South Carolina Bar
Continuing Legal Education Division

2018 SC BAR CONVENTION

Elder Law Committee

"Guardianships and Conservatorships:
The New Article 5 of the Probate Code"

Friday, January 19

SC Supreme Court Commission on CLE Course No. 180808

South Carolina Bar
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Introduction to Article 5

Andrew J. Atkins

No Materials Available

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Overview of Article 5: Differences Between Old Statute and New Statute

Sarah G. St.Onge

Who Moved my Cheese?
Article 5--What's Changed and Why

by

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I. How did we get here?

The Elder Law Committee of the South Carolina Bar and the South Carolina Association of Probate Judges Article 5 Committee created the Article V Task Force to develop proposed legislation for the guardianship and conservatorship sections of the Probate Code, namely Title 62, Article 5, Parts 1 through 4. At the Bar Convention in 2015, the House of Delegates approved a one page document entitled "Improving the Process for Appointment of Guardians and Conservators in the South Carolina Probate Courts." That document was distributed publically and the Bar received comments and suggestions for revisions to Article V which were considered by the Task Force and incorporated into an initial draft that was approved by the House of Delegates at the January 2016 Bar Convention. After the approval in January, the Task Force sought a second round of comments, finalized the draft, and received approval from the House of Delegates in May of 2016 to propose the legislation. The Task Force then drafted comments and made some minor revisions and corrections, which the Board of Governors approved in September 2016. The drafted bill was introduced in the Senate on February 14, 2017 (S. 415; H. 3511), and was signed by the governor on May 9, 2017. The effective date of the legislation is January 1, 2019. Because it was considered and promoted as a compromise bill, almost no changes were made to the legislation during the process.

II. Why change?

Most attorneys, judges, and stakeholders were in agreement that Article V needed to be revised and updated—although they may not have all been in agreement with how best to revise the statute. The process of drafting, which included periods of public input, ensured at least some consensus on basic goals for the revised bill. Achieving all the goals, which sometimes competed, required compromises to balance the interests of various stakeholders. For example, keeping the process affordable may be in conflict with ensuring the due process rights of the Respondent. The goals, and finding a balance for meeting those goals, was the driver behind most of the changes to Article V. Understanding why those changes were believed to be necessary can assist attorneys and judges in interpreting the new statute. Below is a list of the goals established by the Article V Task Force with some of the changes to Article V which relate to each goal.

- **Simplify and clarify the process to promote uniformity throughout the state.** The Article V Task Force learned that throughout the state, many probate courts use different processes and procedures, frequently causing confusion. The new code is much longer than the current code, but the Task Force felt that the specifics were necessary for clarity and consistency. Some of the specific changes included:
    - Giving the probate court the authority to grant a motion to proceed in forma pauperis.
    - Added definitions to Section 62-5-101 to promote clarity and consistency.
    - Established that the court may award costs and expenses, including reasonable attorney's fees.
    - Set forth a specific procedure for emergency and temporary orders. This section is in Part 1 to not only promote consistency throughout the state but to promote consistency between guardianship procedures and conservatorship procedures.
    - Specified the information which must be included in the petition, guardian ad litem report, and the examiner's report.
    - Set out the powers and duties of a conservator in the administration of the estate of the protected person.

- **<u>Ensure adequate due process protections for the allegedly incapacitated individual (Respondent)</u>.**
    - One major change is to separate the role of the attorney for the Respondent and the role of the guardian ad litem. Because the role of the guardian ad litem is crucial to the process, the new law requires that both a guardian ad litem and an attorney be appointed in every case. (Please note that an attorney for the Respondent may withdraw under certain circumstances—a measure designed to balance the due process rights of the Respondent and the costs of the proceedings).
    - A clear and convincing evidentiary standard for both guardianships and conservatorships.
    - Define incapacity to make it clear that if someone can provide for their care or manage their money with supports and assistance, then they are not incapacitated to the extent they need a guardian or to the extent they need a conservator.
    - Define counsel for the Respondent as being charged with representing the expressed wishes of the individual.
    - Set forth the duties and the responsibilities of the guardian ad litem in Part 1, meaning they apply to both guardianships and conservatorships. The detailed duties outlined will promote consistency as well as ensure that the Respondent's wishes are considered and heard. Also, the guardian ad litem must investigate whether there is a less restrictive alternative to guardianship or conservatorship.
    - Specify the information required to be in the petition, including why less restrictive alternatives to guardianship or conservatorship are not available or appropriate and what rights are requested to be removed.
    - The Respondent must be personally served with the summons and petition along with a notice explaining that counsel will be appointed for the individual if they do not have counsel.
    - The Respondent is entitled to be at the hearing, and the individual's presence may not be waived by the guardian ad litem or the court. The Respondent can waive notice of a hearing and his presence at the hearing and may waive the hearing itself, but only in limited circumstances. Even if a hearing is waived, the court may require a formal hearing, require an informal proceeding, or proceed without a hearing.
    - The system is designed to allow the court to exercise its authority to encourage the development of maximum self-reliance and to use its authority only as necessitated by the individual's limitations.

