protective order is not pending in this State, the  
13 conservator appointed in the other state, after giving notice to the  
14 appointing court of an intent to register, may register the protective  
15 order in this State by filing as a foreign judgment in a court of this  
16 State, in any county in which property belonging to the protected  
17 person is located, certified copies of the order and letters of office  
18 and of any bond.~~

19 ~~—(C)(1) Upon registration of a guardianship or protective order  
20 from another state, the guardian or conservator may exercise in this  
21 State all powers authorized in the order of appointment except as  
22 prohibited under the laws of this State, including maintaining  
23 actions and proceedings in this State and, if the guardian or  
24 conservator is not a resident of this State, subject to any conditions  
25 imposed upon nonresident parties.~~

26 ~~—(2) A probate court of this State may grant any relief  
27 available pursuant to the provisions of this article and other laws of  
28 this State to enforce a registered order.~~

29

30

## Part 7

31

32 South Carolina Adult Guardianship and Protective Proceedings

33

### Jurisdiction Act

34

35 Section 62-5-700. This act may be cited as the ‘South Carolina  
36 Adult Guardianship and Protective Proceedings Jurisdiction Act’.

37

38 Section 62-5-701. Notwithstanding another provision of law,  
39 this part provides the exclusive jurisdictional basis for a court of  
40 this State to appoint a guardian or issue a protective order for an  
41 adult.

42

1 Section 62-5-702. In addition to the terms defined in Part 1,  
2 Article 5, Title 62, the following terms, as used in the part, apply:

3 (1) 'Court' means a probate court in this State or a court in  
4 another state with the same jurisdiction as a probate court in this  
5 State.

6 (2) 'Guardianship order' means an order appointing a guardian.

7 (3) 'Home state' means the state in which the alleged  
8 incapacitated individual was physically present, including a period  
9 of temporary absence, for at least six consecutive months  
10 immediately preceding the filing of a petition for the appointment  
11 of a guardian or protective order; or if none, the state in which the  
12 alleged incapacitated individual was physically present, including  
13 a period of temporary absence, for at least six consecutive months  
14 ending with the six months prior to the filing of the petition.

15 (4) 'Significant-connection state' means a state, other than the  
16 home state, with which an alleged incapacitated individual has a  
17 significant connection other than mere physical presence and in  
18 which substantial evidence concerning the alleged incapacitated  
19 individual is available. In determining, pursuant to Sections  
20 62-5-707 and 62-5-714, whether an alleged incapacitated  
21 individual has a significant connection with a particular state, the  
22 court shall consider the:

23 (a) location of the alleged incapacitated individual's family  
24 and other persons required to be notified of the guardianship or  
25 protective proceeding;

26 (b) length of time the alleged incapacitated individual at any  
27 time was physically present in the state and the duration of any  
28 absence;

29 (c) location of the alleged incapacitated individual's  
30 property; and

31 (d) extent to which the alleged incapacitated individual has  
32 ties to the state such as voting registration, state or local tax return  
33 filing, vehicle registration, driver's license, social relationship, and  
34 receipt of services.

35

36

#### REPORTER'S COMMENT

37

38 The 2017 amendment incorporates the definition of 'home state'  
39 (9) from the Uniform Adult Guardianship and Protective  
40 Proceedings Jurisdiction Act adopted in modified form in South  
41 Carolina and included in Sections 62-5-700 through 716 and was  
42 derived from, but differs in a couple of respects from, the  
43 definition of the same term in Section 102 of the Uniform Child

1 Custody Jurisdiction and Enforcement Act (1997). First, unlike  
2 the definition in the UCCJEA, the definition clarifies that actual  
3 physical presence is necessary. The UCCJEA definition instead  
4 focuses on where the child has ‘lived’ for the prior six months.  
5 Basing the test on where someone has ‘lived’ may imply that the  
6 term ‘home state’ is similar to the concept of domicile. Domicile,  
7 in an adult guardianship context, is a vague concept that can easily  
8 lead to claims of jurisdiction by courts in more than one state.  
9 Second, under the UCCJEA, home state jurisdiction continues for  
10 six months following physical removal from the state and the state  
11 has ceased to be the actual home. Under this Act, the six-month  
12 tail is incorporated directly into the definition of home state. The  
13 place where the alleged incapacitated individual was last  
14 physically present for six months continues as the home state for  
15 six months following physical removal from the state. This  
16 modification of the UCCJEA definition eliminates the need to refer  
17 to the six-month tail each time home state jurisdiction is mentioned  
18 in the Act.

