

GUARDIAN AND CONSERVATOR BY COURT APPOINTMENT

*Volunteer Lawyers Program
Alabama State Bar*

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PREFACE

This manual is for help in drafting petitions and preliminary orders for appointment of guardians and conservators under the Alabama Uniform Guardianship and Protective Proceedings Act, 1975 Code of Alabama, Sections 26-2A-1 to 26-2A-160.

It does not cover appointments based on minority or those made by family members, and space is too limited to contain all the possible variations needed to cover every fact situation; the practitioner should consult the Code frequently.

This manual cannot take account of all the different practices of the different probate courts and follows the practice of our local court; other courts may require use of different forms or the court may prepare its own orders. Other courts may have different practices concerning the appointment of doctors, lawyers, and court representatives, and may have local requirements concerning service. It is wise to look at a case in your local court and consult with the court clerk.

The Birmingham Bar Association has published The Birmingham Bar Association Probate Court Forms which will be useful for attorneys practicing in Jefferson County. These forms may be obtained from Birmingham Bar Association, 2021 Second Avenue North, Birmingham, Alabama 35203. These forms cover the administration of decedent's estates and adoption as well as guardianships and conservatorships.

This manual focuses on the filing of the original petition, leaving out many important matters that may arise after the hearing on the petition.

This publication is designed to provide an accurate and authoritative starting point for representation by Volunteer Lawyers Program attorneys on the subject matter covered. In publishing this manual, neither the author nor the Alabama State Bar Volunteer Lawyers Program is engaged in rendering legal or other professional service.

Note: Please see change concerning dual appointments on second page of manual. Please also note additional material on end-of-life decisions by guardian.

The editor invites questions, comments and suggestions from users, which may be directed to Post Office Box 2716, Tuscaloosa, Alabama 35403, telephone (205) 345-3440; facsimile (205) 345-3444; or e-mail at alvreeland@aol.com. He is interested both in improving the manual and in learning of various practices around the state.

Al L. Vreeland, Editor

MANUAL FOR PETITION FOR GUARDIAN AND CONSERVATOR BY COURT APPOINTMENT*

I. Assumptions:

The editors believe that the procedures of the act are designed to emphasize the protection of due process for the respondent and to limit court action to the least possible intrusion on the autonomy and dignity of the individual respondent, and the forms follow that emphasis in an expansive way. The petition should include the names, addresses and telephone numbers of all persons who have significant contact with the respondent.

The petition should provide to the court and other participants the most information possible concerning the respondent, and preserve it for future reference and use.

The suggested forms are for a petition seeking appointment of both a guardian and conservator. The respondent must be "incapacitated" to justify the appointment of a guardian. To justify appointment of a conservator respondent must be (A) unable to manage property or business affairs effectively *and* (B) either (i) have property that will be wasted *or* (ii) needs funds which protection can provide. This manual presumes that a proof of incapacity satisfies the proof of the need for a conservator as well, but the elements of both are included to provide information for separate forms.

The roles of guardian of the person and of conservator of property are separate, and do not require the same person to be appointed to both. If the respondent has income which may be handled entirely by appointment of a representative payee, such as Social Security, or if assets may be protected or made available for respondent's support by a single order, appointment of only a guardian may be sufficient. This would avoid the later necessity and expense of posting bond and subsequent reporting for a conservatorship. If the respondent or a family member can make all the necessary decisions concerning residence, care and treatment, it may not be necessary to appoint a guardian. Either function should be limited to provide only the assistance that is needed; e.g. the guardianship may be limited to make decisions concerning care and treatment, or the conservatorship may be limited to handle a specific asset. These limitations not only avoid undue interference in the respondent's life, they also limit the liability of the appointee.

One purpose of a proceeding may be to establish a Qualified Income Trust (to escape income limitations of Medicaid) or a Medicaid Trust (to escape asset limitations of Medicaid.) The Court may also approve a single transaction without the appointment of a guardian or conservator.

A court appointed conservatorship for a minor, for the purpose of protecting a specific fund, such as a judgment award or life insurance proceeds, should be limited to that fund; the court may also agree to extend the triennial reporting to ten year periods or to the child's majority

with provisions for the filing of annual statements with the court and with the custodian, particularly if the fund is fairly inactive and the costs of triennial reporting would eat up the income. Such a conservatorship may also escape bond expense if the conservator does not have authority to invade the fund.

The code is not precisely clear about the relationships among the roles of attorney for respondent, guardian ad litem and court representative. Alabama Code Section 26-2A-102 provides for the appointment of an attorney for the respondent unless the respondent is represented by counsel in the guardianship proceeding. The appointee may be granted powers and duties of a guardian ad litem, presumably if the court believes the respondent cannot make adequate decisions concerning the petition. A court representative is required. The general section on guardian ad litem, §26-2A-52, states the criterion for appointment as when "representation of the interest would be inadequate." Conservatorship procedure in §26-2A-135(b) provides the appointment of an attorney, "unless the person ... has chosen counsel," who may be granted powers and duties of a guardian ad litem. It also provides that the court representative "may be *a* guardian ad litem." The court representative is optional in conservatorship proceedings.

IMPORTANT NOTE. In previous versions of this manual it was stated that our practice, not clearly authorized by the code, was to appoint the same attorney to serve as guardian ad litem to represent the interests of the respondent and also to serve as court representative. **This has been held to be error.** In re V.A.H., 802 So.2d 1099 (Ala.Civ.App. 2001), decided May 25, 2001, held that such a dual appointment was not authorized by statute, was inconsistent with the duties imposed by statute on the attorney or guardian ad litem for the respondent, and was not consistent with the Rules of Professional Conduct on avoiding conflicts of interest. See further discussion in Update, infra. Although application of some of the language of the opinion is unclear, it appears to be necessary to appoint a separate person as guardian ad litem and court representative. The court did not address the discretionary nature of the appointment of a court representative in conservatorship only proceedings. The language of the statute seems to envision a more or less permanent position which the hearing court routinely uses to interview the respondent and petitioner. It would add greatly to the cost of proceedings if an attorney is used for this function. The use of a charitable or public organization seems to be limited to serving as "an additional court representative."