- **<u>Increase the availability and practicality of limited guardianships</u>.**
    - The changes create the default of a limited guardianship rather than defaulting to a plenary guardianship. This is accomplished by

- The petition must set out what rights the petitioner is requesting that the court remove from Respondent. The guardian ad litem must review these rights with the Respondent. The examiner must list what rights the individual should retain. Finally, the court must specify in its order which rights are removed.

- **Reduce the cost of the process.**
  - Remove the requirement that the guardian ad litem must be an attorney, while ensuring that the guardian ad litem is a qualified professional—namely licensed in law, social work, nursing, medicine, or psychology or who has completed training which satisfies the court. However, because in some extreme cases the non-attorney guardian ad litem may need the advice of an attorney, the recommended code includes this option. Exercising that option should only be necessary in contested cases.
  - Combine the guardian ad litem role and the visitor role.
  - Require only one designated examiner. A second examiner may be appointed upon request or on the court's own motion.
  - If all parties consent, a hearing is not required for a protective order, including the establishment of a special needs trust. A hearing is still required for the appointment of a conservator.
  - In a guardianship case, the hearing may be waived by the Respondent, but the court has discretion to require a hearing.
  - Allow for the creation of a special needs trust for a competent adult with a disability, without the need for a hearing or the appointment of a conservator.

- **Create consistency between conservatorships and guardianship actions. S**ome of the procedures applicable to both guardianship and conservatorship actions have been moved to Part 1, General Provisions. Uniformity is established by consistently using the same organization and language, except where a change is appropriate given the nature of the two different procedures.

- **Establish a system for adequate monitoring of guardians and conservators.**
  - The ward or any person interested in his welfare may informally request relief, and the court may act as is reasonable and appropriate. This provision allows anyone with concerns regarding the welfare of the ward to ask the court to investigate.
  - Explicitly sets forth the obligation of the guardian to ensure the ward receives appropriate care.
  - Requiring the establishment and filing and updating of a plan of care for the ward and permitting the court to require a financial plan for a protected person.

South Carolina Bar
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Elder Law Committee

Friday, January 19

Contested Guardianships and Conservatorships

Hon. Jacqueline D. Belton

ELDER LAW COMMITTEE
CLE SEMINAR

Contested Guardianships & Conservatorships

S.C. Bar Annual Meeting
Kiawah Island, S.C.
January 19, 2017

Associate Judge Jacqueline D. Belton
Richland County Probate Court
1701 Main Street, Room 207
Columbia, S.C. 29201

Contested Guardianships & Conservatorships

OUTLINE

I. COURT PROCESSES

II. FILING AND COURT MANAGEMENT OF THE CONTESTED CASE

III. CRITERIA IN THE APPOINTMENT OF A GUARDIAN OR CONSERVATOR: Differences in a contested and Non-contested Matter

IV. REPORTING REQUIREMENTS FOR GUARDIANSHIP & CONSERVATORSHIP

South Carolina Bar
Continuing Legal Education Division

2018 SC BAR CONVENTION

Elder Law Committee

Friday, January 19

The Role of the Guardian *ad Litem*

Michael S. Large

The Role of Guardian Ad Litem

Article 5—2017 Revisions

Presented By Michael Scott Large

South Carolina Legal Services, Inc.