19 The definition of ‘significant-connection state’ (17) is also from  
20 the Uniform Adult Guardianship and Protective Proceedings  
21 Jurisdiction Act adopted in modified form in South Carolina and  
22 included in Sections 62-5-700 through 716 and was similar to  
23 Section 201(a)(2) of the Uniform Child Custody Jurisdiction and  
24 Enforcement Act (1997). However, this definition adds a list of  
25 factors relevant to adult guardianship and protective proceedings to  
26 aid the court in deciding whether a particular place is a  
27 significant-connection state. Under Section 301(e)(1), the  
28 significant connection factors listed in the definition are to be  
29 taken into account in determining whether a conservatorship may  
30 be transferred to another state.

31  
32 Section 62-5-703. The court may treat a foreign country as if it  
33 were a state for the purpose of applying this part.

34  
35 Section 62-5-704. (A) The court may communicate with a  
36 court in another state concerning a proceeding arising pursuant to  
37 this article. The court shall allow the parties to participate in a  
38 discussion between courts on the merits of a proceeding. Except  
39 as otherwise provided in subsection (B), the court shall make a  
40 record of the communication. When a discussion on the merits of  
41 a proceeding between courts is held, the record must show that the  
42 parties were given an opportunity to participate, must summarize  
43 the issues discussed, and must list the participants to the

1 discussion. In all other matters except as provided in subsection  
2 (B), the record may be limited to the fact that the communication  
3 occurred.

4 (B) Courts may communicate concerning schedules, calendars,  
5 court records, and other administrative matters without making a  
6 record. A court may allow the parties to a proceeding to  
7 participate in any communications held pursuant to this subsection.

8  
9 Section 62-5-705. (A) In a guardianship or protective  
10 proceeding in this State, the court may request the appropriate  
11 court of another state to do any of the following:

12 (1) hold an evidentiary hearing;

13 (2) order a person in that state to produce evidence or give  
14 testimony pursuant to procedures of that state;

15 (3) order that an evaluation or assessment be made of the  
16 alleged incapacitated individual;

17 (4) order an appropriate investigation of a person involved in  
18 a proceeding;

19 (5) forward to the court a certified copy of the transcript or  
20 other record of a hearing pursuant to item (1) or another  
21 proceeding, evidence otherwise produced pursuant to item (2), and  
22 an evaluation or assessment prepared in compliance with an order  
23 pursuant to item (3) or (4);

24 (6) issue an order necessary to assure the appearance in the  
25 proceeding of a person whose presence is necessary for the court to  
26 make a determination, including the alleged incapacitated  
27 individual or the ward or protected person; and

28 (7) issue an order authorizing the release of medical,  
29 financial, criminal, or other relevant information in that state,  
30 including protected health information as defined in 45 C.F.R.  
31 Section 164.504.

32 (B) If a court of another state in which a guardianship or  
33 protective proceeding is pending requests assistance of the kind  
34 provided in subsection (A), the court has jurisdiction for the  
35 limited purpose of granting the request or making reasonable  
36 efforts to comply with the request.

37  
38 Section 62-5-706. (A) In a guardianship or protective  
39 proceeding, in addition to other procedures that may be available,  
40 testimony of a witness who is located in another state may be  
41 offered by deposition or other means allowable in this State for  
42 testimony taken in another state. The court on its own motion may  
43 order that the testimony of a witness be taken in another state and

1 may prescribe the manner in which and the terms upon which the  
2 testimony is to be taken.

3 (B) In a guardianship or protective proceeding, a court in this  
4 State may permit a witness located in another state to be deposed  
5 or to testify by telephone or audiovisual or other electronic means.  
6 The court shall cooperate with the court of the other state in  
7 designating an appropriate location for the deposition or testimony.

8 (C) Documentary evidence transmitted from another state to a  
9 court of this State by technological means that does not produce an  
10 original writing may not be excluded from evidence on an  
11 objection based on the means of transmission.