Note also that the court in V.A.H. found that the statute required appointment of a physician or other qualified person in instances where the alleged disability in one of the specified mental or physical conditions.

A guardian ad litem should also be appointed for any person interested in the petition who is a minor or incompetent.

A Qualified Protective Order is added to the order setting up the case, giving the participants access to information under H.I.P.P.A. Privacy Rules.

The language of §26-2A-50 appears to define "served personally" in §26-2A-103(c) as service by process server according to Rule 4.1 of the Alabama Rules of Civil Procedure, and not by certified mail or publication. Persons designated in §26-2A-103(a) must be served

personally: respondent and, if they can be found within the state: respondent's spouse, if any, and respondent's adult children; if there are no adult children, respondent's parents.

If the Court does not obtain jurisdiction over the person of respondent, all subsequent orders of the Court are void, even if respondent contests the action on merits. Tingle v. Reid, 716 So.2d 1190 (Ala.Civ.App. 1997). Be sure to read this case. The Court of Civil Appeals found no effective service by publication based on failure to follow the Rules of Civil Procedure, but did not deal with the "served personally" language of Section 26-2A-103(c).

II. Guardianship of Mentally Retarded Adult:

The Alabama Uniform Guardianship and Protective Proceedings Act was amended effective August 1, 2000, (Acts 2000-711) to provide a less formal procedure for appointment of a guardian for mentally retarded adults. This procedure is set out in Section 26-2A-102 with the addition of subsection (e) and modification of subsection (a).

Custodial parents or an adult custodial sibling may file a written request for appointment, in lieu of a petition, in order to continue to perform custodial or other parental or family responsibilities.

This procedure is for appointment of a guardian only, and requires a court appointed guardian as litem. It is not further treated in this manual.

III. Authority for End-of-Life Decisions by Guardian:

Alabama's Natural Death Act, Section 22-8A-1 through 13 (1981, revised 1997 and 2001), specifically provides that a judicially appointed guardian is not authorized by such appointment to make decisions for a ward regarding the provision, withholding, or withdrawing of life sustaining treatment or artificially provided nutrition and hydration, unless specifically authorized by the guardian's appointment. In 1997 the legislature amended the Act, which generally contains provisions for what is commonly called a living will, to establish a procedure that recognizes the person's relationships and their priority to serve as "surrogates" to make such decisions in the absence of (1) an advance directive for health care, (2) appointment of a health care proxy with specific authority, or (3) a durable power of attorney with specific authority to make those decisions. These three authorizations, of course, must be made before the subject person becomes incapacitated. The surrogate procedures in Section 11 of the Act gives a guardian with specific authority to make such decisions the first priority to serve in a surrogate capacity.

IV. Where to File the Petition:

Venue is in the probate court of the county where the respondent resides or is present at the time the proceedings are commenced; it may also be the county of an institution where the respondent has been admitted pursuant to a court order. The case may be transferred to another county "in the interest of justice." See Alabama Code Sections 26-2A-101, 26-2A-132, 26-2A-32.

V. How to Use the Manual:

References are to sections of the Alabama Uniform Guardianship and Protective Proceedings Act, 1975 Code of Alabama Sections 26-2A-1 to 26-2A-160, unless otherwise noted, and are shown as "§ 1".

The checklist of facts extrapolates from the Code all facts that may be needed in any case, with references to the Code. In the annotations, references to the checklist are shown as "F.1" representing Fact 1.

The use of the following key words and syntax in the forms is to save space:

BOLD TEXT IN CAPITAL LETTERS indicates a description of material to be supplied.

[Brackets] indicate that the text supplies an example, not suggested wording.

Petitioner is the name of the person seeking appointment of a guardian or conservator.

Respondent is the name of the person for whom the appointment is sought.

Nominee is the name of the person nominated to be the conservator or guardian in the petition.

Appointee is the name of the person appointed by the court.

Following the petition are annotations referenced to each paragraph, citing the "Checklist of Facts" and applicable code sections, and providing other information.

VI. Checklist of Facts Needed for the Petition:

The checklist extrapolates from the Code all facts that may be needed in any case, with references to the Code sections.

A. Statutory Fact Requirements:

1. The interest of the petitioner in the welfare or estate of the respondent. §§102(a), 133(a), 133(b).
2. The full name, date of birth, residence and address of respondent, and other location, such as hospital, if respondent is not now at home. §§133(b), 50.
3. Names and addresses of persons to receive notice. §103.

4. A list of respondent's interest in real estate with tax or other appraisal, bank and savings accounts with balances and account numbers, securities and other investments with approximate values, and household goods with approximate value, also indicating whether other persons have the power to dispose of the respondent's interest (as by power of attorney or joint account) and giving location of property in the state if respondent is not a state resident. §§133(b),139.
5. A general statement of income, including salary, Social Security, black lung, civil service, retirement, interest income from savings, investments and rent, and other income, with actual or estimated monthly or annual amount of income, and whether other persons have the power to receive or spend respondent's funds, as in a joint checking account. §§133(b), 139.
6. Reason why appointment or order is necessary. §§133(b), 20(8), 130(c).
7. Whether nominee has been relieved of bond. §139(c).
8. Name and address of nominee, and basis of priority. §§133(b), 104, 138.

