**CHAPTER FOUR**

**CONSERVATORSHIPS AND OTHER PROTECTIVE PROCEEDINGS IN THE PROBATE COURT**

**INTRODUCTION**

A protective proceeding is an action commenced in the Probate Court requesting the appointment of a conservator or issuance of an order relating to the management of the property of an individual who is unable to manage financial affairs.

**JURISDICTION**

There are two types of jurisdiction. Jurisdiction of a court over a particular type of action (subject matter) and jurisdiction over the person.

The Probate Court has exclusive original jurisdiction over protective proceedings involving minors and adults. Jurisdiction over an individual is obtained by serving the summons and petition on that individual and anyone else required to be served to complete proper service.

**VENUE**

The appropriate county for filing a protective proceeding is usually the county in which the alleged incapacitated individual (A.I.I.) resides. If the A.I.I. does not reside in this state, venue may be in the county in which the A.I.I. owns property or has the right to take legal action. There are some exceptions to this general rule when the A.I.I. is an adult who has recently been brought into or removed from South Carolina. In these cases, reference should be made to the South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act.[[1]](#footnote-1)

**PROCEEDINGS INVOLVING A MINOR**

When a minor is to receive assets over $15,000.00 or when a minor needs to take some action relating to property, the appointment of a conservator or the issuance of a protective order may be necessary. The initiation of the case may be by application (an informal proceeding) rather than the summons and petition required in all cases involving adults. In most cases, it will not be necessary for a guardian *ad litem* (GAL) to be appointed. If the court finds such appointment necessary, the GAL will need to investigate as he or she would in any other protective proceeding except that there is no issue as to capacity. The issues might be whether a conservatorship or a trust is indicated based on the facts, who should serve as conservator or trustee, what restrictions should be placed on the conservator or trustee, and how the funds can be utilized in the best interest of the minor.

**PROCEEDINGS INVOLVING AN ADULT**

A protective proceeding for an A.I.I. is a formal proceeding commenced by the filing of a summons and a petition. The petitioner is the person who commences the action with the court. The respondents to the petition are the A.I.I. and other necessary parties, including the next of kin and anyone named as an agent pursuant to a power of attorney.

Before a protective proceeding is commenced, the petitioner should evaluate less restrictive alternatives. While a protective proceeding is pending, the GAL should consider what actions could be taken that would provide the needed protection with the least restriction of the rights of the A.I.I.

The first allegation that must be made in the petition is that the A.I.I. is incapacitated and in need of protection. Then the petitioner alleges what action should be taken to provide that protection and, if a conservatorship is needed, who should be appointed conservator. The majority of these cases are uncontested, but when there is disagreement as to the A.I.I.’s capacity or as to the appropriate protection, these cases can be quite difficult and the role of the GAL becomes critical. The GAL gathers the information necessary for the court to make a well informed decision.

A summons is required to bring the A.I.I. under the court’s jurisdiction. The summons requires that the A.I.I. and any named co-respondents answer the allegations in the petition.

A petition sets forth the basic facts in the matter and contains the allegations that the Petitioner is making and the relief being requested. The statute sets forth the specific information that must be included in the petition and the persons who are required to be named as co-respondents.

**SERVICE OF PROCESS**

Once the summons and petition have been filed with the court, the petitioner must serve the Respondent(s). Service is required in order to obtain jurisdiction over the parties. The South Carolina Rules of Civil Procedure control how service must be effected. The summons and petition must be hand delivered to the A.I.I. or minor by a sheriff, his deputy or by any other person not less than eighteen years of age, not an attorney in or a party to the action. When a minor or an A.I.I. is served a copy of the summons and petition must also be served on the guardian if within the state or, if none, a parent or other person having care and control or any competent person with whom he resides or in whose service he is employed. Co-respondents may be served by the same method or by registered or certified mail, return receipt requested, or commercial delivery. Anyone other than the A.I.I. may voluntarily accept service by signing an acceptance of service.[[2]](#footnote-2) Accepting service can reduce the time and expense in cases where the parties are in agreement with the proposed action to be taken. These parties may also waive notice of the hearing and answer the petition stating they are in agreement.

In addition to the service of the summons and petition, notice of the right to counsel must be served on the A.I.I. This notice advises the A.I.I. of the right to an attorney in this action and states that the court will appoint an attorney if no attorney appears within fifteen (15) days from filing of the proof of service on the A.I.I. If a physician’s affidavit was filed with the summons and petition, a copy of it must also be served.

Service should be made within one hundred twenty (120) days of the filing of the Summons and Petition. If not, the court has the option of dismissing the case.

The A.I.I. and co-respondents may file answers or other responsive pleadings either agreeing with or opposing the proposed action. An answer or other responsive pleading must normally be filed within thirty (30) days of service, unless an extension is granted by the petitioner’s attorney. The A.I.I.’s time to answer does not start until an attorney retained by the A.I.I. has filed a notice of appearance or the court has appointed an attorney for the A.I.I.

