

SENATE BILL NO. 404

INTRODUCED BY MAZUREK, DUSSAULT, HOLLIDAY, KEMMIS, BENGTSON

IN THE SENATE

February 9, 1981	Introduced and referred to Committee on Judiciary.
February 14, 1981	Committee recommend bill do pass. Report adopted.
February 16, 1981	Bill printed and placed on members' desks.
February 17, 1981	Second reading, do pass.
February 18, 1981	Correctly engrossed.
February 19, 1981	Third reading, passed. Ayes, 46; Noes, 2. Transmitted to House.

IN THE HOUSE

February 20, 1981	Introduced and referred to Committee on Judiciary.
March 14, 1981	Committee recommend bill be concurred in. Report adopted.
March 21, 1981	Second reading, pass consideration.
March 24, 1981	Second reading, pass consideration.
March 27, 1981	Second reading, concurred in.
March 30, 1981	On motion rules suspended and bill allowed to be transmitted on 71st day. Motion adopted.
March 31, 1981	Third reading, concurred in. Ayes, 92; Noes, 4.

IN THE SENATE

April 1, 1981

Returned from House. Con-
curred in. Sent to enrolling.

Reported correctly enrolled.

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INTRODUCED BY

*Bengton*BILL NO. *404*

Meguel Rousseau Lucinda Komara

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAW RELATING TO THE APPOINTMENT OF GUARDIANS FOR INCAPACITATED PERSONS; PROVIDING FOR LIMITED GUARDIANSHIPS; DEFINING WHO MAY BE GUARDIANS AND CLARIFYING THE PROCEDURE FOR APPOINTING GUARDIANS; AMENDING SECTIONS 72-5-312, 72-5-313, 72-5-315 THROUGH 72-5-317, AND 72-5-321, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. In this part, unless the context requires otherwise, the following definitions apply:

(1) "Full guardian" means a guardian who possesses all the legal duties and powers enumerated in 72-5-321.

(2) "Limited guardian" means a guardian who possesses fewer than all of the legal duties and powers of a full guardian and whose rights, powers, and duties have been specifically enumerated by the court.

(3) "Guardian" includes a full guardian and a limited guardian.

NEW SECTION. Section 2. Purpose and basis for guardianship. Guardianship for an incapacitated person may be used only as is necessary to promote and protect the

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well-being of the person. The guardianship must be designed to encourage the development of maximum self-reliance and independence in the person and may be ordered only to the extent that the person's actual mental and physical limitations require it. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been specifically granted to the guardian by the court.

Section 3. Section 72-5-312, MCA, is amended to read:

"72-5-312. Who may be guardian -- priorities. (1) Any competent person or a suitable institution, association, or nonprofit corporation or any of its members may be appointed guardian of an incapacitated person.

(2) Persons who are not disqualified have priority for appointment as guardian in the following order:

(a) a person, association, or private nonprofit corporation, nominated by the incapacitated person, if the court specifically finds that at the time of the nomination the incapacitated person had the capacity to make a reasonably intelligent choice;

~~(a)~~(b) the spouse of the incapacitated person;

~~(b)~~(c) an adult child of the incapacitated person;

~~(c)~~(d) a parent of the incapacitated person, including a person nominated by will or other writing signed by a

1 deceased parent;

2 ~~(d)(e)~~ any relative of the incapacitated person with
3 whom he has resided for more than 6 months prior to the
4 filing of the petition;

5 ~~(f) a relative or friend who has demonstrated a~~
6 ~~sincere, longstanding interest in the welfare of the~~
7 ~~incapacitated person;~~

8 ~~(g) a private association or nonprofit corporation~~
9 ~~with a guardianship program for incapacitated persons, a~~
10 ~~member of such private association or nonprofit corporation~~
11 ~~approved by the association or corporation to act as a~~
12 ~~guardian for the incapacitated person, or a person included~~
13 ~~on an official list of such association or organization as~~
14 ~~willing and suitable to act as guardian of incapacitated~~
15 ~~persons;~~

16 ~~(e)(h)~~ a person nominated by the person who is caring
17 for him or paying benefits to him.