B. Fact Requirements for Court Action:

9. Names and addresses of parents, spouse, and adult children. §§103, 104, 138.
10. Name and address of attorney of respondent, if any. §§102(b), 135(b).
11. Name and address of physician of respondent. §§102(b), 135(b).
12. Name and address of guardian, conservator, or custodian of respondent, if any. §§103(a)(2), 138(a)(1).
13. Name and address of any nominee of respondent. §§104(b), 138(a)(2).
14. Name and address of any attorney-in-fact under durable power of attorney. §138(a)(3)
15. Name and address of any nominee by will of deceased spouse or deceased parent. §§104(c)(1) and (3), 138(a)(4) and (6).
16. Name and address of any nominee of person caring for or paying benefits to respondent. §§104(c)(5), 138(a)(8).

17. Name and address of general guardian. §138(a)(9).
18. Name and address of any relative with whom respondent had resided for more than the past six months. §§104(c)(4), 138(a)(7).

C. Other Facts Needed by GAL, Court Representative and Appointee:

19. History of respondent, especially that related to incapacity.
20. Names, addresses and telephone numbers of persons providing care and assistance to respondent, including family members, professionals, and neighbors.
21. Planned or possible care arrangements. §102(b).
22. What the petitioner wants to accomplish.
23. Proposed limitations or additions to statutory authority. §§105(c), 136(a), 1(Comment), 108, 152, 153.
24. Whether emergency exists requiring immediate court action. §§107, 136(b)(1).
25. Social Security number of respondent, and Social Security number of other person through whom any benefits are claimed.

VII. Service of Notice and Reports

Only service of "notice of hearing" is required, but the better practice is to include a copy of the petition with the notice. Notice may be waived in writing by any person except respondent.
§ 51.

Service of notice must be made at least 14 days before the hearing if by mailing or personal service and at least 10 days before the hearing from last date of publication.

It is advisable for the attorney for petitioner to keep informed of service matters to be sure of timely service. It is also advisable for the attorney to keep informed of physician and court representative appointments and reports to be sure that the respondent is available for examination and interview and that the reports are filed in time for the hearing.

Proof of service, including service by the petitioner, must be filed by the time of the hearing.

VIII. Petition

Because of space limitations, this form is for both guardian and conservator; annotations suggest variations. The petition may be for appointment of only a guardian or only a conservator, or both with limitations, or for an emergency order, or for a one-time protective order.

IN THE MATTER OF) IN THE PROBATE COURT
 NAME OF RESPONDENT,) TUSCALOOSA COUNTY, ALABAMA
 An Alleged Incapacitated)
 Person.) Case No. 2004-

PETITION FOR APPOINTMENT OF GUARDIAN AND CONSERVATOR

Comes now **Petitioner** [on behalf of Tuscaloosa County Department of Human Resources], and petitions the Court for appointment of a Guardian and of a Conservator for **Respondent**, showing the Court as follows:

1. Your petitioner is **RELATION OF PETITIONER TO RESPONDENT** [a social worker in Adult Protective Services] and a person interested in the welfare [or estate] of respondent.

2. Petitioner has [provided respondent with casework service since August, 1992]. Petitioner is **PETITIONER'S AGE** years of age, is employed by **WHOEVER**, and resides at **ADDRESS OF PETITIONER**.

3. Respondent is an incapacitated person within the meaning of the *Code of Alabama*, Section 26-2A-20(8), in that he/she is impaired by reason of [mental and physical infirmities accompanying advanced age], to the extent of lacking sufficient understanding, memory and capacity to make and communicate responsible decisions.

4. Respondent is also a person in need of protection within the meaning of Code of Alabama, Section 26-2A-130(c), in that he/she is unable to manage property and business affairs effectively by reason of [physical and mental infirmities accompanying advanced age] and in that he/she has property that will be wasted unless property management is provided and in that funds are needed for his/her health, support and maintenance, and protection is necessary to obtain and provide the funds.

5. Respondent is **AGE IN NUMBERS** years of age, being born **DATE OF BIRTH** with Social Security number **SOCIAL SECURITY NUMBER**. He/she presently resides at **ADDRESS OF RESPONDENT**, where he/she has lived **YEARS AT ADDRESS**. **HERE INCLUDE HISTORICAL INFORMATION REGARDING SOCIAL SUPPORT AND USE OF RESOURCES**. [Respondent's spouse died in 1984, and she continued to live at home until she had a stroke and moved in with her daughter in May of 1991.]

6. **HERE DESCRIBE IN DETAIL THE NATURE AND EXTENT OF DISABILITY. INCLUDE ANY HISTORICAL OR CURRENT INFORMATION THAT WILL FACILITATE UNDERSTANDING OF INCAPACITY**. [Respondent suffers from chronic pulmonary obstructive disease, asthma, organic brain syndrome and osteoporosis. She cannot remember to pay her bills or keep medical appointments and her utilities have been cut off. Her physician has stated that she cannot live independently or manage her own affairs.]

7. Respondent has an estate of the value of not more than \$ **DOLLAR AMOUNT OF TOTAL ESTATE** which consists of **LIST PROPERTY SUCH AS HOME, ITS TAX OR OTHER APPRAISAL OR ESTIMATED VALUE, AND SAVINGS AND OTHER ASSETS AND THEIR VALUE. STATE WHETHER IT IS PROPOSED THAT ANY ASSETS BE PLACED BEYOND THE AUTHORITY OF DISPOSITION BY THE CONSERVATOR.**

8. He/She has a monthly income of approximately \$ **DOLLAR AMOUNT OF MONTHLY INCOME** from **SOURCE OF MONTHLY INCOME. IF BENEFITS ARE RECEIVED UNDER THE SOCIAL SECURITY NUMBER OF ANOTHER, GIVE THAT NAME AND SOCIAL SECURITY NUMBER.** The value of his/her estate and income for one year is not more than \$ **DOLLAR AMOUNT OF TOTAL ESTATE TO BE ADMINISTERED BY CONSERVATOR AND ANNUAL INCOME.**