**APPOINTMENTS BY THE COURT**

To fully protect the rights of the A.I.I., several appointments may be required. As noted above, if a notice of appearance of counsel for the A.I.I. is not filed with the court within fifteen (15) days of the filing of the proof of service on the A.I.I., the court will appoint counsel. Within thirty (30) days of the filing of the proof of service on the A.I.I., the court is required to appoint a GAL for the A.I.I. and one examiner (a physician). A second examiner may be appointed on the Court’s own motion or at the request of the initial examiner, the A.I.I., or the GAL. The second examiner may be a physician, nurse, social worker or psychologist.

*Note: If capacity is contested, the GAL will likely want to have a second examiner appointed to gather additional input regarding the functional abilities of the A.I.I*.

The court may appoint counsel for a non-attorney GAL. This will not be necessary in most cases, but in a hotly contested or complex case, or in a case in which there is alleged abuse of the A.I.I., the GAL may need the assistance of an attorney.

In some situations where counsel has been appointed, it may become apparent that the A.I.I. is incapable of participating in any meaningful way with the attorney. When the A.I.I. cannot communicate wishes, interests or preferences, the attorney may file a motion to be relieved as counsel. In such cases, the attorney could request to be appointed as the GAL, but one person may not serve as both counsel and GAL at the same time.

**EMERGENCY OR TEMPORARY PROCEEDINGS**

Due to the steps that must be followed in guardianships or protective proceedings, it may take a few months from the time a petition is filed until the court issues a final order. Sometimes, relief may be needed prior to the final order. For example, there may be no one to make a decision or no one with authority to access funds to pay bills, or someone may be stealing from the A.I.I., or a previously appointed conservator may be failing to carry out his responsibilities or may be misusing assets. An emergency order may be issued if the petitioner shows the court that there is an immediate threat of irreparable harm if an order is delayed until notice can be given.[[3]](#footnote-3) After the issuance of an emergency order, service of the pleadings is required and a hearing must be held within ten days of the order.

Where it is imperative that action should be taken, but it does not rise to the definition of an “emergency,” a temporary order may be issued after notice and a hearing. A temporary order will expire after six (6) months unless otherwise specified in the order. A hearing for permanent relief must be held within six (6) months of the temporary order. For more information on emergency or temporary proceedings, see Chapter 5.

**HEARING**

When a hearing is set by the court, a notice must be sent to the A.I.I., all co-respondents who have not waived notice of the hearing, and any person who has filed a request or demand for notice. Notice must be sent at least twenty (20) days before the hearing except in emergency or temporary proceedings. The court may for good cause change the method of notice or the time requirements.[[4]](#footnote-4) The A.I.I. is entitled to be present for the hearing unless he or she waives that right. If the A.I.I. waives the right to attend a hearing and all parties are in agreement, the court may proceed with a formal hearing, an informal hearing, or may issue an order without a hearing. Unless there is a formal hearing, the court will issue a temporary consent order to expire in thirty (30) days. If the A.I.I. does not request a formal hearing during that period, the court shall issue an order on the terms agreed to by the parties and the GAL.

Most hearings are public, but the A.I.I. or the GAL may request that the hearing be closed.

*Note: The role of the GAL in the hearing itself will vary from court to court and case to case. Sometimes nothing beyond a written report may be required and other times the GAL may be expected to testify.*

**PRESUMPTION OF CAPACITY AND CLEAR AND CONVINCING STANDARD**

Adults are presumed to have capacity. To overcome that presumption, the court must find by clear and convincing evidence[[5]](#footnote-5) that the adult is incapacitated. For purposes of a protective proceeding, incapacity is defined as “the inability to effectively receive, evaluate, and respond to information or make or communicate decisions such that a person, even with appropriate, reasonably available support and assistance cannot …manage his property or financial affairs or provide for his support or for the support of his legal dependents, necessitating the need for a protective order.”[[6]](#footnote-6)

*Note: A GAL will be of great assistance to the court in gathering the information necessary to make a determination as to whether the “clear and convincing evidence” standard is met and to determine whether it is appropriate to limit the powers of the conservator or place limitations on the relief requested in the petition.*

**PROTECTIVE ARRANGEMENTS**

If an individual is incapacitated, alternatives to appointment of a conservator may be more appropriate and less restrictive and still provide for long-term asset management.[[7]](#footnote-7) The GAL should look carefully at options to provide needed protection without overreaching. Funding an existing trust, or creating and funding a new trust, such as a special needs trust or a pooled trust,[[8]](#footnote-8) may provide sufficient protection for the protected person without the court remaining involved.