12

13 Section 62-5-707. The court has jurisdiction to appoint a  
14 guardian or issue a protective order for an alleged incapacitated  
15 individual if:

16 (A) this State is the alleged incapacitated individual's home  
17 state;

18 (B) on the date the petition is filed, this State is a  
19 significant-connection state; and

20 (1) the alleged incapacitated individual does not have a  
21 home state or a court of the alleged incapacitated individual's  
22 home state has declined to exercise jurisdiction because this State  
23 is a more appropriate forum; or

24 (2) the alleged incapacitated individual has a home state, a  
25 petition for an appointment or order is not pending in a court of  
26 that state or another significant-connection state and, before the  
27 court makes the appointment or issues the order:

28 (a) a petition for an appointment or order is not filed in  
29 the alleged incapacitated individual's home state;

30 (b) an objection to the court's jurisdiction is not filed by  
31 a person required to be notified of the proceeding; and

32 (c) the court concludes that it is an appropriate forum  
33 pursuant to the factors provided in Section 62-5-710(C);

34 (C) this State does not have jurisdiction pursuant to either  
35 subsections (A) or (B), the alleged incapacitated individual's home  
36 state and all significant-connection states have declined to exercise  
37 jurisdiction because this State is the more appropriate forum, and  
38 jurisdiction in this State is consistent with the constitutions of this  
39 State and the United States; or

40 (D) the requirements for special jurisdiction pursuant to  
41 Section 62-5-708 are met.

42



1 Section 62-5-708. (A) The court lacking jurisdiction pursuant  
2 to Sections 62-5-707 (A) through (C) has special jurisdiction to do  
3 any of the following:

4 (1) appoint a guardian in an emergency pursuant to this  
5 article for a term not exceeding ninety days for an alleged  
6 incapacitated individual who is physically present in this State;

7 (2) issue a protective order with respect to real or tangible  
8 personal property located in this State; or

9 (3) appoint a guardian or conservator for an incapacitated  
10 individual or protected person for whom a provisional order to  
11 transfer the proceeding from another state has been issued pursuant  
12 to procedures similar to Section 62-5-714.

13 (B) If a petition for the appointment of a guardian in an  
14 emergency is brought in this State pursuant to this article and this  
15 State was not the alleged incapacitated individual's home state on  
16 the date the petition was filed, the court shall dismiss the  
17 proceeding at the request of the court of the home state, if any,  
18 whether dismissal is requested before or after the emergency  
19 appointment.

20  
21 Section 62-5-709. Except as otherwise provided in Section  
22 62-5-708, a court that has appointed a guardian or issued a  
23 protective order consistent with this article has exclusive and  
24 continuing jurisdiction over the proceeding until it is terminated by  
25 the court or the appointment or order has expired by its own terms.

26  
27 Section 62-5-710. (A) The court having jurisdiction pursuant  
28 to Section 62-5-707 to appoint a guardian or issue a protective  
29 order may decline to exercise its jurisdiction if it determines at any  
30 time that a court of another state is a more appropriate forum.

31 (B) If the court declines to exercise its jurisdiction pursuant to  
32 subsection (A), it either shall dismiss or stay the proceeding. The  
33 court may impose any condition the court considers just and  
34 proper, including the condition that a petition for the appointment  
35 of a guardian or issuance of a protective order be filed promptly in  
36 another state.

37 (C) In determining whether it is an appropriate forum, the court  
38 shall consider all relevant factors, including:

39 (1) the expressed preference of the alleged incapacitated  
40 individual;

41 (2) whether abuse, neglect, or exploitation of the alleged  
42 incapacitated individual has occurred or is likely to occur and

- 1 which state could best protect the alleged incapacitated individual  
2 from the abuse, neglect, or exploitation;
- 3 (3) the length of time the alleged incapacitated individual  
4 was physically present in or was a legal resident of this or another  
5 state;
- 6 (4) the distance of the alleged incapacitated individual from  
7 the court in each state;
- 8 (5) the financial circumstances of the alleged incapacitated  
9 individual's estate;
- 10 (6) the nature and location of the evidence;
- 11 (7) the ability of the court in each state to decide the issue  
12 expeditiously and the procedures necessary to present evidence;
- 13 (8) the familiarity of the court of each state with the facts  
14 and issues in the proceeding; and
- 15 (9) if an appointment is made, the court's ability to monitor  
16 the conduct of the guardian or conservator.

