

SENATE BILL No. 240

By Committee on Ways and Means

2-9

9 AN ACT concerning appointment of guardians and conservators; amend-
10 ing K.S.A. 2004 Supp. 59-3068 and 59-3075 and repealing the existing
11 sections.

12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. K.S.A. 2004 Supp. 59-3068 is hereby amended to read as
15 follows: 59-3068. (a) The court in appointing a guardian or conservator
16 shall give priority in the following order to:

17 (1) The nominee of the proposed ward or proposed conservatee, if
18 such nomination is made within any durable power of attorney;

19 (2) the nominee of a natural guardian;

20 (3) the nominee of a minor who is the proposed ward or proposed
21 conservatee, if the minor is over 14 years of age;

22 (4) the nominee of the spouse, adult child or other close family mem-
23 ber of the proposed ward or proposed conservatee; or

24 (5) the nominee of the petitioner.

25 (b) (1) The court, in appointing a guardian or conservator, shall con-
26 sider the workload, capabilities and potential conflicts of interest of the
27 proposed guardian or conservator, or both, before making such appoint-
28 ment, and the court shall give particular attention in making such ap-
29 pointment to the number of other cases in which the proposed guardian
30 or conservator, other than a corporation, is currently serving as guardian
31 or conservator, or both, particularly if that number is more than 15 or
32 more wards or conservatees, or both.

33 (2) *The court shall not appoint an unrelated person, institution, as-
34 sociation, or corporation to be the guardian of an incapacitated person if
35 the unrelated person, institution, association, or corporation:*

36 (A) *provides, or is likely to provide during the guardianship, goods
37 or services for a fee or anything of benefit to the incapacitated person in
38 the professional or business capacity;*

39 (B) *is or is likely to become during the guardianship period a creditor
40 of the incapacitated person;*

41 (C) *has or is likely to have during the guardianship period interests
42 that may conflict with interests of the incapacitated person;*

43 (D) *is an employee of a treatment or residential facility where a ward*

1 *is an inpatient in or resident of the facility; or*
2 *(E) is employed by an unrelated person, institution, association, or*
3 *corporation who or which would be disqualified under paragraphs (A)*
4 *through (D).*
5 (c) In appointing a guardian for a person who is an adherent of a
6 religion whose tenets and practices call for reliance on prayer alone for
7 healing, the court shall consider, but shall not be limited to, the appoint-
8 ment of an individual as guardian who is sympathetic to and willing to
9 support this system of healing.
10 Sec. 2. K.S.A. 2004 Supp. 59-3075 is hereby amended to read as
11 follows: 59-3075. (a) (1) The individual or corporation appointed by the
12 court to serve as the guardian shall carry out diligently and in good faith,
13 the general duties and responsibilities, and shall have the general powers
14 and authorities, provided for in this section as well as any specific duties,
15 responsibilities, powers and authorities assigned to the guardian by the
16 court. In doing so, a guardian shall at all times be subject to the control
17 and direction of the court, and shall act in accordance with the provisions
18 of any guardianship plan filed with the court pursuant to K.S.A. 2004
19 Supp. 59-3076, and amendments thereto. The court shall have the au-
20 thority to appoint counsel for the guardian, and the fees of such attorney
21 may be assessed as costs pursuant to K.S.A. 2004 Supp. 59-3094, and
22 amendments thereto.
23 (2) A guardian shall become and remain personally acquainted with
24 the ward, the spouse of the ward and with other interested persons as-
25 sociated with the ward and who are knowledgeable about the ward, the
26 ward's needs and the ward's responsibilities. A guardian shall exercise
27 authority only as necessitated by the ward's limitations. A guardian shall
28 encourage the ward to participate in making decisions affecting the ward.
29 A guardian shall encourage the ward to act on the ward's own behalf to
30 the extent the ward is able. A guardian shall encourage the ward to de-
31 velop or regain the skills and abilities necessary to meet the ward's own
32 essential needs and to otherwise manage the ward's own affairs. In making
33 decisions on behalf of the ward, a guardian shall consider the expressed
34 desires and personal values of the ward to the extent known to the guard-
35 ian. A guardian shall strive to assure that the personal, civil and human
36 rights of the ward are protected. A guardian shall at all times act in the
37 best interests of the ward and shall exercise reasonable care, diligence
38 and prudence. *A guardian who is not a family member shall not provide*
39 *direct services for a fee or for anything of benefit to the ward. The guard-*
40 *ian shall avoid even the appearance of a conflict of interest or impropriety*
41 *when dealing with the needs of the ward. Impropriety or conflict of in-*
42 *terest occurs where the guardian has some personal or agency interest*
43 *that can be perceived as self-serving or adverse to the position or best*