9. (Optional) The monthly expense for his/her care and maintenance will be not less than \$ **DOLLAR AMOUNT OF ESTIMATED MONTHLY EXPENSE. IF NEEDED, HERE STATE WHETHER REAL ESTATE NEEDS TO BE SOLD, APPRAISAL, AND OTHER ACTIONS THAT NEED TO BE TAKEN, AND REASONS FOR SUCH ACTIONS.]**

10. **HERE STATE WHETHER RESPONDENT HAS A SPOUSE, ADULT CHILDREN, OR LIVING PARENTS; GIVE NAME AND ADDRESS AND TELEPHONE NUMBER OF EACH AND WHETHER ADULT CHILDREN LIVE IN ALABAMA, AND IF NONE OF THESE, THE NEAREST OF KIN IN SUFFICIENT FORM TO DETERMINE NOTICE PURSUANT TO §§103 OR 134 AND WHO HAS A PRIORITY FOR APPOINTMENT PURSUANT TO SECTIONS §§104 OR 138.**

11. **HERE STATE RELATION OF RESPONDENT TO NOMINEE OR NOMINEES THAT SUPPORTS NOMINATION, SUCH AS POWER OF ATTORNEY, DURABLE POWER OF ATTORNEY, EXECUTOR IN WILL, CO-SIGNATOR ON ACCOUNTS, OR OTHER TRUST OR ASSISTANCE.**

12. **HERE STATE WHETHER RESPONDENT HAS AN ATTORNEY TO REPRESENT THE RESPONDENT, AND GIVE NAME AND ADDRESS AND TELEPHONE NUMBER, OR:** [Respondent does not have an attorney to represent him/her and requires the appointment of an attorney with the powers and duties of a Guardian Ad Litem to represent him/her in these proceedings.]

13. His/Her present physician is **NAME OF DOCTOR, ADDRESS AND TELEPHONE NUMBER OF DOCTOR,** who will be able to provide the Court the examination of respondent and report of his/her condition.

14. Petitioner is informed and believes that respondent requires a guardian who can make responsible decisions for him/her and give consent for care and treatment of the Ward. **GUARDIAN NOMINEE** is the person best suited to be appointed guardian, and there is no other person [suitable] with greater priority for such appointment under the *Code of Alabama*, Section 26-2A-104.

15. Petitioner is informed and believes that respondent requires a conservator because he/she is unable to manage property and business affairs effectively because of [physical and mental infirmities accompanying advanced age]; that he/she has property that will be wasted unless management will be provided; and that funds are needed for his/her support and maintenance. **CONSERVATOR NOMINEE** is the person best suited to be appointed conservator, and there is no other person [suitable] with greater priority under the *Code of Alabama*, Section 26-2A-138.

16. Because his/her estate and funds may be wasted, notice of filing this petition and notice of hearing should include notice of the statutory protection of respondent's estate under the *Code of Alabama*, Section 26-2A-131.

17. (Optional) An emergency exists, in that decisions need to be made concerning respondent's care and treatment, funds are needed immediately for care of respondent, and there is no person who has authority to act in these circumstances. Affidavits (or reports) from the physician, social worker or nurses are attached hereto and made a part of this petition. A temporary guardian is needed with authority to use respondent's income and expend such funds for the immediate needs of respondent.]

18. (Optional) **GUARDIAN NOMINEE** is the appropriate family member [or: There is no appropriate family member] to make decisions for the respondent, if the circumstances and need arise, concerning the provision, withholding or withdrawing of life sustaining treatment or artificially provided nutrition and hydration, in the event of terminal illness or permanent unconsciousness if respondent is unable to make such decisions.

WHEREFORE, your Petitioner prays that the Court:

A. Issue an order setting this petition down for hearing [including notice of the Court's exclusive jurisdiction over the estate of the respondent]; with personal service of the petition and notice of hearing to **Respondent** and **HERE NAME SPOUSE, ADULT CHILDREN WHO LIVE IN THE STATE, OR IF NO ADULT CHILDREN, PARENTS LIVING IN THE STATE, AND IF NONE OF THESE NEAREST OF KIN LIVING IN THE STATE**; and order that the Petitioner send notice of the hearing to **HERE NAME OTHER PERSONS TO BE NOTIFIED PURSUANT TO 26-2A-103** by [Certified Mail, First Class U. S. Mail or publication].

B. Appoint a physician or other qualified professional to examine **Respondent** and submit a report in writing to the Court.

C. Appoint an attorney with powers of a Guardian Ad Litem to represent the interests of **Respondent (IF RESPONDENT DOES NOT HAVE AN ATTORNEY)**.

D. (IF PETITION IS FOR APPOINTMENT OF A GUARDIAN)
Appoint a Court Representative who shall interview Petitioner and person(s) nominated to be guardian and conservator and visit respondent at the place of his/her abode, and visit the place where it is proposed that respondent shall reside, and submit a report in writing to the Court.

E. Find upon hearing that respondent is an incapacitated person in need of a guardian

and conservator, and grant to **Nominee** Letters of Guardianship and Conservatorship of **Respondent**, as a guardianship and conservatorship with all the powers set out in the *Code of Alabama*, Sections 26-2A-108, 152 and 153, **HERE STATE ADDITIONAL POWERS OR LIMITATION OF POWERS SUCH AS:** [and with additional authority endorsed thereon to sell real estate subject to the confirmation of the Court], or, in the case of a guardianship [with authority to make decisions concerning the provision, withholding or withdrawing of life sustaining treatment or artificially provided nutrition and hydration in the event of terminal illness or permanent unconsciousness, if the ward is unable to make such decisions.], with bond set thereon at \$ **DOLLAR AMOUNT OF TOTAL ESTATE AND ANNUAL INCOME, EXCEPT ASSETS REQUIRING COURT APPROVAL FOR DISPOSAL.**

Respectfully submitted on this the _____ day of **Month**, 2004.

