

Unofficial Draft Copy -- SB 202-1

As of: 2020/07/02 05:00:39

Drafter: Alexis Sandru, 406-444-4026

67th Legislature

PD 0001

1                                   \*\*\*\* BILL NO. \*\*\*\*  
2                                   INTRODUCED BY \*\*\*\*  
3                                   BY REQUEST OF THE \*\*\*\*  
4

5 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING CONSIDERATION OF LESS RESTRICTIVE  
6 ALTERNATIVES IN ADULT GUARDIANSHIP PROCEEDINGS; AMENDING SECTIONS 72-5-305, 72-5-316,  
7 72-5-319, AND 72-5-321, MCA; AND PROVIDING AN APPLICABILITY DATE."  
8

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:  
10

11       **Section 1.** Section 72-5-305, MCA, is amended to read:

12       **"72-5-305. Definitions.** In this part, unless the context requires otherwise, the following definitions  
13 apply:

14       (1) "Full guardian" means a guardian who possesses all the legal duties and powers enumerated in  
15 72-5-321.

16       (2) "Guardian" includes a full guardian and a limited guardian.

17       (3) "Less restrictive alternative" means an approach to meeting an individual's needs that restricts  
18 fewer rights of the individual than would the appointment of a guardian. The term includes supported  
19 decisionmaking, appropriate technological assistance, and appointment of a representative payee.

20       ~~(3)~~(4) "Limited guardian" means a guardian who possesses fewer than all of the legal duties and  
21 powers of a full guardian and whose rights, powers, and duties have been specifically enumerated by the court.

22       (5) "Supported decisionmaking" means assistance from one or more persons of an individual's  
23 choosing in understanding the nature and consequences of potential personal and financial decisions, which  
24 enables the individual to make the decisions, and in communicating a decision once made if consistent with the  
25 individual's wishes."  
26

27       **Section 2.** Section 72-5-316, MCA, is amended to read:

28       **"72-5-316. Findings -- order of appointment.** (1) If the court is satisfied that the person for whom a

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1 guardianship is sought is incapacitated, that the identified needs of the person cannot be met by a less  
2 restrictive alternative, and that judicial intervention in the person's personal freedom of action and decision is  
3 necessary to meet essential requirements for the person's physical health or safety, it may appoint a full  
4 guardian having the powers described in 72-5-321 or a limited guardian having the powers described in the  
5 order. If the court is satisfied that the allegedly incapacitated person could handle the essential requirements for  
6 physical health or safety if the person's financial resources were managed by another, it shall order that the  
7 petition be treated as a petition for a protective order under Title 72, chapter 5, part 4, and proceed accordingly.  
8 Alternatively, the court may dismiss the proceeding or enter any other appropriate order that is not inconsistent  
9 with the specific provisions of this part. In issuing its order, the court shall make specific findings of fact.

10 (2) The court may not invest a guardian with powers or duties beyond those sought in the petition and  
11 may, upon petition for a full guardianship, create a limited guardianship or conservatorship when the court  
12 determines that a limited guardianship or conservatorship is all that is required for the care and protection of the  
13 incapacitated person. The order must specify whether a full or limited guardianship is being created. In the case  
14 of a limited guardianship, the order must specify the particular powers and duties vested in the limited guardian  
15 and the period for which the limited guardianship is created.

16 (3) An incapacitated person may not be limited in the exercise of any civil or political rights except  
17 those that are clearly inconsistent with the exercise of the powers granted to the guardian unless the court's  
18 order specifically provides for the limitations. The order must state that all rights not specifically limited are  
19 retained by the incapacitated person."  
20

21 **Section 3.** Section 72-5-319, MCA, is amended to read:

22 **"72-5-319. Contents of petition for appointment of guardian.** (1) The petition for appointment of a  
23 guardian must contain:

24 (a) the name, residence, and mailing address of the petitioner, the petitioner's relationship to the  
25 alleged incapacitated person, and the petitioner's interest in the matter;

26 (b) the name, residence, and mailing address of the alleged incapacitated person;

27 (c) the nature and degree of the alleged incapacity;

28 (d) if the petition in any way affects the management of the property of the alleged incapacitated

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1 person, the approximate value and description of the property, including any compensation, pension, insurance,  
2 or allowance to which the person may be entitled;

3 (e) whether there is, in any state, a full guardian or limited guardian for the person or estate of the  
4 incapacitated person or a conservator of the person's property;

5 (f) the name, residence, and mailing address of the person whom the petitioner seeks to have  
6 appointed guardian;

