

1 State of Arkansas
2 86th General Assembly
3 Regular Session, 2007

A Bill

SENATE BILL 820

4
5 By: Senator Critcher
6 By: Representative Cooper
7

For An Act To Be Entitled

10 AN ACT TO PROVIDE FOR PUBLIC GUARDIANSHIP OF
11 INCAPACITATED ADULTS WHO OTHERWISE WOULD HAVE NO
12 ONE TO MAKE AND COMMUNICATE DECISIONS NECESSARY
13 FOR THE ADULT'S HEALTH, SAFETY, AND WELFARE; AND
14 FOR OTHER PURPOSES.

Subtitle

16
17 AN ACT TO PROVIDE FOR PUBLIC
18 GUARDIANSHIP OF INCAPACITATED ADULTS.
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20
21 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
22

23 SECTION 1. Legislative findings.

24 The General Assembly finds that:

25 (1)(A) A timely and valid informed consent is necessary to
26 obtain nonemergency medical and long-term care and treatment.

27 (B) However, many adults lack the capacity to provide
28 informed consent to necessary health care, have not executed an advance
29 health care directive or a durable power of attorney, and have no friend or
30 family member qualified and willing to consent on their behalf;

31 (2) Health care providers risk liability and loss of licensure
32 if they provide needed nonemergency medical or long-term care and treatment
33 without informed consent from the patient or the patient's qualified
34 representative; and

35 (3) It is therefore necessary for the preservation of the public
36 health and safety to provide for a public guardian who can make informed



consent to needed medical and long-term care on behalf of incapacitated adults who are unable to consent for themselves and for whom there is no other person qualified and willing to consent.

SECTION 2. Arkansas Code § 20-9-602 is amended to read as follows:
20-9-602. Consent generally.

It is recognized and established that, in addition to such other persons as may be so authorized and empowered, any one (1) of the following persons is authorized and empowered to consent, either orally or otherwise, to any surgical or medical treatment or procedure not prohibited by law which may be suggested, recommended, prescribed, or directed by a licensed physician:

(1) Any adult, for himself or herself;

(2) Any parent, whether an adult or a minor, for his or her minor child or for his or her adult child of unsound mind whether the child is of the parent's blood, an adopted child, a stepchild, or a foster child. However, the father of an illegitimate child cannot consent for the child solely on the basis of parenthood;

(3) Any married person, whether an adult or a minor, for himself or herself;

(4) Any female, regardless of age or marital status, for herself when given in connection with pregnancy or childbirth, except the unnatural interruption of a pregnancy;

(5) Any person standing in loco parentis, whether formally serving or not, and any guardian, conservator, or custodian, for his or her ward or other charge under disability;

(6) Any emancipated minor, for ~~for~~ himself or herself;

(7) Any unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures, for himself or herself;

(8) Any adult, for his or her minor sibling or his or her adult sibling of unsound mind;

(9) During the absence of a parent so authorized and empowered, any maternal grandparent and, if the father is so authorized and empowered, any paternal grandparent, for his or her minor grandchild or for his or her adult grandchild of unsound mind;

- 1 (10) Any married person, for a spouse of unsound mind;
 2 (11) Any adult child, for his or her mother or father of unsound
 3 mind; ~~and~~
 4 (12) Any minor incarcerated in the Department of Correction or
 5 the Department of Community Correction, for himself or herself; and
 6 (13) The Public Guardian for Adults if:
 7 (A) No person described in subdivisions (1) - (12) of this
 8 section is available, willing, and able to act; and
 9 (B) The person of unsound mind has not executed an advance
 10 health care directive or durable power of attorney.

11
 12 SECTION 3. Arkansas Code § 20-17-214(a), concerning persons who may
 13 execute written request for another, is amended to read as follows:

14 (a) If any person is a minor or an adult where a valid declaration
 15 does not exist and a health care proxy has not been designated and who, in
 16 the opinion of the attending physician, is no longer able to make health care
 17 decisions, then the declaration may be executed in the same form on his or
 18 her behalf by the first of the following individuals or category of
 19 individuals who exist and are reasonably available for consultation:

- 20 (1) A legal guardian of the patient, if one has been appointed;
 21 (2) In the case of an unmarried patient under the age of
 22 eighteen (18), the parents of the patient;
 23 (3) The patient's spouse;
 24 (4) The patient's adult child or, if there is more than one (1),
 25 then a majority of the patient's adult children participating in the
 26 decision;
 27 (5) The parents of a patient over the age of eighteen (18);
 28 (6) The patient's adult sibling or, if there is more than one
 29 (1), then a majority of the patient's adult siblings participating in the
 30 decision;
 31 (7) Persons standing in loco parentis to the patient; ~~or~~
 32 (8) A majority of the patient's adult heirs at law who
 33 participate in the decision; or
 34 (9) Any person authorized to consent to a surgical or medical
 35 treatment or procedure under § 20-9-602.

1 SECTION 4. Arkansas Code § 25-10-102(a), concerning the organization
2 of the Department of Health and Human Services, is amended to read as
3 follows:

4 (a) The Department of Health and Human Services shall consist of and
5 be operated under an integrated service system consisting of the following
6 twelve (12) divisions with responsibility and programs assigned to them as
7 determined by the Director of the Department of Health and Human Services:

8 (1)(A) A Division of Aging and Adult Services.

