



Am. Sub. S.B. 157

127th General Assembly
(As Passed by the General Assembly)

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Effective date: May 14, 2008

ACT SUMMARY

- Authorizes a person to nominate by a durable power of attorney or a writing a guardian for a person's incompetent adult child.
- Removes the requirement that a guardian, other than a guardian named in a will by a parent of a minor, selected by a minor over the age of 14, or nominated in or pursuant to a durable power of attorney or a writing must be removed on proof that the guardian is no longer a resident of this state and instead provides that the guardian may be removed.
- States that a person nominated as a guardian of an incompetent adult child pursuant to a durable power of attorney or a writing has preference in appointment over a person applying to be guardian if the person nominated is competent, suitable, and willing to accept the appointment, and if the incompetent adult child does not have a spouse or an adult child and has not designated a guardian prior to the court finding the adult child incompetent.
- Makes corrections to certain sections of the Revised Code amended by Am. Sub. H.B. 53 of the 127th General Assembly regarding incompetent and mentally ill persons.

CONTENT AND OPERATION

Guardianship

Background--durable power of attorney

Continuing law provides that whenever a principal designates another as attorney in fact by a written power of attorney and the writing contains the words "This power of attorney shall not be affected by disability of the principal," "this power of attorney shall not be affected by disability of the principal or lapse of time," or words of similar import, the authority of the attorney in fact is exercisable by the attorney in fact as provided in the written instrument notwithstanding the later disability, incapacity, or adjudged incompetency of the principal and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument (R.C. 1337.09(A)).

Continuing law also provides that whenever a principal designates another the principal's attorney in fact by a power of attorney in writing and the writing expressly states that the power of attorney becomes effective at a later time or upon the occurrence of a specified event, including, but not limited to, the disability, incapacity, or adjudged incompetency of the principal, the attorney in fact may exercise the authority provided to the attorney in fact in the written instrument at the later time or upon the occurrence of the specified event notwithstanding the later disability, incapacity, or adjudged incompetency of the principal and, unless the instrument states a time of termination, notwithstanding the lapse of time since its execution (R.C. 1337.09(B)).

Nomination--in durable power of attorney or writing

Under continuing law, in a durable power of attorney described above or in a writing, both of the following apply:

(1) A principal may nominate the attorney in fact or any other person or a nominator may nominate another person to be the guardian of the principal's person, estate, or both.

(2) A principal may nominate the attorney in fact or any other person and the nominator may nominate another person to be the guardian of the person, the estate, or both of one or more of the principal's or nominator's *minor children*, whether born at the time of the execution of the durable power of attorney or writing or afterward.

The nomination is for consideration by a court if proceedings for the appointment of a guardian of the person, the estate, or both of one or more of the

principal's or nominator's *minor children* are commenced at a later time. Nomination of a person as a guardian or successor guardian of the person, the estate, or both of one or more of the principal's or nominator's minor children, and any subsequent appointment of the guardian or successor guardian as guardian under R.C. 2111.02, does not vacate the jurisdiction of any other court that previously may have exercised jurisdiction over the person of the minor. The durable power of attorney described above or the writing that contains the nomination of a person to be the guardian of the person, the estate, or both of one more of the principal's or nominator's minor children may be filed with the probate court for safekeeping, and the probate court must designate the nomination as the nomination of a standby guardian.

The act allows a principal in a durable power of attorney described above to nominate an attorney in fact or any other person, and allows a nominator in a writing to nominate another person, to be the guardian of the person, the estate, or both of one or more of the principal's or nominator's minor *or incompetent adult* children, whether born at the time of the execution of the durable power of attorney or writing or afterward (*subject to notice and a hearing pursuant to R.C. 2111.02 in the case of a nominator nominating another person in a writing*), and makes the appropriate references to the principal's or nominator's minor *or incompetent adult* children. (R.C. 1337.09(D) and 2111.121.)

Residency of guardian

Prior law provided that a guardian, other than a guardian named in a will by a parent of a minor, selected by a minor over the age of 14, or nominated in or pursuant to a durable power of attorney or writing, could be removed on proof that the guardian was no longer a resident of the county in which the guardian resided at the time of the guardian's appointment, *and had to be removed on proof that the guardian was no longer a resident of this state*. The act removes the requirement that the guardian *must* be removed on proof that the guardian is no longer a resident of this state and instead provides that the guardian *may* be removed in that situation. The act also removes repetitious language related to nonresident guardians. (R.C. 2109.21(C).)

Preference in appointment

The act provides that a person nominated as a guardian of an incompetent adult pursuant to a durable power of attorney or a writing has preference in appointment over a person applying to be guardian if the person nominated is competent, suitable, and willing to accept the appointment, and if the incompetent adult child does not have a spouse or an adult child and has not designated a guardian prior to the court finding the adult child incompetent (R.C. 2111.02(D)(2)).

