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2 93rd General Assembly
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4

As Engrossed: H3/10/21

A Bill

HOUSE BILL 1648

5 By: Representative McKenzie
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For An Act To Be Entitled

8 AN ACT TO AMEND THE LAW CONCERNING THE RIGHTS OF
9 INCAPACITATED PERSONS; CONCERNING TEMPORARY
10 GUARDIANSHIPS, INCAPACITY HEARINGS, AND INCAPACITY
11 DETERMINATIONS; TO REPEAL THE LAW CONCERNING THE
12 RIGHTS OF RELATIVES; AND FOR OTHER PURPOSES.
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Subtitle

15 TO AMEND THE LAW CONCERNING THE RIGHTS OF
16 INCAPACITATED PERSONS; CONCERNING
17 TEMPORARY GUARDIANSHIPS, INCAPACITY
18 HEARINGS, AND INCAPACITY DETERMINATIONS;
19 AND TO REPEAL THE LAW CONCERNING THE
20 RIGHTS OF RELATIVES.
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24 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
25

26 SECTION 1. Arkansas Code § 28-65-106 is amended to read as follows:

27 28-65-106. ~~Rights of incapacitated persons~~ Ward's Bill of Rights.

28 (a)(1) This section is intended to create the "Ward's Bill of Rights"
29 and to improve the process for emergency guardianships and other actions or
30 processes related to guardianships in this state.

31 (2) As used in this section, "ward" means an adult for whom a
32 guardian has been appointed.

33 (b) A copy of this section shall be:

34 (1) Served on a proposed ward over eighteen (18) years of age
35 with the guardianship petition; and

36 (2) Provided to a ward upon request at any point during the



1 guardianship or guardianship process.

2 (c) A ward is not presumed to be incompetent and retains all legal and
3 civil rights except those which have been expressly limited by court order or
4 those rights which have been specifically granted by court order to the
5 guardian by the court.

6 (b)(1)(d)(1) A ward retains has the right to communicate, visit, or
7 interact appropriate communication and visitation with any person of the
8 ward's choice.

9 (2) A guardian of the ward may limit or prohibit communication
10 and visitation with the ward if the guardian:

11 (A) Determines it is necessary to limit or prohibit
12 communication and visitation with the ward to protect the ward; and

13 (B) Complies with the following:

14 (i) The guardian shall express his or her concerns
15 and any planned limitations or prohibitions on communication and visitation
16 to the ward and, if appropriate, with the person whose communication and
17 visitation with the ward will be limited or prohibited; and

18 (ii) If the guardian acts on limiting or prohibiting
19 communication and visitation with the ward, the guardian shall;

20 (a) List the limitations or prohibitions and
21 the reasons for the limitations or prohibitions in writing;

22 (b) Deliver the information described under
23 subdivision (d)(2)(B)(ii)(a) personally to the ward;

24 (c) Deliver the information described under
25 subdivision (d)(2)(B)(ii)(a) by reasonable means to the person whose
26 communication and visitation with the ward will be limited or prohibited; and

27 (d) In addition to the information described
28 under subdivision (d)(2)(B)(ii)(a), deliver to the ward and the person whose
29 communication and visitation with the ward will be limited or prohibited;

30 (1)(A) Written notice that the ward and
31 the person whose communication and visitation with the ward will be limited
32 or prohibited may petition the court immediately to remove the limitations
33 and prohibitions imposed by the guardian.

34 (B) The ward or person whose
35 communication and visitation with the ward will be limited or prohibited may
36 request a hearing on his or her petition to remove the limitations or

1 prohibitions imposed by the guardian.

2 (C) Upon the request of the ward,
3 the guardian shall assist the ward in seeking and scheduling a hearing on his
4 or her petition to remove the limitations and prohibitions imposed by the
5 guardian; and

6 (2) Instructions on how to file the
7 petition.

8 ~~(2)~~(3) If a ward is unable to give express consent to
9 communication, visitation, or interaction with a person due to a physical or
10 mental condition, then the consent of the ward may be presumed by a guardian
11 or ~~a~~ the court based on the ward's prior relationship with the person seeking
12 communication, visitation, or interaction with the ward.

13 (e) A ward has the right to:

14 (1) A copy of the paperwork associated with the guardianship,
15 including without limitation all pleadings and court orders;

16 (2) A guardianship that encourages the development or
17 maintenance of the independence of the ward with, if possible, the eventual
18 goal of terminating the guardianship;

19 (3) Consideration of the ward's current and previously stated
20 personal preferences, desires, medical and psychiatric treatment preferences,
21 religious beliefs, living arrangements, and other preferences and opinions;

22 (4) Exercise full control of all aspects of the ward's life not
23 specifically granted by the court to the guardian; and

24 (5) Receive a copy of all rights, pleadings, notices, and court
25 orders in the native language of the ward and in a manner accessible to the
26 ward relative to his or her abilities.