9 (B) The Division of Aging and Adult Services may include
10 the Office of Public Guardian for Adults;

11 (2) A Division of Medical Services;

12 (3) A Division of Behavioral Health, which shall include
13 community mental health centers, state hospitals, and the Bureau of Alcohol
14 and Drug Abuse Prevention;

15 (4) A Division of Developmental Disabilities Services, which
16 shall include both community programs and human development centers;

17 (5) A Division of County Operations;

18 (6) A Division of Administrative Services;

19 (7) A Division of Youth Services, which shall include serious
20 offender and community-based programs and the youth service centers;

21 (8) A Division of Volunteerism;

22 (9) A Division of State Services for the Blind;

23 (10) A Division of Children and Family Services;

24 (11) A Division of Child Care and Early Childhood Education; and

25 (12) A Division of Health.

26
27 SECTION 5. Arkansas Code § 28-65-203(h), concerning the qualifications
28 of guardians, is amended to read as follows:

29 (h)(1) Except as provided in subsection (b) of this section, no public
30 agency or employee of any public agency acting in his or her official
31 capacity shall be appointed as guardian for any incapacitated person.

32 (2) No employee of a public agency which provides direct
33 services to the incapacitated person shall be appointed guardian of the
34 person or estate of the incapacitated person.

35 (3) No employee of a public agency which provides direct
36 services to the incapacitated person shall be appointed as a temporary

1 guardian.

2 (4) Notwithstanding any other provision of law, the Public
3 Guardian for Adults may serve as guardian of the person or the estate, or
4 both, of an incapacitated person receiving services from any public agency.

5 ~~(4)~~(5) The department shall ~~issue regulations~~ promulgate rules
6 to implement this provision.

7
8 SECTION 6. Arkansas Code Title 28, Chapter 65 is amended to add an
9 additional subchapter to read as follows:

10 28-65-701. Office of Public Guardian for Adults – Creation.

11 (a) The Office of Public Guardian for Adults is created.

12 (b) The Public Guardian for Adults shall be the administrator of the
13 office.

14
15 28-65-702. Public Guardian for Adults – Appointment – Qualifications.

16 (a) The Director of the Division of Aging and Adult Services of the
17 Department of Health and Human Services shall appoint an employee of the
18 division to serve as the Public Guardian for Adults.

19 (b) The Public Guardian for Adults is qualified to serve as guardian
20 of the person and estate and shall devote his or her entire time to the
21 duties of the Office of Public Guardian for Adults.

22 (c) The Public Guardian for Adults may consent or withhold consent to
23 health and long-term care treatment but shall not participate in or make
24 decisions about the services that will be offered by the Department of Health
25 and Human Services to persons who are wards of the Public Guardian for
26 Adults.

27
28 28-65-703. Public Guardian for Adults – Duties.

29 (a) The Public Guardian for Adults:

30 (1) Shall administer and organize the work of the Office of
31 Public Guardian for Adults;

32 (2) May employ staff as necessary to carry out the functions of
33 the office; and

34 (3) May accept the services of volunteers who shall be
35 reimbursed for expenses in the same manner as public employees.

36 (b) The Public Guardian for Adults shall receive and review referrals

1 for adult guardianship.

2 (c) The Public Guardian for Adults may file a petition to be appointed
3 guardian of an adult or to intervene in a guardianship if the adult's person
4 or property, or both are in jeopardy if:

5 (1) The Public Guardian for Adults determines that the guardian
6 of an adult who has been declared incapacitated is unable or unwilling to
7 perform his or her duties under the guardianship, or the Public Guardian for
8 Adults has probable cause to believe that the adult lacks the capacity to
9 make and communicate decisions necessary for the adult's health, safety, and
10 welfare or to manage the adult's property;

11 (2) There is no suitable private guardian qualified and willing
12 to accept the guardianship appointment; and

13 (2) A circuit court determines that intervention of the Public
14 Guardian for Adults would be in the best interest of an adult who is alleged
15 to be incapacitated or has been found to be incapacitated.

16 (d)(1) The Public Guardian for Adults either directly or through staff
17 or volunteered services shall monitor each ward and each ward's care and
18 progress on a continuing basis.

19 (2) The monitoring shall include quarterly personal contact with
20 each ward.

21 (3) A written record shall be created and maintained concerning
22 each personal contact and shall contain the information specified in § 28-65-
23 322.

24 (e)(1) The Public Guardian for Adults shall create financial and
25 statistical records concerning all cases in which the Office of Public
26 Guardian for Adults provides guardianship services.

27 (2) Office records that identify individuals for whom the office
28 has provided guardianship services shall be kept confidential except to the
29 extent that disclosure is required by other laws.

30 (3) Office records shall be retained in accordance with state
31 record retention rules.

32
33 28-65-704. Correspondence and legal process.

34 All correspondence and legal process regarding a public guardianship
35 under this subchapter shall be to or from the Public Guardian for Adults in
36 his or her official capacity.

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2 28-65-705. No bond required.

3 Bond shall not be required in connection with public guardian services
4 under this subchapter.

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6 28-65-706. Department of Health and Human Services – Adoption of
7 rules.

8 The Department of Health and Human Services may adopt rules necessary
9 to implement this subchapter.

10
11 SECTION 7. Contingent effectiveness.

12 This act shall take effect upon the occurrence of the following:

13 (1) The Director of the Division of Aging and Adult Services of
14 the Department of Health and Human Services determines that adequate
15 appropriation, funding, and positions are available to carry out a public
16 guardianship program for adults; and

17 (2) The director appoints an employee of the Division of Aging
18 and Adult Services to serve as Public Guardian for Adults.