Whenever an A.I.I. meets social security disability criteria, is under the age of sixty-five (65), and is receiving or would be better served by qualifying for needs-based government benefits such as Supplemental Security Income or Medicaid, a special needs trust or a subaccount in a pooled trust should be considered.

*Note. Not everyone is familiar with this option, so it is important that the GAL look at the situation and be sure that this possibility is considered whenever it might be appropriate.*

Some actions are brought in the court to obtain court approval for a single transaction such as the sale or purchase of a home or other real property or approval of a gift of assets belonging to the protected person. An action can also be brought for the purpose of ratifying an existing general durable power of attorney (POA), in which the A.I.I. has given an attorney-in-fact the power to handle his or her business and financial affairs. Once there is a formal finding by the court of incapacity as a result of a protective proceeding, the A.I.I. cannot revoke or change the POA. Again, the GAL should examine whether the proposed action is in the best interest of the A.I.I.

**RIGHTS REMOVED OR RETAINED**

Among the most important decisions the court must make, if there is a finding of incapacity, is the degree of incapacity and what rights should be removed from the protected person.[[9]](#footnote-9) This is another area in which the GAL plays an important role in assuring that the removal of rights in the court order is no broader than necessary. Each right should be specifically addressed in the order. The rights at issue in a conservatorship proceeding include the rights and powers to buy, sell, or transfer real or personal property or transact business of any type; to make, modify, or terminate contracts; or to bring or defend any action at law or equity

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Unless a court order specifies otherwise, the appointment of a conservator terminates the parts of a power of attorney that relate to matters within the scope of the conservatorship. The authority of an agent to make health care decisions or authority granted by advance directives regarding health care is not altered or changed by the appointment of a conservator.[[10]](#footnote-10)

It is also important to note that the court is required to report to the State Law Enforcement Division (SLED) the name and identifying information of anyone found to be incapacitated. Once reported, the protected person is prohibited from shipping, transporting, possessing, or receiving firearms or ammunition.[[11]](#footnote-11)

**PRIORITY FOR APPOINTMENT**

There is a statutory priority of persons who should be considered as potential conservator for a protected person.[[12]](#footnote-12) The person must be “qualified,” a word that will be interpreted in different ways by different courts, but would include requirements such as being of age and not being guilty of a crime involving financial wrongdoing or abuse, and being knowledgeable about the duties of serving as conservator and being able to carry out those duties for the benefit of the protected person. If a person is qualified and holds the highest priority, the court may appoint or may decline to appoint that person if the court deems that to be in the best interest of the protected person.

**BONDS AND RESTRICTED ACCOUNTS**

Except upon a finding of good cause, the court will require a fiduciary bond in conservatorship proceedings to protect the assets of the protected person. Many insurance companies sell such bonds. The bond is typically in an amount of at least the value of the protected person’s personal estate plus one year's income. An alternative to bond may be placing funds in a bank account that is restricted so that withdrawals cannot be made except by an order of the court. If such an account is set up, a restricted account agreement should be signed by the conservator with a financial institution that will agree to sign and abide by the restricted account agreement. In some circumstances, both bonded and restricted accounts may be used in the same case, which usually is an indication significant assets in multiple accounts. Some courts require that the conservator be bonded, even if a restricted account is used.

**PAYMENT OF FEES AND COSTS IN A PROTECTIVE PROCEEDING**

The court has broad latitude in determining fees and deciding who will is responsible for payment of those fees.[[13]](#footnote-13) Unless there is a court order to the contrary, a petitioner is responsible for his or her own attorney’s fees and costs, as well as other costs and expenses of the action. This is a difficult concept for many petitioners to understand when they are often simply trying to bring a situation before the court so that someone they care about can be adequately protected. The petitioner may request that these fees and costs be reimbursed from or, to the extent not yet paid, paid from the funds of the protected person. In most cases, this request will be granted, but some potential petitioners are not willing or able to take the financial risk.

If there are sufficient funds and the court believes that the action was in the best interest of the protected person, the court will generally order that counsel for the petitioner, counsel for the protected person, the GAL, and the examiner(s) be paid from the funds of the protected person. The court is responsible for determining the reasonableness of the fees and may, in some instances, reduce the fees.

Each person expecting to be paid or reimbursed should request payment of fees and expenses in the petition or responsive pleadings or at the hearing or in a motion. Attorneys are expected to submit a fee affidavit and/or a detailed invoice setting forth the services provided, the time expended, the hourly rate, and any costs incurred. Others requesting payment should submit an affidavit setting forth the same information.

In addition to being able to award fees from the funds of the protected person, the court may assess fees and costs to another party. This gives the court the flexibility to decide that a party was acting in bad faith or otherwise causing the petitioner or the protected person to incur fees and expenses that should not, in the court’s consideration of justice and equity, have been necessary. This power in the court should serve as a deterrent to frivolous actions or defenses.