1 *interest of the ward. The guardian shall be independent from all providers*
2 *of services to the ward to ensure that the guardian remains free to chal-*
3 *lenge inappropriate or poorly delivered services and to advocate vigor-*
4 *ously on behalf of the ward. The guardian shall not concurrently represent*
5 *both the ward and the service provider. The guardian shall not employ*
6 *such guardian's friends or family to provide services for a profit or fee*
7 *unless no alternative is available and the guardian discloses this arrange-*
8 *ment to the court. A guardian who is also an attorney shall not provide*
9 *legal services to the ward for a fee. The guardian shall petition or assist*
10 *the ward to petition the court for limitation or termination of the guard-*
11 *ianship when the ward is no longer a person with a disability in need of*
12 *a guardian, or when there are effective alternatives available. The guard-*
13 *ian shall assist the ward in preparing and filing a petition for restoration*
14 *upon request.*

15 (b) A guardian shall have the following general duties, responsibili-
16 ties, powers and authorities:

17 (1) If the ward is a minor, to have the custody and control of the
18 minor, and to provide for the minor's care, treatment, habilitation, edu-
19 cation, support and maintenance;

20 (2) if the ward is an adult, to take charge of the person of the ward,
21 and to provide for the ward's care, treatment, habilitation, education,
22 support and maintenance;

23 (3) to consider and either provide on behalf of the ward necessary or
24 required consents or refuse the same;

25 (4) to assure that the ward resides in the least restrictive setting ap-
26 propriate to the needs of the ward and which is reasonably available;

27 (5) to assure that the ward receives any necessary and reasonably
28 available medical care, consistent with the provisions of K.S.A. 2004 Supp.
29 59-3077, and amendments thereto, when applicable, and any reasonably
30 available nonmedical care or other services as may be needed to preserve
31 the health of the ward or to assist the ward to develop or retain skills and
32 abilities;

33 (6) to promote and protect the comfort, safety, health and welfare of
34 the ward;

35 (7) to make necessary determinations and arrangements for, and to
36 give the necessary consents in regard to, the ward's funeral arrangements,
37 burial or cremation, the performance of an autopsy upon the body of the
38 ward, and anatomical gifts of the ward, subject to the provisions and
39 limitations provided for in K.S.A. 65-2893 and 65-3210 and K.S.A. 65-
40 1734, and amendments thereto; and

41 (8) to exercise all powers and to discharge all duties necessary or
42 proper to implement the provisions of this section.

43 (c) A guardian shall not be obligated by virtue of the guardian's ap-

1 pointment to use the guardian's own financial resources for the support
2 of the ward.

3 (d) A guardian shall not be liable to a third person for the acts of the
4 ward solely by virtue of the guardian's appointment, nor shall a guardian
5 who exercises reasonable care in selecting a third person to provide any
6 medical or other care, treatment or service for the ward be liable for any
7 injury to the ward resulting from the wrongful conduct of that third
8 person.