17  
18 Section 62-5-711. (A) If at any time the court determines that  
19 it acquired jurisdiction to appoint a guardian or issue a protective  
20 order because of unjustifiable conduct, the court may:

- 21 (1) decline to exercise jurisdiction;
- 22 (2) exercise jurisdiction for the limited purpose of fashioning  
23 an appropriate remedy to ensure the health, safety, and welfare of  
24 the alleged incapacitated individual or the protection of the alleged  
25 incapacitated individual's property or prevent a repetition of the  
26 unjustifiable conduct, including staying the proceeding until a  
27 petition for the appointment of a guardian or issuance of a  
28 protective order is filed in a court of another state having  
29 jurisdiction; or
- 30 (3) continue to exercise jurisdiction after considering:
- 31 (a) the extent to which the alleged incapacitated  
32 individual and all persons required to be notified of the  
33 proceedings have acquiesced in the exercise of the court's  
34 jurisdiction;
- 35 (b) whether it is a more appropriate forum than the court  
36 of any other state pursuant to the factors provided in Section  
37 62-5-710(C); and
- 38 (c) whether the court of any other state would have  
39 jurisdiction under factual circumstances in substantial conformity  
40 with the jurisdictional standards of Section 62-5-708.

41 (B) If the court determines that it acquired jurisdiction to  
42 appoint a guardian or issue a protective order because a party  
43 seeking to invoke its jurisdiction engaged in unjustifiable conduct,

1 it may assess against that party necessary and reasonable expenses,  
2 including attorney's fees, investigative fees, court costs,  
3 communication expenses, witness fees and expenses, and travel  
4 expenses. The court may not assess fees, costs, or expenses of any  
5 kind against this State or a governmental subdivision, agency, or  
6 instrumentality of this State unless authorized by law other than  
7 this article.

8

9 Section 62-5-712. If a petition for the appointment of a  
10 guardian or issuance of a protective order is brought in this State  
11 and this State was not the alleged incapacitated individual's home  
12 state on the date the petition was filed, in addition to complying  
13 with the notice requirements of this State, notice of the petition  
14 must be given to those persons who would be entitled to notice of  
15 the petition if a proceeding were brought in the alleged  
16 incapacitated individual's home state. The notice must be given in  
17 the same manner as notice is required to be given in this State.

18

19 Section 62-5-713. Except for a petition for the appointment of a  
20 guardian in an emergency or issuance of a protective order limited  
21 to property located in this State pursuant to Section 62-5-708(A)(1)  
22 or (2), if a petition for the appointment of a guardian or issuance of  
23 a protective order is filed in this State and in another state and  
24 neither petition has been dismissed or withdrawn, the following  
25 rules apply:

26 (A) if the court has jurisdiction pursuant to Section 62-5-707, it  
27 may proceed with the case unless a court in another state acquires  
28 jurisdiction under provisions similar to Section 62-5-707 before  
29 the appointment or issuance of the order; or

30 (B) if the court does not have jurisdiction pursuant to Section  
31 62-5-707, whether at the time the petition is filed or at any time  
32 before the appointment or issuance of the order, the court shall stay  
33 the proceeding and communicate with the court in the other state.  
34 If the court in the other state has jurisdiction, the court in this State  
35 shall dismiss the petition unless the court in the other state  
36 determines that the court in this State is a more appropriate forum.

37

38 Section 62-5-714. (A) A guardian or conservator appointed in  
39 this State may petition the court to transfer the guardianship or  
40 conservatorship to another state.

41 (B) Notice of a petition pursuant to subsection (A) must be  
42 given to the persons that would be entitled to notice of a petition in  
43 this State for the appointment of a guardian or conservator.

1 (C) On the court's own motion or on request of the guardian or  
2 conservator, the ward or protected person, or other person required  
3 to be notified of the petition, the court shall hold a hearing on a  
4 petition filed pursuant to subsection (A), except that a hearing must  
5 not be required if a consent order is signed by all parties who have  
6 pled, defended, or otherwise participated in the proceeding, as  
7 provided by the South Carolina Rules of Civil Procedure.