27 (f) A guardian shall consult properly with the ward concerning
28 significant financial and lifestyle decisions affecting the ward.

29 (g) A ward or a guardian of the ward may request that the court
30 conduct a review hearing every six (6) months to evaluate whether the
31 authority of the guardian should be modified.

32 (h) A ward, guardian, or other interested party may request at any
33 time a hearing before the court on any particular areas of concern.

34 (i) This section does not replace or repeal other remedies otherwise
35 available to a ward under the law.

36

1 SECTION 2. Arkansas Code § 28-65-110 is repealed.

2 ~~28-65-110. Rights of relatives.~~

3 ~~(a)(1) If a relative has reason to believe coupled with facts to~~
4 ~~substantiate his or her belief that the guardian of a ward or another person~~
5 ~~is unreasonably interfering with or denying visitation between the relative~~
6 ~~and the ward, the relative may file a petition for reasonable visitation with~~
7 ~~the ward in a court with jurisdiction over proceedings under this chapter~~
8 ~~that concern the ward.~~

9 ~~(2) A petition for reasonable visitation filed under this~~
10 ~~section shall be verified and shall state:~~

11 ~~(A) Whether the petitioner is a relative as defined under~~
12 ~~§ 28-65-101;~~

13 ~~(B) Whether the guardian or other person is unreasonably~~
14 ~~interfering with or denying visitation between the petitioner and the ward;~~

15 ~~(C) The identity of the guardian or other person alleged~~
16 ~~to be unreasonably interfering with or denying visitation between the~~
17 ~~petitioner and the ward; and~~

18 ~~(D) The facts supporting the petitioner's allegation that~~
19 ~~the guardian or other person is unreasonably interfering with or denying~~
20 ~~visitation between the petitioner and the ward.~~

21 ~~(3)(A) A petition for reasonable visitation filed under this~~
22 ~~section shall be served on all parties to a guardianship proceeding that is~~
23 ~~initiated under this chapter and concerns the ward who is the subject of the~~
24 ~~petition for reasonable visitation.~~

25 ~~(B) A relative who files a petition for reasonable~~
26 ~~visitation under this section is not a party to a guardianship proceeding~~
27 ~~described under subdivision (a)(3)(A) of this section.~~

28 ~~(b)(1) If a ward objects to visitation with the petitioner, the~~
29 ~~petitioner shall prove by a preponderance of the evidence that the ward was~~
30 ~~unduly influenced by the guardian or another person.~~

31 ~~(2) If the ward consents to visitation with the petitioner, does~~
32 ~~not object to visitation with the petitioner, or is unable to express his or~~
33 ~~her consent or objection to visitation with the petitioner, the guardian or~~
34 ~~other person shall prove one (1) or more of the following conditions by a~~
35 ~~preponderance of the evidence in order to overcome the presumption that~~
36 ~~visitation between the petitioner and the ward is in the best interest of the~~

1 ward;

2 (A) ~~The petitioner physically abused, exploited,~~
3 ~~neglected, sexually abused, or otherwise maltreated the ward or another~~
4 ~~adult; or~~

5 (B) ~~Visitation between the petitioner and the ward would~~
6 ~~be harmful to the mental health or physical well-being of the ward.~~

7 (c)(1) ~~An order issued by the court granting or denying a petition for~~
8 ~~reasonable visitation filed under this section shall include statements of~~
9 ~~fact and law supporting the court's order.~~

10 (2) ~~If the court grants the petition for reasonable visitation,~~
11 ~~then:~~

12 (A) ~~The court may impose reasonable restrictions on~~
13 ~~visitation between the petitioner and the ward;~~

14 (B) ~~The petitioner shall be responsible for paying costs~~
15 ~~associated with the visitation, including, but not limited to, transportation~~
16 ~~and supervision costs;~~

17 (C) ~~Visitation shall not occur in a manner that negatively~~
18 ~~impacts the ward's medical or treatment needs;~~

19 (D) ~~If the ward is placed in a facility, visitation shall~~
20 ~~occur at the facility;~~

21 (E) ~~Visitation shall be subject to the rules of the~~
22 ~~facility in which the ward is placed; and~~

