

SENATE BILL NO. 32

INTRODUCED BY M. MCNALLY

BY REQUEST OF THE CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING MONITORING REQUIREMENTS FOR GUARDIANS OF ADULTS; PROVIDING FOR ANNUAL REPORTING BY GUARDIANS; REQUIRING GUARDIANSHIP PROCEEDINGS TO INCLUDE A PLAN OF CARE FOR AN INCAPACITATED PERSON; AMENDING SECTIONS 72-5-315 AND 72-5-321, MCA; AND PROVIDING 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) (a) The petition must include a written plan for the care of the incapacitated person after appointment of the guardian, to the extent reasonably known to the petitioner at the time of filing the petition. If the needs of the incapacitated person are not reasonably known to the petitioner when the petition is filed or if the petitioner is not the proposed guardian, the guardian, within 30 days after appointment, shall submit a written plan for the care of the incapacitated person to the court, to all interested persons, and to any person who has filed a request for notice under 72-5-318. If the plan changes at any time between the annual reports of the guardian, a modified plan must be filed with the next annual report.

(b) The plan must be based on the needs of the incapacitated person and must consider the best interests of the incapacitated person, as well as the incapacitated person's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the guardian. The plan must include:

(i) the living arrangement, services, and supports the guardian expects to arrange, facilitate, or continue for the incapacitated person;

(ii) social and educational activities the guardian expects to facilitate on behalf of the incapacitated

1 person:

2 (iii) any person with whom the incapacitated person has a close personal relationship or a relationship
3 involving regular visitation and any plan the guardian has for facilitating visits with the person;

4 (iv) the anticipated nature and frequency of the guardian's visits and communication with the
5 incapacitated person;

6 (v) goals for the incapacitated person, including any goal related to the restoration of the
7 incapacitated person's rights, and how the guardian anticipates achieving the goals;

8 (vi) whether the incapacitated person has an existing plan and, if so, whether the guardian's plan is
9 consistent with that plan; and

10 (vii) a statement or list of the amount the guardian proposes to charge for each service the guardian
11 anticipates providing to the incapacitated person.

12 ~~(2)~~(3) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity.

13 The allegedly incapacitated person may have counsel of the person's own choice or the court may, in the
14 interest of justice, appoint an appropriate official or order the office of state public defender, provided for in 2-
15 15-1029, to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the
16 person in the proceeding.

17 ~~(3)~~(4) The person alleged to be incapacitated must be examined by a physician appointed by the
18 court who shall submit a report in writing to the court and must be interviewed by a visitor sent by the court.
19 Whenever possible, the court shall appoint as visitor a person who has particular experience or expertise in
20 treating, evaluating, or caring for persons with the kind of disabling condition that is alleged to be the cause of
21 the incapacity. The visitor shall also interview the person who appears to have caused the petition to be filed
22 and the person who is nominated to serve as guardian and visit the present place of abode of the person
23 alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the
24 requested appointment is made and submit the visitor's report in writing to the court. Whenever possible without
25 undue delay or expense beyond the ability to pay of the alleged incapacitated person, the court, in formulating
26 the judgment, shall utilize the services of any public or charitable agency that offers or is willing to evaluate the
27 condition of the allegedly incapacitated person and make recommendations to the court regarding the most
28 appropriate form of state intervention in the person's affairs.

1 ~~(4)(5)~~ The person alleged to be incapacitated is entitled to be present at the hearing in person and to
2 see or hear all evidence bearing upon the person's condition. The person is entitled to be present by counsel, to
3 present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to
4 trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be
5 incapacitated or the person's counsel requests it."

6
7 **Section 2.** Section 72-5-321, MCA, is amended to read:

8 **"72-5-321. Powers and duties of guardian of incapacitated person.** (1) The powers and duties of
9 a limited guardian are those specified in the order appointing the guardian. The limited guardian is required to
10 report the condition of the incapacitated person, including reporting the information identified in [section
11 1(2)(b)(i) through (vii)], and of the estate that has been subject to the guardian's possession and or control as
12 required by the court or by court rule annually for the preceding year. A copy of the report must be submitted to
13 all interested persons and to any person who has filed a request for notice under 72-5-318.

14 (2) A full guardian of an incapacitated person has the same powers, rights, and duties respecting the
15 ward that a parent has respecting an unemancipated minor child, except that a guardian is not liable to third
16 persons for acts of the ward solely by reason of the parental relationship. In particular and without qualifying the
17 foregoing, a full guardian has the following powers and duties, except as limited by order of the court:

18 (a) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction
19 relating to detention or commitment of the ward, the full guardian is entitled to custody of the person of the ward
20 and may establish the ward's place of residence within or outside of this state.

21 (b) If entitled to custody of the ward, the full guardian shall make provision for the care, comfort, and
22 maintenance of the ward and whenever appropriate arrange for the ward's training and education. Without
23 regard to custodial rights of the ward's person, the full guardian shall take reasonable care of the ward's
24 clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property
25 of the ward is in need of protection.