8 (D) The court shall issue an order provisionally granting a  
9 petition to transfer a guardianship and shall direct the guardian to  
10 petition for guardianship in the other state if the court is satisfied  
11 that the guardianship will be accepted by the court in the other  
12 state and the court finds that:

13 (1) the ward is physically present in or is reasonably  
14 expected to move permanently to the other state;

15 (2) an objection to the transfer has not been made or, if an  
16 objection has been made, the objector has not established that the  
17 transfer would be contrary to the interests of the ward; and

18 (3) plans for care and services for the ward in the other state  
19 are reasonable and sufficient.

20 (E) The court shall issue a provisional order granting a petition  
21 to transfer a conservatorship and shall direct the conservator to  
22 petition for conservatorship in the other state if the court is  
23 satisfied that the conservatorship will be accepted by the court of  
24 the other state and the court finds that:

25 (1) the protected person is physically present in or is  
26 reasonably expected to move permanently to the other state, or the  
27 protected person has a significant connection to the other state  
28 considering the factors provided in Section 62-5-707;

29 (2) an objection to the transfer has not been made or, if an  
30 objection has been made, the objector has not established that the  
31 transfer would be contrary to the interests of the protected person;  
32 and

33 (3) adequate arrangements will be made for management of  
34 the protected person's property.

35 (F) The court shall issue a final order confirming the transfer  
36 and terminating the guardianship or conservatorship upon its  
37 receipt of:

38 (1) a provisional order accepting the proceeding from the  
39 court to which the proceeding is to be transferred which is issued  
40 under provisions similar to Section 62-5-715; and

41 (2) the documents required to terminate a guardianship or  
42 conservatorship in this State.

43

1 Section 62-5-715. (A) To confirm transfer of a guardianship or  
2 conservatorship to this State under provisions similar to Section  
3 62-5-714, the guardian or conservator must petition the court in  
4 this State to accept the guardianship or conservatorship. The  
5 petition must include a certified copy of the other state's  
6 provisional order of transfer.

7 (B) Notice of a petition pursuant to subsection (A) must be  
8 given to those persons that would be entitled to notice if the  
9 petition were a petition for the appointment of a guardian or  
10 issuance of a protective order in both the transferring state and this  
11 State. The notice must be given in the same manner as notice is  
12 required to be given in this State.

13 (C) On the court's own motion or on request of the guardian or  
14 conservator, the ward or protected person, or other person required  
15 to be notified of the proceeding, the court shall hold a hearing on a  
16 petition filed pursuant to subsection (A), except that a hearing must  
17 not be required if a consent order is signed by all parties who have  
18 pled, defended, or otherwise participated in the proceeding, as  
19 provided by the South Carolina Rules of Civil Procedure.

20 (D) The court shall issue an order provisionally granting a  
21 petition filed pursuant to subsection (A) unless:

22 (1) an objection is made and the objector establishes that  
23 transfer of the proceeding would be contrary to the interests of the  
24 ward or protected person; or

25 (2) the guardian or conservator is ineligible for appointment  
26 in this State.

27 (E) The court shall issue a final order accepting the proceeding  
28 and appointing the guardian or conservator as guardian or  
29 conservator in this State upon its receipt of a final order from the  
30 court from which the proceeding is being transferred, when that  
31 final order is issued pursuant to provisions similar to Section  
32 62-5-714 transferring the proceeding to this State.

33 (F) Not later than ninety days after issuance of a final order  
34 accepting transfer of a guardianship or conservatorship, the court  
35 shall determine whether the guardianship or conservatorship needs  
36 to be modified to conform to the laws of this State.

37 (G) In granting a petition pursuant to this section, the court  
38 shall recognize a guardianship or conservatorship order from the  
39 other state, including the determination of the ward or protected  
40 person's incapacity and the appointment of the guardian or  
41 conservator.

42 (H) The denial by the court of a petition to accept a  
43 guardianship or conservatorship transferred from another state

1 does not affect the ability of the guardian or conservator to seek  
2 appointment as guardian or conservator in this State pursuant to  
3 another provision of this article if the court has jurisdiction to  
4 make an appointment other than by reason of the provisional order  
5 of transfer.