9 (e) A guardian shall not have the power:

10 (1) To prohibit the marriage or divorce of the ward;

11 (2) to consent, on behalf of the ward, to the termination of the ward's
12 parental rights;

13 (3) to consent to the adoption of the ward, unless approved by the
14 court;

15 (4) to consent, on behalf of the ward, to any psychosurgery, removal
16 of any bodily organ, or amputation of any limb, unless such surgery, re-
17 moval or amputation has been approved in advance by the court, except
18 in an emergency and when necessary to preserve the life of the ward or
19 to prevent serious and irreparable impairment to the physical health of
20 the ward;

21 (5) to consent, on behalf of the ward, to the sterilization of the ward,
22 unless approved by the court following a due process hearing held for
23 the purposes of determining whether to approve such, and during which
24 hearing the ward is represented by an attorney appointed by the court;

25 (6) to consent, on behalf of the ward, to the performance of any
26 experimental biomedical or behavioral procedure on the ward, or for the
27 ward to be a participant in any biomedical or behavioral experiment, with-
28 out the prior review and approval of such by either an institutional review
29 board as provided for in title 45, part 46 of the code of federal regulations,
30 or if such regulations do not apply, then by a review committee estab-
31 lished by the agency, institution or treatment facility at which the pro-
32 cedure or experiment is proposed to occur, composed of members se-
33 lected for the purposes of determining whether the proposed procedure
34 or experiment:

35 (A) Does not involve any significant risk of harm to the physical or
36 mental health of the ward, or the use of aversive stimulants, and is in-
37 tended to preserve the life or health of the ward or to assist the ward to
38 develop or regain skills or abilities; or

39 (B) involves a significant risk of harm to the physical or mental health
40 of the ward, or the use of an aversive stimulant, but that the conducting
41 of the proposed procedure or experiment is intended either to preserve
42 the life of the ward, or to significantly improve the quality of life of the
43 ward, or to assist the ward to develop or regain significant skills or abilities,

1 and that the guardian has been fully informed concerning the potential
2 risks and benefits of the proposed procedure or experiment or of any
3 aversive stimulant proposed to be used, and as to how and under what
4 circumstances the aversive stimulant may be used, and has specifically
5 consented to such;

6 (7) to consent, on behalf of the ward, to the withholding or with-
7 drawal of life-saving or life sustaining medical care, treatment, services
8 or procedures, except:

9 (A) In accordance with the provisions of any declaration of the ward
10 made pursuant to the provisions of K.S.A. 65-28,101 through 65-28,109,
11 and amendments thereto; or

12 (B) if the ward, prior to the court's appointment of a guardian pur-
13 suant to K.S.A. 2004 Supp. 59-3067, and amendments thereto, shall have
14 executed a durable power of attorney for health care decisions pursuant
15 to K.S.A. 58-629, and amendments thereto, and such shall not have been
16 revoked by the ward prior thereto, and there is included therein any
17 provision relevant to the withholding or withdrawal of life-saving or life-
18 sustaining medical care, treatment, services or procedures, then the
19 guardian shall have the authority to act as provided for therein, even if
20 the guardian has revoked or otherwise amended that power of attorney
21 pursuant to the authority of K.S.A. 58-627, and amendments thereto, or
22 the guardian may allow the agent appointed by the ward to act on the
23 ward's behalf if the guardian has not revoked or otherwise amended that
24 power of attorney; or