**COMPENSATION OF THE CONSERVATOR**

State law allows conservators to reasonable compensation as determined by the court. Serving as conservator is an important and potentially time-consuming job. Corporate or professional conservators often charge a fee based on a percentage of the assets being managed. This fee should be calculated on an annual basis even if paid monthly or quarterly. For example, if there is $200,000.00 under management and the annual fee is 1.5%, then the total fee for the year would be $3,000.00, or $250.00 per month. Individual conservators often waive compensation. If an individual conservator wishes to be compensated, compensation is typically based on the time spent and the duties required.

**CONSERVATOR DUTIES**

After appointment, the conservator is charged with managing the finances of the protected person for the benefit of the protected person and his or her dependents. The conservator is a fiduciary, similar to a trustee. The conservator is under court supervision and is bound to act in the best interests of the protected person.

One of the first actions of the conservator is to inventory the estate of the protected person and file that inventory with the court. The court may also require the conservator to file a financial plan covering several topics set forth in the statute including a budget showing expected income and expenditures. If there is real property, the conservator needs to protect and preserve the property. If the property needs to be sold, the conservator must petition the court for approval of the sale. The conservator must invest the funds of the protected person as a prudent investor.[[14]](#footnote-14) If the protected person has a will, revocable trust, joint accounts, or beneficiary designations, the conservator should try to maintain the estate plan created by the protected person. The conservator is required to file a report with the court with updated information, including an accounting, annually and at other times specified by statute or as requested by the court.

**CONSERVATOR POWERS**

Except as limited by court order, a conservator is granted fairly broad authority to act reasonably in the best interest of the protected person. However, actions such as the sale, lease, or mortgage of real estate, making gifts to charity, or payment of fees to the conservator require court approval.

**PROCEEDINGS AFTER APPOINTMENT**

When a conservator is appointed, the court maintains jurisdiction and there are occasions when a court may be asked to take additional action. Some examples might include the termination of a conservatorship because the incapacity has ceased, the replacement of a conservator, or limiting or expanding the conservatorship**.** Sometimes the court will re-appoint the original GAL or appoint a new GAL to investigate the requested action and make a recommendation.

**MEDIATION**

After a successful pilot program, the South Carolina Supreme Court added Rule 5 to the Rules of the Probate Court in 2012. All contested litigation in Probate Court is eligible for mediation. It is generally understood that the issue of capacity, if contested, is not subject to mediation, but other issues in guardianship and protective proceedings such as who should be appointed, what relief should be granted, what rights are lost or retained, could often be decided through mediation. Mediation is intended to give all interested parties an opportunity to participate in a facilitated conference and arrive at a mutually acceptable resolution that can then be presented to the court for approval. The court order authorizing the mediation should specify the role the GAL is to play in the mediation. If the order is not clear, prior to participating in a mediation the GAL should contact the appointing probate court to obtain clear instructions.

If the GAL believes mediation would be beneficial to the parties, or if the GAL believes mediation would not be advantageous, he or she should notify the court.

1. S.C. Code Ann. §§ 62-5-701 to -716. [↑](#footnote-ref-1)
2. Rule 4, SCRCP. [↑](#footnote-ref-2)
3. S.C. Code Ann. § 62-5-108. (See Appendix for full text.) [↑](#footnote-ref-3)
4. S.C. Code Ann. § 62-1-401. [↑](#footnote-ref-4)
5. There are three basic standards of proof: “a preponderance of the evidence,” “clear and convincing evidence,” and “proof beyond a reasonable doubt.” A clear and convincing standard is somewhere in the middle. [↑](#footnote-ref-5)
6. S.C. Code Ann. § 62-5-101(13). [↑](#footnote-ref-6)
7. For more information on alternatives to the appointment of a conservator, see Chapter 2 of this Manual. [↑](#footnote-ref-7)
8. A special need trust and a pooled fund trust are trusts that allow “disabled” minors or adults who receive certain government benefits to maintain eligibility for benefits instead of being disqualified due due to the settlement proceeds, inheritance, or other influx of funds. [↑](#footnote-ref-8)
9. Note that an A.I.I. is called a “protected person” once the court issues an order determining that the individual is incapacitated. [↑](#footnote-ref-9)
10. S.C. Code Ann. § 62-5-407. [↑](#footnote-ref-10)
11. S.C. Code Ann. § 23-31-1040(D). [↑](#footnote-ref-11)
12. S.C. Code Ann. § 62-5-408. [↑](#footnote-ref-12)
13. S.C. Code Ann. § 62-5-105. [↑](#footnote-ref-13)
14. For more detail, see the Uniform Prudent Investor Act set forth in SC Code Ann. § 62-7-933. [↑](#footnote-ref-14)