6  
7 REPORTER'S COMMENTS  
8

9 The language in this section was amended in 2017 to include  
10 language that creates the option of not having a hearing in the  
11 matter of the transfer of a guardianship and/or conservatorship case  
12 from another state. Prior to the 2017 amendments, there was no  
13 such option, and this change was written to make Section  
14 62-5-715(C) consistent with Section 62-5-714(C).  
15

16 Section 62-5-716. (A) If a guardian has been appointed in  
17 another state and a petition for the appointment of a guardian is not  
18 pending in this State, the guardian appointed in the other state,  
19 after giving notice to the appointing court of an intent to register,  
20 may register the guardianship order in this State by filing as a  
21 foreign judgment in the court, in any appropriate county of this  
22 State, certified copies of the order and letters of office. The court  
23 shall treat this as the filing of authenticated or certified records and  
24 shall charge the fees set forth in Section 8-21-770. The court will  
25 then issue a certificate of registration. The guardian shall file the  
26 certificate, along with a copy of his fiduciary letters of office in  
27 county real estate records.

28 (B) If a conservator has been appointed in another state and a  
29 petition for a protective order is not pending in this State, the  
30 conservator appointed in the other state, after giving notice to the  
31 appointing court of an intent to register, may register the protective  
32 order in this State by filing as a foreign judgment in the Probate  
33 Court, in any county in which property belonging to the protected  
34 person is located, certified copies of the order and letters of office  
35 and of any bond. The court shall treat this as the filing of  
36 authenticated or certified records and shall charge the fees set forth  
37 in Section 8-21-770 for the filing of such documents. The court  
38 will then issue a certificate of registration. The conservator shall  
39 file the certificate, along with a copy of the fiduciary letters in the  
40 county real estate records.

41 (C)(1) Upon registration of a guardianship or protective order  
42 from another state, the guardian or conservator may exercise in this  
43 State all powers authorized in the order of appointment except as

1 prohibited under the laws of this State, including maintaining  
2 actions and proceedings in this State and, if the guardian or  
3 conservator is not a resident of this State, subject to any conditions  
4 imposed upon nonresident parties.

5 (2) A probate court of this State may grant any relief  
6 available pursuant to the provisions of this article and other laws of  
7 this State to enforce a registered order.”

8  
9 REPORTER’S COMMENTS

10  
11 The purpose of this section is to describe the process for  
12 registration of orders from another state and the powers of the  
13 guardian or conservator in this State. The 2017 amendment adds  
14 language that provides direction to the court stating that the filing  
15 of the guardian or conservatorship order is to be treated the same  
16 as the filing of an authenticated or certified record. The guardian  
17 or conservator pays the required fee, and he is required to file the  
18 certificate issued by the court along with a copy of his fiduciary  
19 letters of office in the county office that keeps all real estate  
20 records. Prior to the 2017 amendments, the language did not  
21 provide enough clarity regarding these procedures and what  
22 powers the guardian or conservator could exercise in this State.”

23  
24 SECTION 6. (A) This act takes effect on January 1, 2019.

25 (B) Except as otherwise provided in this act, on the effective  
26 date of this act:

27 (1) this act applies to any conservatorships, guardianships, or  
28 protective orders for minors or persons under a disability created  
29 before, on , or after its effective date;

30 (2) this act applies to all judicial proceedings concerning  
31 conservatorships, guardianships, or protective orders for minors or  
32 persons under a disability commenced on or after its effective date;

33 (3) this act applies to judicial proceedings concerning  
34 conservatorships, guardianships, and protective orders for minors  
35 or persons under a disability commenced before its effective date  
36 unless the court finds that application of a particular provision of  
37 this act would substantially interfere with the effective conduct of  
38 the judicial proceedings or prejudice the rights of the parties, in  
39 which case that particular provision of this act does not apply and  
40 the superseded law applies;

41 (4) subject to item (B)(5) and subsection (C) of this  
42 SECTION, any rule of construction or presumption provided in  
43 this act applies to governing instruments executed before the

1 effective date of this act unless there is a clear indication of a  
2 contrary intent in the terms of the governing instrument; and

3 (5) an act done and any right acquired or accrued before the  
4 effective date of the act is not affected by this act.

5 (C) If a right is acquired, extinguished, or barred upon the  
6 expiration of a prescribed period that has commenced to run under  
7 any other statute before the effective date of the act, that statute  
8 continues to apply to the right even if it has been repealed or  
9 suspended.

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