23 (F) ~~The court may impose on the guardian or other person~~
24 ~~alleged to have unreasonably interfered with or denied visitation between the~~
25 ~~petitioner and the ward the cost of filing a petition for reasonable~~
26 ~~visitation under this section and reasonable attorney's fees incurred by the~~
27 ~~petitioner as a result of the guardian's or other person's opposing the~~
28 ~~petition if the guardian or other person:~~

29 (i) ~~Unreasonably interfered with or denied~~
30 ~~visitation between the petitioner and the ward; and~~

31 (ii) ~~Opposed visitation between the petitioner and~~
32 ~~the ward in bad faith.~~

33 (3) ~~If the court denies the petition for reasonable visitation,~~
34 ~~the:~~

35 (A) ~~Petitioner may file another petition for reasonable~~
36 ~~visitation no earlier than one (1) year after the date on which the court~~

1 ~~enters the order denying visitation if there is a material change in~~
2 ~~circumstances; and~~

3 ~~(B) Court may impose on the petitioner the costs of~~
4 ~~opposing the petition, including without limitation the costs for subpoenas,~~
5 ~~witness fees, and reasonable attorney's fees incurred by the guardian or~~
6 ~~other person alleged to have unreasonably interfered with or denied~~
7 ~~visitation between the petitioner and the ward.~~

8 ~~(d) The court shall not impose costs on:~~

9 ~~(1) A person or entity that in good faith interfered with or~~
10 ~~denied visitation at the direction of the guardian or other person; and~~

11 ~~(2) The ward.~~

12
13 SECTION 3. Arkansas Code § 28-65-213 is amended to read as follows:

14 28-65-213. ~~Hearing—Effect of determinations~~ Rights of wards and
15 proposed wards.

16 (a) At the hearing, the respondent ward or proposed ward shall have
17 the right to:

- 18 (1) Be represented by counsel;
- 19 (2) Present evidence on his or her own behalf;
- 20 (3) Cross-examine adverse witnesses;
- 21 ~~(4) Remain silent;~~
- 22 ~~(5)(4)(A) Be present; and.~~

23 (B)(i) The petitioner or person with physical custody of
24 the respondent ward or proposed ward shall make reasonable efforts to ensure
25 that the respondent ward or proposed ward is present or otherwise able to
26 participate electronically for all hearings.

27 (ii) If the respondent ward or proposed ward is not
28 present at a hearing, the court shall:

29 (a) Inquire first as to the reasons for the
30 absence of the respondent ward or proposed ward; and

31 (b) Proceed after being satisfied that it is
32 not safe, appropriate, or possible for the respondent ward or proposed ward
33 to be present or otherwise participate; and

34 ~~(6)(5)~~ Require the attendance by subpoena of one (1) or more of
35 the professionals who prepared the evaluation.

36 (b) The burden of proof by clear and convincing evidence is upon the

1 petitioner, and a determination of incapacity shall be made before
2 consideration of a proper disposition.

3 (c)(1) If the respondent ward or proposed ward is found to be
4 incapacitated, the court shall determine the extent of the incapacity and the
5 feasibility of less restrictive alternatives to guardianship to meet the
6 needs of the respondent.

7 (2) If it is found that alternatives to guardianship are
8 feasible and adequate to meet the needs of the respondent ward or proposed
9 ward, the court may dismiss the action.

10 (3) If it is found that the respondent ward or proposed ward is
11 substantially without capacity to care for himself or herself or his or her
12 estate, a guardian for the person or estate, or both shall be appointed.

13
14 SECTION 4. Arkansas Code § 28-65-218 is amended to read as follows:

15 28-65-218. ~~Temporary guardian~~ Emergency and temporary guardianships.

16 (a)(1)(A) ~~Except as provided under subdivision (a)(2) of this section,~~
17 ~~if~~ If upon presentation of an emergency ex parte motion accompanied by an
18 affidavit or verified petition giving rise to specific facts in appropriate
19 detail the court finds that there is imminent danger to the life or health of
20 ~~the~~ an incapacitated person or of loss, damage, or waste to the property of
21 an incapacitated person and that this requires the immediate appointment of a
22 guardian of his or her person or estate, or both, the court ~~may, with or~~
23 ~~without notice, appoint a~~ shall issue an order appointing an emergency
24 temporary guardian for the incapacitated person for a specified period, which
25 period, including all extensions, shall not exceed ninety (90) days, and the
26 court may remove or discharge him or her or terminate the guardianship.

27 (B) An ex parte emergency guardianship order shall include
28 a date and time certain, not to exceed fourteen (14) days from the date on
29 which the order is entered, for a hearing reviewing the allegations in the
30 emergency ex parte motion.

