

Effective 5/8/2018

75-5-303 Procedure for court appointment of a guardian of an incapacitated person.

- (1) An incapacitated person or any person interested in the incapacitated person's welfare may petition for a finding of incapacity and appointment of a guardian.
- (2)
 - (a) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity.
 - (b) Unless the allegedly incapacitated person has counsel of the person's own choice, the court shall appoint an attorney to represent the person in the proceeding the cost of which shall be paid by the person alleged to be incapacitated, unless the allegedly incapacitated person and the allegedly incapacitated person's parents are indigent.
 - (c) If the court determines that the petition is without merit, the attorney fees and court costs shall be paid by the person filing the petition.
 - (d) If the court appoints the petitioner or the petitioner's nominee as guardian of the incapacitated person, regardless of whether the nominee is specified in the moving petition or nominated during the proceedings, the petitioner shall be entitled to receive from the incapacitated person reasonable attorney fees and court costs incurred in bringing, prosecuting, or defending the petition.
- (3) The legal representation of the incapacitated person by an attorney shall terminate upon the appointment of a guardian, unless:
 - (a) there are separate conservatorship proceedings still pending before the court subsequent to the appointment of a guardian;
 - (b) there is a timely filed appeal of the appointment of the guardian or the determination of incapacity; or
 - (c) upon an express finding of good cause, the court orders otherwise.
- (4) The person alleged to be incapacitated may be examined by a physician appointed by the court who shall submit a report in writing to the court and may be interviewed by a visitor sent by the court. The visitor also may interview the person seeking appointment as guardian, 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, conduct other investigations or observations as directed by the court, and submit a report in writing to the court.
- (5)
 - (a) The person alleged to be incapacitated shall be present at the hearing in person and see or hear all evidence bearing upon the person's condition. If the person seeking the guardianship requests a waiver of presence of the person alleged to be incapacitated, the court shall order an investigation by a court visitor, the costs of which shall be paid by the person seeking the guardianship.
 - (b) The investigation by a court visitor is not required if there is clear and convincing evidence from a physician that the person alleged to be incapacitated has:
 - (i) fourth stage Alzheimer's Disease;
 - (ii) extended comatosis; or
 - (iii)
 - (A) an intellectual disability; and
 - (B) an intelligence quotient score under 25.
 - (c) The person alleged to be incapacitated is entitled to be represented 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 so requests.

- (d) Counsel for the person alleged to be incapacitated, as defined in Subsection 75-1-201(22), is not required if:
- (i) the person is the biological or adopted child of the petitioner;
 - (ii) the value of the person's entire estate does not exceed \$20,000 as established by an affidavit of the petitioner in accordance with Section 75-3-1201;
 - (iii) the person appears in court with the petitioner;
 - (iv) the person is given the opportunity to communicate, to the extent possible, the person's acceptance of the appointment of petitioner;
 - (v) no attorney from the state court's list of attorneys who have volunteered to represent respondents in guardianship proceedings is able to provide counsel to the person within 60 days of the date of the appointment described in Subsection (2);
 - (vi) the court is satisfied that counsel is not necessary in order to protect the interests of the person; and
 - (vii) the court appoints a visitor under Subsection (4).

Amended by Chapter 455, 2018 General Session