FOR PETITIONER

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2424 Sixth Street
Tuscaloosa, AL 35401
Telephone (205) 345-3440

IN THE MATTER OF) IN THE PROBATE COURT OF
NAME OF RESPONDENT,) TUSCALOOSA COUNTY, ALABAMA
An Alleged Incapacitated)
Person.) Case No. 2004-

VERIFICATION OF PETITION FOR APPOINTMENT OF GUARDIAN
AND CONSERVATOR

STATE OF ALABAMA)
TUSCALOOSA COUNTY)

I, the undersigned **Petitioner**, being sworn, state that I have read and understood the Petition for Appointment of Guardian and Conservator in the above styled case; that the petition was filed at my request and direction; and that the allegations in the above petition are true and correct, to the best of my knowledge, information and belief.

Given on this the ___ day of **Month**, 2004.

NAME OF PETITIONER

ACKNOWLEDGED, SWORN TO AND SUBSCRIBED before me on this the ____ day of **MONTH**, 2004.

Notary Public
My commission expires:

IX. NOTES

Style. "Person to be protected" is the statutory designation of respondent where only a conservatorship is sought.

1. F.1; §§133(a), 133(b), 102(a). Petitioner for guardianship must be a person interested in the welfare of respondent, and petitioner for conservatorship must be interested in respondent's welfare or estate. A conservatorship must set forth the petitioner's interest **to the extent known**.

2. F.1; §133(b). See Note 1 as to interest.

3. F.6; §20(8).

4. F.6; §§130(c), 133(a),(b).

5. F.2; §§133(b), 50.

6. F.6, F.19; §§20(8), 130(c), 133(b).

7. F.4; §§133(b), 139. Account of assets is not required for a guardianship petition.

8. F.5; §§133(b), 139. Account of income is not required for a guardianship petition.

9. F.4, F.5, F.23, §152(d). Needed if it is fairly certain that real estate must be sold to pay for respondent's care or to qualify respondent for medicaid coverage.

10. F.3, F.9; §§103, 104, 138.

11. F.12, F.13, F.14, F.15, F.16, F.17, F.18; §§104, 138.

12. F.10; §§102(b), 135(b).

13. F.11; §§102(b), 135(b).

14. F.8; §§104, 104.1.

15. F.8, §§133(b), 138, 139(c).

16. §131. The probate court cannot issue an injunction, but after service of notice of the petition and hearing the court has jurisdiction over assets. It may be useful to include service on other parties such as banks and stock transfer agents.

17. F.24; §§107, 131, 136(b)(1). It may be better to place a request for emergency orders and supporting facts in a separate petition so that it will not be overlooked and so that it will receive separate scheduling; a hearing may not be necessary, depending on the court, the severity of the order sought, and the facts presented by affidavit. To support an ex parte order, a

letter from the doctor showing respondent's condition, and verified by affidavit if possible, should be attached to the petition; affidavits from social workers, nurses or others should also be attached.

18. If petitioner wishes to have the guardian given the authority to make end-of-life decisions, the petition should also recite whether there is an adequate and operative authorization by a living will, appointment of a health care proxy or durable power of attorney. The practitioner should review the provisions of the Natural Death Act and the 1997 revision of the durable power of attorney (26-1-2) to get a sense of what can be authorized and how it works. The editor does not know of anyone who follows all the requirements of the surrogate procedures in the Natural Death Act, but it is worth noting that following the procedures provides certain immunity from liability. The editor has not seen or found the Board of Health certification form referred to in 22-8A-11 (i).

Although the Code provides only for the emergency appointment of a temporary guardian, limited to a renewable period of 15 days (§107), additional authority in §131 and §136(b)(1) provides for preserving and applying assets of respondent. This may be done by a separate order authorizing the nominee or other person to act as what amounts to a temporary conservator, or by adding such authorization to the appointment of a temporary guardian. This may be done without notice after the petition is filed.

A. See paragraph 10 of the petition setting up notice. If an emergency order is sought in the initial petition, the prayer for it should be the first presented. See paragraph 17.

B. Paragraph 13 provides the court with information if it wishes to appoint respondent's doctor, but does not request a particular person; court must appoint a physician or other qualified person in guardianship proceeding; in a conservatorship proceeding, a physician or other qualified person must examine respondent only if disability is mental illness or other cause listed in §135(b). Some courts use a particular mental health professional for such examination.

C. It is improper for petitioner to suggest a person to serve as guardian ad litem; even if respondent has an attorney, the court may appoint a guardian ad litem and a guardian ad litem should be sought for any minor or incompetent persons who will be affected by the petition, as suggested in the introductory materials.

D. See Update.

E. This prayer will be framed to advise the court exactly what action is desired: either or both functions; the same or separate appointees; limited or expanded powers; or authorization for a single transaction.

Verification. The code does not require a petition to be verified, but the best practice is to do so, particularly where ex parte court action is sought, because it provides the court facts given under oath.

IN THE MATTER OF) IN THE PROBATE COURT OF

RESPONDENT,) TUSCALOOSA COUNTY, ALABAMA

An Alleged Incapacitated)

Person.) Case No. 2004-

NOTICE OF APPOINTMENT AND ACCEPTANCE
OF GUARDIAN AD LITEM

TO: _____

Take notice, that by an order of this Court, this day made and entered, you were appointed to act as Guardian Ad Litem to represent the interest of **Respondent** in the above cause.

DONE AND ORDERED on this the ____ day of **Month**, 2004.

W. Hardy McCollum, Probate Judge

ACCEPTANCE

I hereby accept my appointment as Guardian Ad Litem for the above alleged incapacitated person, to represent and protect the interest of the said person upon the hearing on the Petition for Appointment of A Guardian and Conservator.

