

SENATE BILL NO. 164  
INTRODUCED BY S. GALLUS  
BY REQUEST OF THE PUBLIC DEFENDER COMMISSION

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE DISTINCTION BETWEEN THE POWERS AND DUTIES OF ASSIGNED COUNSEL AND A GUARDIAN AD LITEM IN PROCEEDINGS TO ADJUDICATE INCAPACITY AND TO PROTECT PROPERTY OF MINORS AND PERSONS UNDER DISABILITY; AMENDING SECTIONS 72-5-315 AND 72-5-408, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 72-5-315, MCA, is amended to read:

**"72-5-315. Procedure for court appointment of guardian -- hearing -- examination -- interview -- procedural rights.** (1) The incapacitated person or any person interested in the incapacitated person's welfare, including the county attorney, may petition for a finding of incapacity and appointment of a guardian.

(2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity. The allegedly incapacitated person may have counsel of the person's own choice or the court may, in the interest of justice, appoint an appropriate official or order the office of state public defender, provided for in 47-1-201, to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the person in the proceeding. ~~The official or assigned counsel has the powers and duties of a guardian ad litem.~~

(3) The person alleged to be incapacitated must be examined by a physician appointed by the court who shall submit a report in writing to the court and must be interviewed by a visitor sent by the court. Whenever possible, the court shall appoint as visitor a person who has particular experience or expertise in treating, evaluating, or caring for persons with the kind of disabling condition that is alleged to be the cause of the incapacity. The visitor shall also interview the person who appears to have caused the petition to be filed and the person who is nominated to serve as guardian and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the requested appointment is made and submit the visitor's report in writing to the court. Whenever possible without undue delay or expense beyond the ability to pay of the alleged incapacitated person, the court, in formulating the judgment, shall utilize the services of any public or charitable agency that offers or is willing to evaluate the condition of the allegedly

incapacitated person and make recommendations to the court regarding the most appropriate form of state intervention in the person's affairs.

(4) The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon the person's condition. The person is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel requests it."

**Section 2.** Section 72-5-408, MCA, is amended to read:

**"72-5-408. Procedure concerning hearing and order on original petition.** (1) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If at any time in the proceeding the court determines that the interests of the minor are or may be inadequately represented, the court may order the office of state public defender, provided for in 47-1-201, to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the minor. ~~Counsel assigned to represent a minor also has the powers and duties of a guardian ad litem.~~

(2) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of the person's own choice, the court shall order the office of state public defender, provided for in 47-1-201, to assign counsel to represent the person pursuant to the Montana Public Defender Act, Title 47, chapter 1. ~~Assigned counsel has the powers and duties of a guardian ad litem.~~ If the alleged disability is mental illness or mental deficiency, the court may direct that the person to be protected be examined by a physician or professional person as defined in 53-21-102 designated by the court. If the alleged disability is physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court. It is preferable that a physician designated by the court not be connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

(3) In the case of an appointment pursuant to 72-5-410(1)(h), the court shall direct that the person to be protected be examined by a physician as set forth in subsection (2).

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

NEW SECTION. **Section 3. Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 4. Applicability.** [This act] applies to appointments on or after [the effective date of this act].

- END -