Introduction

Article 5 Part 1 sets forth the duties and the responsibilities of the guardian ad litem which apply to both guardianships and conservatorships. As the Reporter's Comments point out, "the detailed duties outlined in the 2017 revisions were designed to promote consistency as well as ensure that the allegedly incapacitated individual's wishes are considered and heard". Also, and of great significance, the guardian ad litem (GAL) must investigate whether there are less restrictive alternatives to guardianship or conservatorship and ensure that an incapacitated individual's rights are only removed as a last resort to protect the individual or his/her property,

Guardian ad litem

Until the new 2019 law goes into effect, the GAL in Probate Court is an attorney assigned by the Court to represent the best interests of a potentially incapacitated individual (Individual). The GAL has the responsibility to investigate, independently assess the facts of the case, represent the best interests of the Individual to the Court, and advocate for those interests in the Report of the GAL to the Court and/or by oral testimony.[1]

GAL Qualifications—Changes under revised Article 5

SECTION 62-5-101 (10) "Guardian ad litem" means a person licensed in the State of South Carolina in law, social work, nursing, medicine, or psychology, or who has completed training to the satisfaction of the court, and who has been appointed by the court to advocate for the best interests of the alleged incapacitated individual.

Reporter's Comments: The definition of "guardian ad litem" was expanded to include non-attorneys and clarify that the guardian ad litem will not be acting as counsel for the alleged incapacitated individual. This essentially separates the role of the GAL from the role of the attorney avoiding an inherent conflict of interest. The role and duties of the guardian ad litem are expanded in the revisions to ensure that an adequate investigation happens prior to appointment; therefore, the guardian ad litem must have training that satisfies the court.

[1] Portions of the material are excerpted from A Practical Guide to Elder and Special Needs Law in South Carolina, 4th Ed. Principal Author and editor: Franchelle C. Millender. Reprinted with permission by the SC Bar-CLE Division. To order please contact the CLE Division at 803-771-0333/800-768-7787.

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

Statutory Authority for the Appointment

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

1. ***In a Guardianship Proceeding:***

SECTION 62-5-303B. Appointment of counsel, guardian ad litem, and examiner.

(A) Upon receipt by the court of proof of service of the summons, petition, and notice of right to counsel upon the alleged incapacitated individual, the court shall:

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

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

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

(b) One examiner, who shall be a physician, to examine the alleged incapacitated individual and file a notarized report setting forth his evaluation of the condition of the alleged incapacitated individual in accordance with the provisions set forth in § 62-5-303D. Unless the guardian ad litem or the alleged incapacitated individual objects, if a physician's notarized report is filed with the petition and served upon the alleged incapacitated individual and all interested parties with the petition, then the court may appoint such physician as the examiner. Upon the court's own motion or upon request of the initial examiner,

the alleged incapacitated individual, or his guardian ad litem, the court may appoint a second examiner, who shall be a physician, nurse, social worker, or psychologist.

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

Reporter's Comments: The 2017 amendments are an important departure from the prior statute, Section 62-5-303(b), which required the appointment of a lawyer "who then has the powers and duties of a guardian ad litem." Traditionally, a guardian ad litem not only has a duty to the alleged incapacitated individual but also a duty to the court to discern and report what is in the best interest of the individual regardless of the individual's preferences, although by statute those preferences must be considered by the court. With the 2017 amendments, the alleged incapacitated individual must have a lawyer who argues for the individual's expressed wishes regardless of what may be in his best interests, and a guardian ad litem who acts as the eyes and ears of the court to discern the best outcome for the alleged incapacitated individual and to advise the court thereof.

2. ***In a Conservatorship or Protective Proceeding concerning persons under disability and minors:***

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

SECTION 62-5-403B. Appointment of counsel, guardian ad litem, and examiner.

(A) Except in cases governed by § 62-5-431 relating to veterans benefits, upon receipt by the court of proof of service of the summons, petition, and notice of right to counsel upon the alleged incapacitated individual, the court shall:

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

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

(a) A guardian ad litem for the alleged incapacitated individual who shall have the duties and responsibilities set forth in § 62-5-106.