WITNESS my hand, this the ____ day of _____, 2004.

Guardian Ad Litem

IN THE MATTER OF) IN THE PROBATE COURT OF
RESPONDENT,) TUSCALOOSA COUNTY, ALABAMA
An Alleged Incapacitated)
Person.) Case No. 2004-

NOTICE OF APPOINTMENT AND ACCEPTANCE
OF COURT REPRESENTATIVE

TO: _____

Take notice, that by an order of this Court, this day made and entered, you were appointed to act as Court Representative in the above cause with the following duties and responsibilities as Court Representative, including:

1. Interview **Respondent**, who is presently residing at **ADDRESS OF RESPONDENT**.
2. Interview the Petitioner in this cause, [who is also nominated to be Guardian and Conservator]: **Petitioner**, **ADDRESS OF PETITIONER**, telephone _____ ; **ADD INTERVIEW WITH OTHER NOMINEES**.
3. You will submit a report in writing to the Court of your findings in said cause on or before the date of hearing.

DONE AND ORDERED on this the ____ day of **Month**, 2004.

W. Hardy McCollum, Probate Judge

ACCEPTANCE

I hereby accept my appointment as Court Representative in the hearing on the Petition for Appointment of A Guardian and Conservator, and to make an investigation and report to the Court as provided by the order of the Court and the law.

WITNESS my hand, this the ____ day of _____, 2004.

Court Representative

IN THE MATTER OF) IN THE PROBATE COURT OF
NAME OF RESPONDENT,) TUSCALOOSA COUNTY, ALABAMA
An Alleged Incapacitated)
Person.) Case No. 2004-

ORDER OF COURT

In this cause a petition having been filed under the Alabama Uniform Guardianship and Protective Proceedings Act alleging **Respondent** to be an incapacitated person and seeking appointment of a guardian and conservator of the said respondent; [and this Court thereby having exclusive jurisdiction over the estate of respondent;]

IT IS THEREFORE ORDERED that said cause be set for hearing before this Court on the ____ day of _____, 2003, at ____ o'clock __.m.

[IT IS FURTHER ORDERED that no disposition shall be made of any asset of **Respondent**, except for current income used for his/her necessary maintenance, during the pendency of these proceedings, unless ordered by the Court.]

IT IS FURTHER ORDERED that the [petition and] notice of the date set for hearing be served by personal service upon **RESPONDENT, NAME AND ADDRESS**, and **HERE ADD OTHER PERSONS REQUIRING PERSONAL SERVICE PURSUANT TO 26-2A-103(c)**. It is further ordered that Petitioner shall serve notice of the hearing by First Class U. S. Mail on **HERE NAME OTHERS, OR**: no other notice is required.

IT IS FURTHER ORDERED that _____ be and hereby is appointed by the Court to examine **Respondent** and submit a report in writing to this Court of the findings of the examination.

IT IS FURTHER ORDERED that _____ is appointed to serve as Guardian Ad Litem to represent the interests of **Respondent** .

IT IS FURTHER ORDERED that _____ is appointed to serve as Court Representative and to submit a report in writing to this Court.

IT IS FURTHER ORDERED by the Court that counsel for all parties to this proceeding

including the guardian ad litem and court representative are hereby granted the right to obtain from all health care providers, health plans, mental health providers, and mental health plans all information relating to the past, present, or future physical and/or mental condition of **Respondent** who is a party to the case as well, as all information relating to the provision of physical and/or health care to such individual and payment for the provision of such health care. This protective order is intended to allow the parties and third parties to comply with the requirements of the federal HIPAA Privacy Rules, 45 C.F.R. Section 164.512(3), AS A “QUALIFIED PROTECTIVE ORDER” under that regulation. This protective order expressly authorizes disclosure of “Protected Health Information” as defined in the Privacy Rules by the parties and third parties to counsel for the parties, subject to timely objection to the notice provision of ARCP 34. The parties and counsel for the parties may use and disclose such information for the purposes of this proceeding only and are to return or destroy such information (including all copies made) at the end of this proceeding.

DONE AND ORDERED this the _____ day of **MONTH**, 2004.

W. Hardy McCollum, Probate Judge

IN THE MATTER OF) IN THE PROBATE COURT OF
NAME OF RESPONDENT,) TUSCALOOSA COUNTY, ALABAMA
An Alleged Incapacitated)
Person.) Case No. 2004-

WRIT TO SHERIFF TO SERVE COPY
OF PETITION AND ORDER

TO THE SHERIFF OF TUSCALOOSA COUNTY, ALABAMA, GREETINGS:

You are hereby ordered to serve the attached [Petition for Appointment of Guardian and Conservator and the] order of this Court setting the petition for hearing on the said **Respondent**, at **ADDRESS OF RESPONDENT**. **[CREATE SEPARATE WRIT FOR OTHER PERSONS TO BE SERVED BY PERSONAL SERVICE.]**

DONE AND ORDERED on this the ____ day of **MONTH**, 2004.

W. Hardy McCollum
Judge of Probate

STATE OF ALABAMA)
TUSCALOOSA COUNTY)

SHERIFF'S RETURN

Executed by leaving a copy of the [Petition and] Order with

Respondent [OR OTHER PERSONS TO BE SERVED] on this the ____ day of _____, 2003.

