

State of Arkansas

77th General Assembly

Regular Session, 1989

A Bill

SENATE BILL

274

By: Senator Bearden

For An Act To Be Entitled

"AN ACT TO AMEND TITLE 28, CHAPTER 65, SUBCHAPTER 2 OF THE ARKANSAS CODE OF 1987 TO PROVIDE ADEQUATE NOTICE TO PERSONS UNDER GUARDIANSHIP PROCEEDINGS; TO SET FORTH RIGHTS OF THE ALLEGED INCAPACITATED PERSON; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code §28-65-207 is hereby amended to read as follows:

"28-65-207. Notice of hearing for appointment. (a) Notice of the hearing for the appointment of a guardian need not be given to any person:

- (1) Who has signed the petition;
- (2) Who has in writing waived notice of the hearing except the alleged incapacitated person may not waive notice;
- (3) Who actually appears at the hearing;
- (4) Whose existence, relationship to the alleged incapacitated person, or whereabouts is unknown and cannot by the exercise of reasonable diligence be ascertained;
- (5) Other than the alleged incapacitated person, whom the court finds to be beyond the limits of the continental United States or himself incompetent; or
- (6) The alleged incapacitated person if the court finds he is detained or confined by a foreign power or has disappeared.

(b) Except as provided in subsection (a) of this section, before the court shall appoint a guardian, other than a temporary guardian, notice shall be served of the time and place of the hearing on the petition requesting the appointment of a guardian for an alleged incapacitated person on:

- (1) the alleged incapacitated person in the proceeding; and
- (2) the following persons, other than the petitioner, who are competent and known to the petitioner or whose existence and address can be

ascertained by the petitioner with reasonably diligent efforts:

- (A) the spouse of the alleged incapacitated person;
- (B) all adult children of the alleged incapacitated person;
- (C) the parents of the alleged incapacitated person;
- (D) all adult brothers and sisters of the alleged incapacitated

person; and,

- (E) any existing guardian.

(3) in case no such person listed in paragraph (2) can be given notice, notice shall be given to at least one (1) and not more than three (3) of the nearest adult relatives of the alleged incapacitated person who are known to the petitioner or whose existence and address can be ascertained with reasonably diligent efforts;

(4) if not the petitioner, any person or organization which, in the petition, is proposed to serve as guardian or limited guardian, or the person who is nominated by will or other writing to serve as guardian or limited guardian;

(5) to the extent known to the petitioner, the person or facility having care or custody of the alleged incapacitated person of the proceeding; and,

- (6) any other person as directed by the Court.

(c) A copy of the petition giving rise to the notice shall be attached to any notice served pursuant to this chapter.

(d) Notice shall be served personally on the alleged incapacitated person. Personal service and service on all others shall be had in any manner provided by Rule 4 of the Arkansas Rules of Civil Procedure, provided that service by publication is used only after all other means under that Rule have been attempted and proven unsuccessful or cannot be accomplished through reasonable diligence.

(e) The court, for good cause shown, may reduce the number of days of notice, but in every case at least thirty (30) days' notice shall be given, except as provided by Ark. Code §28-65-218.

(f) It shall not be necessary that the person for whom guardianship is sought be represented by a guardian ad litem in the proceedings."

SECTION 2. Title 28, Chapter 65, subsection 2 is hereby amended by adding the following new sections to read as follows:

"28-65-221. Right for Alleged Incapacitated Person to be Present.

(a) The alleged incapacitated person shall have the right to be present at the guardianship proceeding.

(b) If the alleged incapacitated person is unable to be present because of mental or physical incapacity, all reasonable steps shall be made to insure that the alleged incapacitated person is informed of the nature of the proceedings.

(c) A professional evaluation of the alleged incapacitated person, pursuant to Ark. Code §28-65-212, must be conducted to determine the alleged incapacitated person's capacity to comprehend and appreciate the nature of the proceedings. This section shall not conflict with the application of Ark. Code §28-65-211.

(1) If the professional evaluation determines that the alleged incapacitated person is unable to comprehend and appreciate the nature of the proceedings and the court determines that the alleged incapacitated person should not be present, the court shall include in the record its findings warranting the alleged incapacitated person's absence and the proceedings shall be conducted without the presence of the alleged incapacitated person.

(2) If the professional evaluation determines that the alleged incapacitated person is able to comprehend and appreciate the nature of the proceedings, the alleged incapacitated person shall appear before the court.

28-65-223. Right to Counsel-Status of Adults. (a) Respondent's right to counsel shall be absolute. If at or prior to a hearing on a petition alleging an adult to be incapacitated or partially incapacitated, or if at any point in the course of a proceeding pursuant to the petition the adult alleged incapacitated person is not represented by counsel, the court shall appoint an attorney.

(b) When an attorney is appointed, the court shall delay the hearing on the petition only for the period of time necessary for the attorney to prepare the case for the hearing but in no event less than twenty (20) days after such appointment.

(c) An attorney appointed pursuant to this section shall contact the alleged incapacitated person promptly after receiving notification of the appointment. If the petition succeeds, the attorney shall be reasonably compensated by the estate of the ward. If the petition is denied by the court, the petitioner shall assume all costs of the proceeding, including

alleged incapacitated person's attorney's fees. If the alleged incapacitated person has proven that he or she cannot afford the services of an attorney, the court shall appoint an attorney and the petitioner shall be responsible for reasonably compensating the attorney a fee established by the court.

(d) (1) The responsibility of an attorney appointed pursuant to the provisions of this section ceases upon the appointment of a guardian or limited guardian. The court may appoint an attorney to represent the ward at any subsequent proceedings.

(2) Whenever there is an appeal of the guardianship appointment subsequent to a hearing on a petition requesting the appointment of a guardian or limited guardian, the responsibility of an attorney appointed pursuant to this subsection continues with respect to the appeal until the conclusion of the appeal proceedings. Upon application of the attorney to the court, the court may allow the attorney to withdraw from the case and shall appoint another attorney to represent the ward.

(e) In all cases where independent counsel is retained by or on behalf of the alleged incapacitated person of the proceeding, the court shall make an inquiry to determine whether counsel is independent and whether any conflict of interest exists which would preclude proper representation of the alleged incapacitated person of the proceeding or which would be detrimental to the best interest of the proceeding. The court shall appoint other counsel where retained counsel is found not to be independent.

(f) The alleged incapacitated person may waive the right to be represented by counsel only if:

(1) the alleged incapacitated person is present at the guardianship proceeding and the waiver is knowing, intelligent and voluntary; and

(2) the court determines that continuing the proceeding is in the best interest of the alleged incapacitated person and counsel need not be present to protect the rights of the alleged incapacitated person.

(g) Actions brought pursuant to this subsection shall be made a part of the record in the guardianship proceeding.

28-65-224. The court shall compile a record of the proceedings which shall include written findings of fact and conclusions of law.

28-65-225. The additions to this subchapter shall not invalidate appointments of guardians made pursuant to Act 940 of 1985, but shall apply to all guardianships filed after the effective date of this act."

SECTION 3. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 4. All laws and parts of laws in conflict with this act are hereby repealed.