7 (g) the names, residences, and nature of relationship, so far as is known or can reasonably be  
8 ascertained, of the persons most closely related by blood or marriage to the alleged incapacitated person;

9 (h) the name and residence of the person or institution having the care and custody of the alleged  
10 incapacitated person;

11 (i) the reasons why the appointment of a guardian is sought, including:  
12 (i) any less restrictive alternatives for meeting the alleged incapacitated person's needs that have  
13 been implemented or, if no less restrictive alternatives have been implemented, the reason why; and  
14 (ii) the reason why a less restrictive alternative is insufficient to meet the alleged incapacitated  
15 person's need;

16 (j) -and whether a limited guardianship or full guardianship is requested;

17 (k) the facts supporting the allegations of incapacity and the need for a guardian;

18 (l) the specific areas of protection and assistance requested and the limitation of rights requested  
19 to be included in the order of appointment;

20 (m) in the case of a petition for limited guardianship, the particular powers and areas of authority  
21 that the petition seeks to have vested in the limited guardian as provided in 72-5-320 and the term for which the  
22 limited guardianship is requested;

23 (n) in the case of a petition for full guardianship, the length of time the guardianship is expected to  
24 last.

25 (2) The petition may also include a request for temporary guardianship as provided in 72-5-317 if the  
26 petitioner believes that the requisites of that section are met and that the appointment of a temporary guardian,  
27 pending the completion of guardianship proceedings, is necessary to protect the welfare of the alleged  
28 incapacitated person. The facts requiring appointment of a temporary guardian must be stated with specificity."

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2 **Section 4.** Section 72-5-321, MCA, is amended to read:

3 **"72-5-321. Powers and duties of guardian of incapacitated person.** (1) The powers and duties of  
4 a limited guardian are those specified in the order appointing the guardian. The limited guardian is required to  
5 report the condition of the incapacitated person and of the estate that has been subject to the guardian's  
6 possession and control, as required by the court or by court rule.

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

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

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

19 (c) A full guardian may give any consents or approvals that may be necessary to enable the ward to  
20 receive medical or other professional care, counsel, treatment, or service. This subsection (2)(c) does not  
21 authorize a full guardian to consent to the withholding or withdrawal of life-sustaining treatment or to a do not  
22 resuscitate order if the full guardian does not have authority to consent pursuant to the Montana Rights of the  
23 Terminally Ill Act, Title 50, chapter 9, or to the do not resuscitate provisions of Title 50, chapter 10. A full  
24 guardian may petition the court for authority to consent to the withholding or withdrawal of life-sustaining  
25 treatment or to a do not resuscitate order. The court may not grant that authority if it conflicts with the ward's  
26 wishes to the extent that those wishes can be determined. To determine the ward's wishes, the court shall  
27 determine by a preponderance of evidence if the ward's substituted judgment, as applied to the ward's current  
28 circumstances, conflicts with the withholding or withdrawal of life-sustaining treatment or a do not resuscitate

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1 order.

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

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

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

11 (e) Unless waived by the court, a full guardian is required to report the condition of the ward and of  
12 the estate which has been subject to the full guardian's possession or control annually for the preceding year. A  
13 copy of the report must be served upon the ward's parent, child, or sibling if that person has made an effective  
14 request under 72-5-318.

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

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

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

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1 care and maintenance.

2 (5) Except as provided in subsection (6), a full guardian or limited guardian may not involuntarily  
3 commit for mental health treatment or for treatment of a developmental disability or for observation or  
4 evaluation a ward who is unwilling or unable to give informed consent to commitment, except as provided in 72-  
5 5-322, unless the procedures for involuntary commitment set forth in Title 53, chapters 20 and 21, are followed.  
6 This chapter does not abrogate any of the rights of mentally disabled persons provided for in Title 53, chapters  
7 20 and 21.

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

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

17 (7) Upon the death of a full guardian's or limited guardian's ward, the full guardian or limited guardian,  
18 upon an order of the court and if there is no personal representative authorized to do so, may make necessary  
19 arrangements for the removal, transportation, and final disposition of the ward's physical remains, including  
20 burial, entombment, or cremation, and for the receipt and disposition of the ward's clothing, furniture, and other  
21 personal effects that may be in the possession of the person in charge of the ward's care, comfort, and  
22 maintenance at the time of the ward's death."  
23

24 **NEW SECTION. Section 5. Applicability.** [This act] applies to guardianship proceedings  
25 commenced on or after [the effective date of this act].  
26

27 - END -