Reporters Comments: This is an important departure from former Section 62-5-409, which required the appointment of a lawyer "who then has the powers and duties of a guardian ad litem." Traditionally, a guardian ad litem not only has a duty to the alleged incapacitated individual but also has a duty to the court to discern and report what is in the best interest of the individual regardless of the individual's preferences, although by statute those preferences must be considered by the court. With the 2017 amendments, the alleged incapacitated individual must have a lawyer who argues for the individual's expressed wishes regardless of what may be in his best interests, and a guardian ad litem who acts as the eyes and ears of the court to discern the best outcome for the alleged incapacitated individual and to advise the court thereof. A party may recommend a guardian ad litem and the court may accept or reject the recommendation, but best practices may require that the court independently select the guardian ad litem.

Investigation

After appointment, The GAL's first step is to carefully review the petition filed with the Probate Court. GAL must always be thorough, accurate and objective. "The scope of GAL's authority is to investigate and make recommendations, and, under Court supervision the scope may expand if action needs to be taken to protect the Individual."[2] Section 62-5-106 sets forth the responsibilities and duties of the GAL.

Reporter's Comments: The 2017 amendments added this section to provide guidance with specificity for the responsibilities and duties of the guardian ad litem as part of the guardianship and conservatorship process to insure that the highest level of integrity and dignity was applied to the process.

In doing so, the alleged incapacitated individual's best interests would be protected to the maximum extent possible while establishing evidence of the alleged incapacitated individual's capacity to manage his personal and financial matters and at what level he may require assistance or can manage using a less restrictive alternative.

These provisions have incorporated some of the previous responsibilities of the visitor in these proceedings. The duties and responsibilities of the guardian ad litem as set forth also provide a paradigm for addressing potential legal issues which may arise in the course of the guardian ad litem's appointment. Section 62-5-106 is also broad enough to allow the court to instruct the guardian ad litem on issues which have not been stated in any of the provisions of this section that could be unforeseen.

This section further addresses how hearings should be treated whether in an informal or formal manner, and allows the court discretion in extending or limiting the express authority of a guardian ad litem in conformity with the authority originally granted to the guardian ad litem.

[2] A Practical Guide to Elder and Special Needs Law in South Carolina p.824

SECTION 62-5-106. Responsibilities and duties of the guardian ad litem.

(A) The responsibilities and duties of a guardian ad litem include, but are not limited to:

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

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

(a) obtaining and reviewing relevant documents;

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

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

(d) interviewing all parties;

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

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

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

(h) reviewing a credit report on the proposed conservator (i) interviewing the person whose appointment is sought to ascertain:

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

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

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

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

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

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

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

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

(3) advocating for the best interests of the alleged incapacitated individual by making specific recommendations regarding resources as may be appropriate and available to benefit the alleged incapacitated individual, the appropriateness of the appointment of a guardian or conservator, and any limitations to be imposed;

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

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

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

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

(B) Notes of a guardian ad litem are exempt from subpoenas.

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

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

(2) a description of the alleged incapacitated individual;

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

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

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

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

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

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

(9) any other information relevant to the matter.

(D) The report shall contain recommendations including:

(1) whether a guardian or conservator is needed;

(2) the propriety and suitability of the proposed fiduciary after consideration of his geographic location, his familial or other relationship, his ability to carry out the duties of the proposed fiduciary, his commitment to promoting the welfare of the alleged incapacitated individual, his financial capabilities and integrity , his potential conflicts of interests, the wishes of the alleged incapacitated individual, and the recommendations of the relatives of the alleged incapacitated individual;

(3) approval or disapproval by the alleged incapacitated individual of the proposed fiduciary;

(4) an evaluation of the future care and treatment needs of the alleged incapacitated individual;

(5) if there is a proposed residential plan for the alleged incapacitated individual, whether that plan is in the best interest of the alleged incapacitated individual;

(6) a recommendation regarding any rights in § 62-5-304A that should be retained by the alleged incapacitated individual;

(7) whether the matter should be heard in a formal hearing even if all parties are in agreement; and

(8) any other recommendations relevant to the matter.

(E) The court in its discretion may extend or limit the responsibilities or authority of the guardian ad litem.

Remedies

The GAL is not limited in recommendations to the Court. Some cases have simple, straight forward recommendations—but others—require creative thinking and complicated solutions.