Sheriff, Tuscaloosa County

IN THE MATTER OF
NAME OF RESPONDENT,
An Incapacitated Person

) IN THE PROBATE COURT OF
) TUSCALOOSA COUNTY, ALABAMA
) Case No. 2004-

ORDER FOR APPOINTMENT OF GUARDIAN
AND CONSERVATOR

The verified petition of **Petitioner** for appointment of a Guardian and of a Conservator for **Respondent** being before the Court, and the Court having taken evidence thereon, the Court finds as follows:

1. Petitioner is **RELATION OF PETITIONER TO RESPONDENT** and a person interested in the welfare of respondent.

2. Present at the hearing were the Petitioner and his/her attorney; [Respondent]; the guardian ad litem; and the Court Representative. The Court received the report of **NAME OF DOCTOR** and the Court Representative; received testimony of the Petitioner who stated that all the allegations of his/her petition were true; and heard from all persons present. [The Guardian Ad Litem waived the presence of **Respondent** on the grounds that he/she cannot understand the proceedings and that attendance at the hearing would not be consistent with his/her welfare.]

3. **Respondent** is an incapacitated person within the meaning of the Code of Alabama, Section 26-2A-20(8), in that he/she is impaired by reason of [mental and physical infirmities accompanying advanced age], to the extent of lacking sufficient understanding, memory and capacity to make and communicate responsible decisions. He/She is unable to manage property and business affairs effectively for such reason and protection is needed to provide funds for his/her health, support and maintenance.

4. He/She is **AGE IN NUMBERS** years of age, being born **DATE OF BIRTH**, and presently resides at **ADDRESS OF RESPONDENT**. [His/Her home is at **ADDRESS OF PERMANENT HOME**, [where he/she previously lived alone, and he/she will not be able to return there to live because of his/her need for nursing home care.]

5. Respondent has an estate of the value of not more than **\$ DOLLAR AMOUNT OF TOTAL ESTATE** [which consists of his/her residence **HERE STATE VALUE AND ADD SAVINGS AMOUNT**]. He/She has a monthly income of approximately **\$ DOLLAR AMOUNT OF MONTHLY INCOME** from **SOURCE OF MONTHLY INCOME**. The value of his/her estate and income for one year is not more than **\$ DOLLAR AMOUNT OF TOTAL ESTATE AND ANNUAL INCOME**. **HERE STATE AMOUNTS THAT SHOULD BE EXCLUDED FROM BOND BECAUSE CONSERVATOR CANNOT DISPOSE OF PROPERTY WITHOUT FURTHER ORDER OF COURT**.

[6. The monthly expense for his/her care and maintenance will be not less than **\$ DOLLAR AMOUNT OF ESTIMATED MONTHLY EXPENSES**, and it will be necessary to

sell respondent's interest in the real estate to provide funds for his/her care, and to qualify him/her for Medicaid benefits for nursing home care. **OR STATE OTHER ACTIONS NEEDED THAT MAY REQUIRE COURT APPROVAL.**]

7. His/Her [only] family member is **NAMES AND ADDRESSES OF NEXT-OF-KIN** OR [whose name and address are not known, but who is believed not to live in this state.] [He/She does not have a wife, children or surviving parents.] **OR STATE FAMILY RELATIONSHIPS RELATIVE TO PRIORITY FOR APPOINTMENT AND FOR NOTICE REQUIREMENTS.**

8. **Respondent** requires a conservator to manage his/her estate, and a guardian who can make responsible decisions for him/her and make plans and give consent for his/her care and treatment. **GUARDIAN APPOINTEE** is the person best suited to be appointed guardian, and there is no other [suitable] person with greater priority for such appointment under the *Code of Alabama*, Section 26-2A-104.

9. **CONSERVATOR APPOINTEE** is the person best suited to be appointed conservator of his/her estate; no [suitable] person has greater priority under the *Code of Alabama*, Section 26-2A-138; [and no other person has asked to be or has been nominated to serve as Conservator.]

10. (Optional) The guardian needs authority to make decisions concerning the provision, withholding or withdrawing of life sustaining treatment or artificially provided nutrition and hydration in the event of a terminal illness or permanent unconsciousness of the ward, if the ward is unable to make such decisions.

IT IS THEREFORE ORDERED AND DECREED as follows:

A. **GUARDIAN APPOINTEE** is hereby appointed Guardian of **Respondent** with all the powers and duties of a Guardian as set out in the *Code of Alabama* Section 26-2A-108, and Letters of Guardianship are hereby granted to him/her . [The guardian is authorized to make health care decisions for the ward, including decisions concerning the provision, withholding or withdrawing of live sustaining treatment or artificially provided nutrition and hydration in the event of a terminal illness or permanent unconsciousness of the ward, if the ward is unable to make such decisions.]

B. **CONSERVATOR APPOINTEE** is appointed Conservator of the estate of **Respondent** with all the powers set out in the *Code of Alabama*, Sections 26-2A-152 and 153, **EXCEPT LIMITATIONS, OR SPECIFIC PURPOSE, OR ADD ADDITIONAL POWER SUCH AS:** [with the additional power and authority to sell his/her Ward's interest in real estate, subject to confirmation by the Court], and Letters of Conservatorship with such powers endorsed thereon shall issue upon his/her filing a bond with good and sufficient sureties in the penal sum of **\$ DOLLAR AMOUNT OF TOTAL ESTATE AND ANNUAL INCOME, EXCLUSIVE OF ASSETS REQUIRING COURT ORDER FOR DISPOSAL.**

C. The Conservator is authorized to pay from the estate of the Ward court costs in the amount of \$_____, including a fee for the Guardian Ad Litem in the amount of \$_____ and a fee for the Court Representative in the amount of \$_____.

[D. The Conservator is also authorized to pay to him/herself from the estate of the Ward the amount of \$_____, which he/she has paid in attorney fees and costs for filing the petition, and the Conservator is authorized to repay him/herself all other sums advanced for the care, support and maintenance of the Ward.]

DONE AND ORDERED on this the _____ day of _____, 2004.

