

ALAN WILSON
ATTORNEY GENERAL

June 8, 2022

The Honorable Anne J. Thayer
2010 Lindale Road
Anderson, SC 29621

Dear Representative Thayer:

You have requested an opinion from this Office on behalf of a constituent regarding the probate court's appointment of an examiner pursuant to sections 62-5-303B and 62-5-403B of the South Carolina Code of Laws. We will address each of the questions below.

LAW/ANALYSIS

To provide some background, an alleged incapacitated individual must be examined by an examiner before a guardian or conservator can be appointed. Section 62-5-303B provides for the probate court's appointment of the examiner in a guardianship proceeding:

(A) Upon receipt by the court of proof of service of the summons, petition, and notice of right to counsel upon the alleged incapacitated individual, the court shall:

....

(2) no later than thirty days from the filing of the proof of service on the alleged incapacitated individual, appoint:

(a) a guardian ad litem for the alleged incapacitated individual who shall have the duties and responsibilities set forth in Section 62-5-106; and

(b) one examiner, who must be a physician, to examine the alleged incapacitated individual and file a notarized report setting forth his evaluation of the condition of the alleged incapacitated individual in accordance with the provisions set forth in Section 62-5-303D. Unless the guardian ad litem or the alleged incapacitated individual objects, if a physician's notarized report is filed with the petition

and served upon the alleged incapacitated individual and all interested parties with the petition, then the court may appoint such physician as the examiner. Upon the court's own motion or upon request of the initial examiner, the alleged incapacitated individual, or his guardian ad litem, the court may appoint a second examiner, who must be a physician, nurse, social worker, or psychologist . . .

S.C. Code Ann. § 62-5-303B (1976 Code, as amended).

Section 62-5-403B provides for the probate court's appointment of the examiner in proceedings to appoint a conservator or to issue a protective order. See S.C. Code Ann. § 62-5-403B (1976 Code, as amended). It contains exceptions for cases governed by section 62-5-431 relating to veterans benefits and for cases when the alleged incapacitated individual is confined, detained, or missing. Otherwise, its language is identical to section 62-5-303B.

An examiner's report must contain certain information. Section 62-5-303D provides for an examiner's report in a guardianship proceeding:

(A) Each examiner shall complete a notarized report setting forth an evaluation of the condition of the alleged incapacitated individual The evaluation shall contain, to the best of the examiner's knowledge and belief:

- (1) a description of the nature and extent of the incapacity, including specific functional impairments;
- (2) a diagnosis and assessment of the alleged incapacitated individual's mental and physical condition, including whether he is taking any medications that may affect his actions;
- (3) an evaluation of the alleged incapacitated individual's ability to exercise the rights set forth in Section 62-5-304A;
- (4) when consistent with the scope of the examiner's license, an evaluation of the alleged incapacitated individual's ability to learn self-care skills, adaptive behavior, and social skills, and a prognosis for improvement;
- (5) the date of all examinations and assessments upon which the report is based;

(6) the identity of the persons with whom the examiner met or consulted regarding the alleged incapacitated individual's mental or physical condition; and

(7) the signature and designation of the professional license held by the examiner.

(B) Unless otherwise directed by the court, the examiner may rely upon an examination conducted within the ninety-day period immediately preceding the filing of the petition. In the absence of bad faith, an examiner appointed by the court pursuant to Section 62-5-303B, is immune from civil liability for breach of patient confidentiality made in furtherance of his duties.

S.C. Code Ann. § 62-5-303D (1976 Code, as amended). Section 62-5-403D contains virtually identical requirements for an examiner's report in a proceeding to appoint a conservator or to issue a protective order. See S.C. Code Ann. § 62-5-403D (1976 Code, as amended).

We have been presented with three separate questions. We believe that Questions 1 and 2 are best answered together:

1. Does the Probate Court have the authority to appoint an examiner?
2. If so, is that appointment required to be conditioned on any prior, or current, relationship between the alleged incapacitated individual and the examiner?

Because sections 62-5-303B and 62-5-403B expressly require the probate court to appoint an examiner,¹ we believe the question is whether the probate court is authorized to select the particular physician who will be appointed as examiner. Sections 62-5-303B and 62-5-403B provide for the probate court's appointment of both a guardian ad litem and an examiner no later than thirty days from the filing of the proof of service. Pursuant to the Reporter's Comments, "a party may recommend a guardian ad litem and the court may accept or reject the recommendation, but best practices may require that the court independently select the guardian ad litem." Reporter's Comments to S.C. Code Ann. § 62-5-303B and 62-5-403B. It is our opinion that the Legislature similarly granted the probate court the power to independently select the physician who will be appointed as examiner. However, the court in In re Campbell, 379 S.C. 593, 666 S.E.2d 908 (2008), held that the probate court is "obligated to appoint neutral and objective examiners and that failure to do so amounts to an abuse of discretion subject to reversal on appeal."

¹ Section 62-5-403B provides exceptions for cases governed by section 62-5-431 relating to veterans benefits and for cases when the alleged incapacitated individual is confined, detained, or missing.

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We do not believe that the physician who is appointed as examiner is required to have a current or prior relationship with the alleged incapacitated individual. As pointed out in your letter, sections 62-5-303B and 62-5-403B make no reference to an examiner having a prior, or ongoing relationship, with the alleged incapacitated individual. The only requirement is that the initial examiner be a physician.

Furthermore, sections 62-5-303D and 62-5-403D allow an examiner to rely upon an examination conducted within the ninety-day period immediately preceding the filing of the petition in his report, unless the probate court directs otherwise. They do not state that the examiner has to personally conduct the examination. In our opinion, an examiner is not required to be the alleged incapacitated individual's current or prior physician.

3. If an examiner is appointed, is he or she obligated to conduct an examination for purposes of determining incapacity and report his/her findings to the Probate Court?

We understand the question as being whether an examiner is required to conduct a personal examination of the alleged incapacitated individual. As stated in answer to the questions above, sections 62-5-303D and 62-5-403D do not require the examiner to personally conduct the examination.

CONCLUSION

In our opinion, the Legislature granted the probate court the power to independently select the physician who will be appointed as examiner in proceedings to appoint a guardian or conservator pursuant to sections 62-5-303B and 62-5-403B. However, the court in In re Campbell, 379 S.C. 593, 666 S.E.2d 908 (2008), held that the probate court is "obligated to appoint neutral and objective examiners and that failure to do so amounts to an abuse of discretion subject to reversal on appeal."

We do not believe that an examiner is required to be the alleged incapacitated individual's current or prior physician. Based on the language of sections 62-5-303D and 62-5-403D, it is also our opinion that an examiner does not have to personally conduct an examination of the alleged incapacitated individual in order to complete his report.

Sincerely,



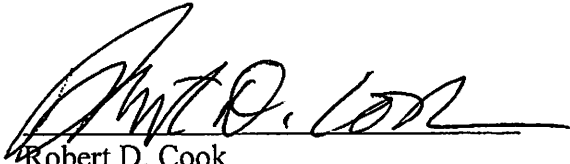
Elinor V. Lister
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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Robert D. Cook
Solicitor General