A GAL recommendation may support the petition, oppose it, or suggest alternative solutions. The goal of the recommendation is always to put the Individual in the best possible position.

Once issues are identified, but prior to the hearing or Order, the GAL can take action with Court approval to address any immediate dangers or problems. Examples may include requesting authority from the Court to obtain financial records, legal documents, or have another doctor examine the Individual. One of the most important examples is when the GAL must petition the Court for an interim order to protect the Individual or his/her assets.[3]

SECTION 62-5-108. Emergency or temporary relief.

(A) Emergency orders without notice, emergency hearings, duration, security.

(1) Emergency orders without notice shall not be issued unless the moving party files a summons, motion for emergency order with supporting affidavit(s), verified pleading, notice of emergency hearing, and any other document required by the court. The verified pleading, motions, and affidavits shall set forth specific facts supporting the allegation that an immediate and irreparable injury, loss, or damage will result before notice can be served on adverse parties and a hearing held pursuant to subsection (B).

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

(b) If the emergency relief requested is an order for (i) appointment of a temporary guardian, conservator, guardian ad litem, or other fiduciary or (ii) the removal of an existing guardian, conservator, or other fiduciary, and the appointment of a substitute, then the moving party must submit evidence of the suitability and creditworthiness of the proposed fiduciary.

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

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

[3] A Practical Guide to Elder and Special Needs Law in South Carolina p.827

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

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

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

(7) On two days' notice to the party who obtained the emergency order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move for the emergency order's dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as possible and may consolidate motions.

Comment [cw1]: Amended to mirror language in Rule 65(b).

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

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

(B) Temporary orders and temporary hearings with notice.

(1) No temporary order shall be issued without notice to the adverse party.

(2) An order for a temporary hearing shall not be issued unless the moving party files a summons, motion for temporary hearing with affidavits, and a petition or other appropriate pleading setting forth specific facts supporting the allegation that immediate relief is needed during the pendency of the action, and notice of temporary hearing.

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

(b) If the temporary relief requested is an order for (i) appointment of a temporary guardian, conservator, guardian ad litem, or other fiduciary or (ii)

removal of an existing guardian, conservator or other fiduciary, and the appointment of a substitute, then the moving party must submit evidence of the suitability and creditworthiness of the proposed fiduciary.

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

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

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

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

(C) In an emergency, the court may exercise the power of a guardian with or without notice if the court makes emergency findings as required by the Adult Heath Care Consent Act § 44-66-30(B).

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

Comment [cw2]: Language was added to specifically address emergency or temporary situations for the protection of the alleged incapacitated individuals' property.

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

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

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

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

Section 62-5-108(B) outlines the procedure to obtain temporary relief in a non-emergency and with notice to adverse parties. A temporary order may be required in cases where there is no imminent risk of substantial harm to a person or of substantial economic loss, but action should be taken on an expedited basis. The need may arise if incapacity is expected to be of limited duration, or a currently serving guardian is not adequately performing his duties. The same documents are required as for emergency relief, but

Reporting to the Probate Court

The GAL is the "eyes and ears" of the Probate Court because the Individual may not be able to appear before the Court. Often, the GAL is often the only independent interface the Court has with the individual in question. The GAL's primary responsibility is always to act in best interests of the Individual.

The GAL's must offer the Court a clear analysis of the issues in question and a recommendation for action on the petition. The GAL report is a critical part of the process of creating and defining rights and responsibilities of the parties. The GAL report must provide the Court with a clear picture of the Individual, issues and situation—and often—recommend a course of action different from the Individual's wishes.[4] With the 2017 revisions, a detailed, written report with recommendations is now required at least forty-eight hours prior to the hearing, unless excused or required earlier by the court.

[4] A Practical Guide to Elder and Special Needs Law in South Carolina p.827-28.

South Carolina Bar
Continuing Legal Education Division

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Elder Law Committee

Friday, January 19

Panel Discussion:
Probate Court's Perspective on Article 5

Hon. Ashley H. Amundson
Andrew J. Atkins
Hon. Jacqueline D. Belton
Michael S. Large
Hon. Carolyn W. Rogers
Sarah G. St.Onge

No Materials Available