31 (C) If the court finds clear and convincing evidence that
32 a temporary guardianship is necessary and appropriate to protect the ward or
33 the property of the ward after the hearing required under subdivision
34 (a)(1)(B) or after a written agreement or agreement in court by the necessary
35 parties, the court may enter an order granting temporary guardianship for a
36 period of up to ninety (90) days from the date of the emergency hearing.

1 (2)(A) If the incapacitated person is ~~a minor~~ an adult, the
2 ~~initial period for the appointment of a temporary guardian shall be for a~~
3 ~~period not to~~ not exceed ninety (90) days.

4 (B)~~(i)~~ However, If the incapacitated person is a minor, on
5 or before the expiration of the ninety-day period and after a hearing on the
6 merits or an agreement by the necessary parties, the court may extend the
7 temporary guardianship for up to an additional one hundred eighty (180) days
8 ~~period not to exceed ninety (90) days if the court finds after a hearing on~~
9 ~~the merits that there remains imminent danger to the life or health of the~~
10 ~~minor if the temporary guardianship is not extended.~~

11 ~~(ii)~~(3) Notice of the emergency hearing shall be
12 given before the hearing as required by subsections (b)-(d) of this section.
13 However, notice is not required with respect to a person whose whereabouts
14 are unknown or cannot by the exercise of reasonable diligence be ascertained.

15 (b) Immediate notice of the temporary guardianship order shall be
16 served by the petitioner upon the following:

17 (1) ~~The ward, if over fourteen (14) years of age~~ The ward, if
18 the ward is at least fifteen (15) years of age;

19 (2) The parents of the ward, if the ward is a minor;

20 (3) The spouse, if any, of the ward;

21 (4) Any other person who is the guardian of the person or of the
22 estate of the ward, or any other person who has ~~the care and custody of the~~
23 ~~ward, and the director of any agency from which the respondent is receiving~~
24 services been the primary caregiver of the ward;

25 (5) The Department of Human Services when the temporary guardian
26 appointed serves as guardian of five (5) or more wards;

27 (6) If there is neither a known parent nor known spouse, at
28 least one (1) of the nearest competent relatives by blood or marriage of the
29 ward, if known; and

30 (7) If directed by the court:

31 (A) Any department, bureau, agency, or political
32 subdivision of the United States or of this state which makes or awards
33 compensation, pension, insurance, or other allowance for the benefit of the
34 ward or his or her estate;

35 (B) Any department, bureau, agency, or political
36 subdivision of the United States or of this state or any charitable

1 organization, which may be charged with the supervision, control, or custody
2 of the incompetent; or

3 (C) Any other person designated by the court.

4 (c) The notice shall include:

5 (1) A copy of the petition;

6 (2) A copy of the temporary order and order of appointment;

7 (3) Notice of a hearing date; and

8 (4) A statement of rights of the proposed ward as provided in §
9 ~~28-65-207(b)(1)~~ § 28-65-207(b) and § 28-65-213.

10 (d) If the proposed ward is ~~over fourteen (14)~~ at least fifteen (15)
11 years of age, there shall be personal service upon him or her if personal
12 service can be had. Service on others shall be according to the Arkansas
13 Rules of Civil Procedure or as otherwise provided by the court.

14 (e) Notice need not be given to any person listed in § 28-65-
15 207(a)(1)-(6).

16 (f) ~~Within three (3) working~~ fourteen (14) days of the entry of the
17 temporary guardianship order, a full hearing on the merits shall be held.

18 (g) ~~(1) The appointment may be to perform duties respecting specific~~
19 ~~property or to perform particular acts, as stated in the order of appointment~~
20 If the petitioner is unable to serve a person entitled to notice under this
21 section despite reasonable efforts, the petitioner shall make further
22 reasonable efforts after the full hearing on the merits to serve the person
23 with a copy of the original pleadings and a copy of the temporary
24 guardianship order.

25 (2) The respondent may request a subsequent review hearing
26 before the court that shall be scheduled as soon as reasonably possible.

27 (h) The temporary guardian shall make such reports as the court shall
28 direct ~~and shall account to the court upon termination of his or her~~
29 ~~authority.~~

30 (i) In all other respects, the provisions of this chapter concerning
31 guardians shall apply to temporary guardians, and an appeal may be taken from
32 the order of appointment of a temporary guardian.

33 (j) The letters issued to a temporary guardian shall state the date of
34 expiration of the authority of the temporary guardian.

35
36 /s/McKenzie