W. Hardy McCollum, Probate Judge
Tuscaloosa County, Alabama

STATE OF ALABAMA)
TUSCALOOSA COUNTY) PROBATE COURT
Case No. 2004-

LETTERS OF GUARDIANSHIP AND CONSERVATORSHIP

BE IT REMEMBERED, AND MADE KNOWN TO ALL WHOM IT MAY CONCERN:

That on [his] application to my Court for guardianship and conservatorship by court appointment, I have caused these LETTERS OF GUARDIANSHIP AND CONSERVATORSHIP to issue to

APPOINTEE,

as Guardian of the person and Conservator of the Estate of

RESPONDENT,

an incapacitated person, and in every case which occasion may require, the said Guardian and Conservator is authorized and directed to exercise the following powers and duties:

All powers conferred under Ala. Code Sections 26-2A-108 upon guardians of incapacitated persons. [OR STATE LIMITATION OR EXPANSION OF POWER, such as end-of-life decisions, as recited in the order of appointment.]

All powers conferred under Ala. Code Sections 26-2A-152 and 153 to Conservators, **ADD OTHER POWERS**, AS: and in addition, authority to sell real estate of the Ward, subject to the approval of the Court. [OR STATE LIMITED POWER]

as the lawful Guardian and Conservator of the said Ward.

WITNESS MY HAND and official seal this ___ day of _____, 2004.

W. Hardy McCollum, Probate Judge
Tuscaloosa County, Alabama

STATE OF ALABAMA)
TUSCALOOSA COUNTY)

I, W. Hardy McCollum, Judge of Probate, hereby certify that the foregoing is a true and correct copy of Letters of Guardianship and Conservatorship issued in favor of **APPOINTEE** as Guardian and Conservator of **Respondent**, as the same appears of record in my office.

WITNESS my hand and official seal on this the _____ day of _____, 2004.

W. Hardy McCollum, Probate Judge
Tuscaloosa County, Alabama

UPDATE

The only statutory changes in the Act are the addition in 1991 of §104.1 to provide for corporations to act as guardians for the developmentally disabled; in 1995 of Section 26-2A-9 which provides that after January 1, 1997, a previously appointed curator becomes a conservator; and Section 26-2A-102(e) for informal procedure for appointment of a family guardian for mentally retarded adults.

The *Alabama Digest* treats cases concerning the Act under Mental Health, Sections 101 to 196, with additional treatment of property matters in Sections 211 to 313.

There have been few significant cases dealing with the Act.

McCallie v. McCallie, 660 So.2d 584 (Ala. 1995):

- (a) applied Rules of Civil Procedure to conservatorship proceedings (Note 1, at 585);
- (b) presumed from lack of record of testimony that probate court's judgment was correct;
- (c) found that respondent's attorney could stipulate to incapacity; and
- (d) found that professional examination not required if freedom of respondent not restricted.

Martin v. Clark, 554 So.2d 1030 (Ala. 1989):

- (a) found venue proper in county where respondent is present, even if not domicile; and
- (b) found jurisdiction is where action was commenced to the exclusion of all coordinate tribunals, *Orton v. Cheatham*, 293 Ala. 639, 643, 309, So.2d 94, 96 (1975).

Meadows v. Meadows, 603 So.2d 884 (Ala. 1992), the Supreme Court:

- (a) ruled that best interest of incapacitated person controls who should be guardian, not ability to manage money; and
- (b) accepted party's Appellate Rule 10(d) summary of testimony in lieu of non-existent probate record.

Reid v. Tingle, 716 So.2d 1190 (Ala.Civ.App. 1997)

- (a) found that failure to perfect service on respondent deprives the Court of jurisdiction and renders all subsequent orders void, even if respondent contests the action on the merits after objecting to jurisdiction.
- (b) found that, where service was not perfected, appointed conservator has no authority.
- (c) strictly applied Rules of Civil Procedure on service to conservatorship proceedings.

Scott v. Kelley, 745 So.2d 872 (Ala.Civ.App. 1999)

found that court, in accounting by conservator, cannot give credit for funds for which account is not given, regardless of lack of education of conservator.

In re Conservatorship of V. A. H., 802 So.2d 1099 (Ala.Civ.App. 2001).

(a) holds that in conservatorship cases, the court must appoint a physician or other professional person to examine respondent if the disability asserted is any of the mental or physical conditions specified in the statute, Section 135(b)); this examination is required--without reference to specific disabilities--in a guardianship case, Section 102(b).

(b) does not reach the issue whether the conservatorship, guardianship or subsequent proceedings may be void because of failure to appoint a physician and separate court representative; failure to make such appointments, even without a request, is error that will be reversed on appeal.

(c) notices that Section 135(d) does not require, in its language, that guardian ad litem and court representative cannot be the same person or that separate counsel must be requested; the absence of such language is not applied to this case, except that the respondent does not have to request a separate appointment for it to be required.

(d) does not indicate that circuit court procedures are different from those of probate court; this case was heard in Jefferson County where probate court has equity powers.

(e) dual appointment of attorney/guardian ad litem and court representative deprives respondent of right to have court representative examined on respondent's behalf.

(f) does not reach the issue whether the physician must be examined at the hearing; guardianship Section 102(c) includes the physician with the court representative in respondent's right to cross-examine witnesses. Presumably respondent or respondent's attorney may waive presence of physician for cross examination. The court does not address the issue whether the presence of the court representative may be waived.

This case was decided on pro se brief of respondent only.

State Department of Human Resources v. Estate of Harris, 857 So.2d 818 (Ala.Civ.App. 2002)

The estate of the protected person, not the Department of Human Resources who brought the petition is to bear the costs of the proceeding. It is not clear whether the outcome would be different if the protected person's estate was not sufficient or if the petition was denied. The Court of Civil Appeals goes off on whether the guardian ad litem appointment was required and concludes that it was not. I do not think it stands for much except that the estate in this case should bear the

costs of the proceeding.

Other cases have dealt primarily with conservator duties and settlements.

May 11, 2004