Compensation and replacement of guardian ad litem or trustee

Am. Sub. H.B. 53 of the 127th General Assembly, effective August 7, 2007, defined "incompetent person," as used in R.C. 2307.14, as a person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide. Am. Sub. H.B. 53 also provided that the court may fix a compensation for a guardian ad litem's or trustee's services, which are taxed in the costs against the minor, the incompetent person, or the unborn persons. The act removes the definition of and the reference to "incompetent person" from R.C. 2307.14. The act also removes from R.C. 2307.14 a cross reference to R.C. 2307.13, a section that was repealed in 1971. (R.C. 2307.14.)

Conveyance of real estate from dower if spouse is insane

Am. Sub. H.B. 53 of the 127th General Assembly provided in R.C. 5305.22 that any real estate or interest in real estate coming to a person by purchase, inheritance, or otherwise, after the spouse of the person is adjudged an incompetent person and admitted to either a hospital for persons with mental illness in this or any other state of the United States or the psychiatric department of any hospital of the United States, may be conveyed by the person while the person's spouse who is an incompetent remains a patient of that hospital, free and clear from any dower right or expectancy of the person's spouse who is an incompetent person. The act removes all references to "incompetent person" from R.C. 5305.22 and replaces them with "mentally ill person subject to hospitalization by court order." The act also provides that "mentally ill person subject to hospitalization by court order" has the same meaning as in R.C. 5122.01 (see **COMMENT 1**). (R.C. 5305.22.)

Returns of taxable property

Am. Sub. H.B. 53 of the 127th General Assembly defined "incompetent person" as used in R.C. 5711.05 as a person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide. Am. Sub. H.B. 53 also provided that generally each person must return all the taxable property of which the person is the owner and that all taxable property belonging to the persons named or indicated must be returned by the fiduciaries of a minor or *an incompetent person* having no guardian, by the minor's or *incompetent person's* father, if living, if not, by the minor's or *incompetent person's* mother, if living,

and if neither father nor mother is living, by the person having such property in charge. The act removes the definition of "incompetent person" from R.C. 5711.05, defines "legal disability" for use in R.C. 5711.05 as having the same meaning as in R.C. 2131.02 (see **COMMENT 2**), and removes the references to a minor or incompetent person from R.C. 5711.05 and replaces them with a reference to a person under a legal disability. (R.C. 5711.05.)

Proper taxing district for listing property

Am. Sub. H.B. 53 of the 127th General Assembly, in amending R.C. 5711.07, provided in part that property belonging to an incompetent person residing in this state must be listed and assessed in the taxing district or county in which that incompetent person resides. The act defines "incompetent person" for use in R.C. 5711.07 to mean a person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide. (R.C. 5711.07.)

Mentally ill person not admitted to a veteran's home

Am. Sub. H.B. 53 of the 127th General Assembly provided in R.C. 5907.06 that a person *with a mental illness* that causes the person to be dangerous to the community cannot be admitted to a veteran's home. The act removes the reference to "a person with a mental illness" and replaces it with "a mentally ill person subject to hospitalization by court order." It also defines that term to have the same meaning as in R.C. 5122.01 (see **COMMENT 1**). (R.C. 5907.06.)

Hearing by probate judge when resident of veteran's home is mentally ill

Am. Sub. H.B. 53 of the 127th General Assembly provided in R.C. 5907.09 that when the affidavit referred to in R.C. 5907.08 is filed, the probate judge must determine the competence of the resident. The act removes the reference to "competence" from R.C. 5907.09 and instead requires the probate judge to determine whether the resident is a mentally ill person subject to hospitalization by court order. The act also defines "mentally ill person subject to hospitalization by court order" for use in R.C. 5907.09 to have the same meaning as in R.C. 5122.01 (see **COMMENT 1**). (R.C. 5907.09.)

COMMENT

1. "Mentally ill person subject to hospitalization by court order" means a mentally ill person who, because of the person's illness (R.C. 5122.01):

(a) Represents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;

(b) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness;

(c) Represents a substantial and immediate risk of serious physical impairment or injury to self as manifested by evidence that the person is unable to provide for and is not providing for the person's basic physical needs because of the person's mental illness and that appropriate provision for those needs cannot be made immediately available in the community; or

(d) Would benefit from treatment in a hospital for the person's mental illness and is in need of such treatment as manifested by evidence that creates a grave and imminent risk to substantial rights of others or the person.

2. "Legal disability" includes the following (R.C. 2131.02):

(a) Persons under the age of eighteen years;

(b) Persons of unsound mind;

(c) Persons in captivity;

(d) Persons under guardianship of the person and estate; or either.

HISTORY

ACTION	DATE
Introduced	05-01-07
Reported, S. Judiciary - Civil Justice	06-12-07
Passed Senate (33-0)	06-19-07
Reported, H. Judiciary	01-15-08
Passed House (92-0)	01-23-08
Senate concurred in House amendments (32-0)	01-30-08

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