25 ~~(C) in the circumstances where the ward's treating physician shall~~
26 ~~certify in writing to the guardian that the ward is in a persistent vegetative~~
27 ~~state or is suffering from an illness or other medical condition for which~~
28 ~~further treatment, other than for the relief of pain, would not likely pro-~~
29 ~~long the life of the ward other than by artificial means, nor would be likely~~
30 ~~to restore to the ward any significant degree of capabilities beyond those~~
31 ~~the ward currently possesses, and which opinion is concurred in by either~~
32 ~~a second physician or by any medical ethics or similar committee to which~~
33 ~~the health care provider has access established for the purposes of re-~~
34 ~~viewing such circumstances and the appropriateness of any type of phy-~~
35 ~~sician's order which would have the effect of withholding or withdrawing~~
36 ~~life-saving or life sustaining medical care, treatment, services or proce-~~
37 ~~dures. Such written certification shall be approved by an order issued by~~
38 ~~the court when the guardian can prove beyond a reasonable doubt the~~
39 ~~ward's intent, after full informed consent, to withhold or withdraw health~~
40 ~~care or food and water in the current circumstances. The ward shall be~~
41 ~~afforded full and complete due process including, but not limited to, the~~
42 ~~right to court appointed counsel, notice, hearing, subpoena power, dis-~~
43 ~~covery, payment of costs for experts if such ward is deemed indigent and~~

1 *right to a jury trial. In making this determination, there shall be a pre-*
2 *sumption in favor of the continued treatment of the ward. If the ward is*
3 *not able to communicate or give informed consent, the court appointed*
4 *counsel shall make decisions on behalf of the ward in order to zealously*
5 *represent the ward and protect such ward's constitutional rights. If the*
6 *ward, or court appointed attorney on behalf of a non-communicative*
7 *ward, elects a jury trial, the panel shall consist of 12 members and render*
8 *a unanimous verdict. The court should appoint an attorney from the pro-*
9 *tection and advocacy system for the state of Kansas if they are able to*
10 *serve. Health care shall not include food and water. Food and water shall*
11 *not be withheld or withdrawn without express written intent of the ward.*
12 *Non-terminal physical or mental disability alone shall not be a rational*
13 *reason for withholding or withdrawing medical treatment. People with*
14 *non-terminal physical or mental disabilities who express an interest in*
15 *withholding or withdrawing medical care should be treated the same as*
16 *people without disabilities and be referred for appropriate support and*
17 *services;*

18 (8) to exercise any control or authority over the ward's estate, except
19 if the court shall specifically authorize such. The court may assign such
20 authority to the guardian, including the authority to establish certain
21 trusts as provided in K.S.A. 2004 Supp. 59-3080, and amendments
22 thereto, and may waive the requirement of the posting of a bond, only if:

23 (A) Initially, the combined value of any funds and property in the
24 possession of the ward or in the possession of any other person or entity,
25 but which the ward is otherwise entitled to possess, equals \$10,000 or
26 less; and

27 (B) either the court requires the guardian to report to the court the
28 commencement of the exercising of such authority, or requires the guard-
29 ian to specifically request of the court the authority to commence the
30 exercise of such authority, as the court shall specify; and

31 (C) the court also requires the guardian, whenever the combined
32 value of such funds and property exceeds \$10,000, to:

33 (i) File a guardianship plan as provided for in K.S.A. 2004 Supp. 59-
34 3076, and amendments thereto, which contains elements similar to those
35 which would be contained in a conservatorship plan as provided for in
36 K.S.A. 2004 Supp. 59-3078, and amendments thereto;

37 (ii) petition the court for appointment of a conservator as provided
38 for in K.S.A. 2004 Supp. 59-3058, 59-3059 or 59-3060, and amendments
39 thereto; or

40 (iii) notify the court as the court shall specify that the value of the
41 conservatee's estate has equaled or exceeded \$10,000, if the court has
42 earlier appointed a conservator but did not issue letters of conservatorship
43 pending such notification; and

1 (9) to place the ward in a treatment facility as defined in K.S.A. 2004
2 Supp. 59-3077, and amendments thereto, except if authorized by the
3 court as provided for therein.

4 (f) The guardian shall file with the court reports concerning the status
5 of the ward and the actions of the guardian as the court shall direct
6 pursuant to K.S.A. 2004 Supp. 59-3083, and amendments thereto.

7 Sec. 3. K.S.A. 2004 Supp. 59-3068 and 59-3075 are hereby repealed.

8 Sec. 4. This act shall take effect and be in force from and after its
9 publication in the statute book.