26 (c) A full guardian may give any consents or approvals that may be necessary to enable the ward to
27 receive medical or other professional care, counsel, treatment, or service. This subsection (2)(c) does not
28 authorize a full guardian to consent to the withholding or withdrawal of life-sustaining treatment or to a do not

1 resuscitate order if the full guardian does not have authority to consent pursuant to the Montana Rights of the
2 Terminally Ill Act, Title 50, chapter 9, or to the do not resuscitate provisions of Title 50, chapter 10. A full
3 guardian may petition the court for authority to consent to the withholding or withdrawal of life-sustaining
4 treatment or to a do not resuscitate order. The court may not grant that authority if it conflicts with the ward's
5 wishes to the extent that those wishes can be determined. To determine the ward's wishes, the court shall
6 determine by a preponderance of evidence if the ward's substituted judgment, as applied to the ward's current
7 circumstances, conflicts with the withholding or withdrawal of life-sustaining treatment or a do not resuscitate
8 order.

9 (d) If a conservator for the estate of the ward has not been appointed, a full guardian may:

10 (i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the
11 welfare of the ward to perform that person's duty;

12 (ii) receive money and tangible property deliverable to the ward and apply the money and property for
13 support, care, and education of the ward. However, the full guardian may not use funds from the ward's estate
14 for room and board that the full guardian, the full guardian's spouse, parent, or child has furnished the ward
15 unless a charge for the service is approved by order of the court made upon notice to at least one of the next of
16 kin of the incompetent ward, if notice is possible. The full guardian must exercise care to conserve any excess
17 for the ward's needs.

18 (e) ~~Unless waived by the court, a~~ full guardian is required to report the condition of the ward,
19 including reporting the information identified in [section 1(2)(b)(i) through (vii)], and of the estate ~~which that~~ has
20 been subject to the full guardian's possession or control annually for the preceding year. A copy of the report
21 must be ~~served upon the ward's parent, child, or sibling if that person has made an effective request submitted~~
22 to all interested persons and to any person who has filed a request for notice under 72-5-318.

23 (f) If a conservator has been appointed, all of the ward's estate received by the full guardian in excess
24 of those funds expended to meet current expenses for support, care, and education of the ward must be paid to
25 the conservator for management as provided in this chapter, and the full guardian must account to the
26 conservator for funds expended.

27 (3) Upon failure, as determined by the clerk of court, of the guardian to file an annual report, the court
28 shall order the guardian to file the report and give good cause for the guardian's failure to file a timely report.

1 (4) Any full guardian of one for whom a conservator also has been appointed shall control the custody
2 and care of the ward. A limited guardian of a person for whom a conservator has been appointed shall control
3 those aspects of the custody and care of the ward over which the limited guardian is given authority by the
4 order establishing the limited guardianship. The full guardian or limited guardian is entitled to receive
5 reasonable sums for the guardian's services and for room and board furnished to the ward as agreed upon
6 between the guardian and the conservator, provided the amounts agreed upon are reasonable under the
7 circumstances. The full guardian or limited guardian authorized to oversee the incapacitated person's care may
8 request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's
9 care and maintenance.

10 (5) Except as provided in subsection (6), a full guardian or limited guardian may not involuntarily
11 commit for mental health treatment or for treatment of a developmental disability or for observation or
12 evaluation a ward who is unwilling or unable to give informed consent to commitment, except as provided in 72-
13 5-322, unless the procedures for involuntary commitment set forth in Title 53, chapters 20 and 21, are followed.
14 This chapter does not abrogate any of the rights of mentally disabled persons provided for in Title 53, chapters
15 20 and 21.

16 (6) (a) If the court has found that a ward has a primary diagnosis of a major neurocognitive disorder,
17 as defined in the fifth edition of the diagnostic and statistical manual of mental disorders adopted by the
18 American psychiatric association, and because of this disorder the ward is unwilling or unable to give informed
19 consent to treatment, a full guardian or limited guardian may seek admission of the ward for stabilization and
20 treatment to a hospital, skilled nursing facility, or another appropriate treatment facility other than the Montana
21 state hospital.

22 (b) If the ward is admitted to the Montana mental health nursing care center, the court shall review
23 every 90 days whether the Montana mental health nursing care center is the appropriate placement for the
24 ward or whether a less restrictive alternative placement exists.

25 (7) Upon the death of a full guardian's or limited guardian's ward, the full guardian or limited guardian,
26 upon an order of the court and if there is no personal representative authorized to do so, may make necessary
27 arrangements for the removal, transportation, and final disposition of the ward's physical remains, including
28 burial, entombment, or cremation, and for the receipt and disposition of the ward's clothing, furniture, and other

1 personal effects that may be in the possession of the person in charge of the ward's care, comfort, and
2 maintenance at the time of the ward's death."

3

4 NEW SECTION. Section 3. Applicability. (1) [Section 1] applies to guardianship proceedings
5 commenced on or after [the effective date of this act].

6 (2) [Section 2] applies to guardianships in existence on or after [the effective date of this act]. A
7 person appointed as a limited guardian prior to the enactment of [section 2] shall file the person's first annual
8 report in 2022 on the anniversary of the person's appointment. A person appointed as a full guardian prior to
9 the enactment of [section 2] for whom a court has waived the annual reporting requirement shall file the
10 person's first annual report in 2022 on the anniversary of the person's appointment.

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