18 ~~(3) The priorities established in subsection (2) are~~
19 ~~not binding, and the court shall select the person,~~
20 ~~association, or nonprofit corporation that is best qualified~~
21 ~~and willing to serve.~~

22 ~~(4) Except as provided in subsection (5), the court~~
23 ~~may not appoint a person, institution, association, or~~
24 ~~nonprofit corporation to be the guardian of an incapacitated~~
25 ~~person if the person, institution, association, or nonprofit~~

1 corporation;

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3 ~~guardianship substantial services to the incapacitated~~
4 ~~person in the professional or business capacity other than~~
5 ~~in the capacity of guardian;~~

6 ~~(b) is or is likely to become during the guardianship~~
7 ~~period a creditor of the incapacitated person, other than in~~
8 ~~the capacity of guardian;~~

9 ~~(c) has or is likely to have during the guardianship~~
10 ~~period interests that may conflict with those of the~~
11 ~~incapacitated person; or~~

12 ~~(d) is employed by a person, institution, association,~~
13 ~~or nonprofit corporation who or which would be disqualified~~
14 ~~under subsections (4)(a) through (4)(c).~~

15 ~~(5) If the court determines that there is no qualified~~
16 ~~person willing and able to serve as guardian, the court may~~
17 ~~appoint an agency of the state or federal government that is~~
18 ~~authorized or required by statute to provide services to the~~
19 ~~person, or to persons suffering from the kind of disability~~
20 ~~from which the incapacitated person is suffering or a~~
21 ~~designee of the agency, notwithstanding the provisions of~~
22 ~~subsection (4). Whenever an agency is appointed guardian,~~
23 ~~the court may also appoint a limited guardian to represent~~
24 ~~a specified interest of the incapacitated person. Whenever a~~
25 ~~limited guardian is appointed pursuant to this subsection,~~

1 ~~the specified interest of the incapacitated person is the~~
 2 ~~sole responsibility of the limited guardian and is removed~~
 3 ~~from the responsibility of the agency."~~

4 Section 4. Section 72-5-313, MCA, is amended to read:

5 "72-5-313. Visitor in guardianship proceedings
 6 defined. A visitor is, with respect to guardianship
 7 proceedings, a person who is trained in law, nursing, or
 8 social work, ~~medical care, mental health care, pastoral~~
 9 ~~care, education, or rehabilitation~~ and is an officer,
 10 employee, or special appointee of the court with no personal
 11 interest in the proceedings."

12 NEW SECTION. Section 5. Request for notice --
 13 interested person. (1) Any interested person who desires to
 14 be notified before any order is made in a guardianship
 15 proceeding may file with the clerk a request for notice upon
 16 payment of any fee required by statute or court rule. The
 17 clerk shall mail a copy of the demand to the guardian, if
 18 one has been appointed.

19 (2) A request is not effective unless it contains a
 20 statement showing the interest of the person making it and
 21 his address or that of his attorney and is effective only as
 22 to matters occurring after the filing. Any governmental
 23 agency paying or planning to pay benefits to the alleged
 24 incapacitated person is an interested person in guardianship
 25 proceedings.

1 NEW SECTION. Section 6. Contents of petition for
 2 appointment of guardian. (1) The petition for appointment of
 3 a guardian shall contain:

4 (a) the name, residence, and mailing address of the
 5 petitioner, his relationship to the alleged incapacitated
 6 person, and his interest in the matter;

7 (b) the name, residence, and mailing address of the
 8 alleged incapacitated person;

9 (c) the nature and degree of the alleged incapacity;

10 (d) if the petition in any way affects the management
 11 of the property of the alleged incapacitated person, the
 12 approximate value and description of his property, including
 13 any compensation, pension, insurance, or allowance to which
 14 he may be entitled;

15 (e) whether there is, in any state, a full guardian or
 16 limited guardian for the person or estate of the
 17 incapacitated person or a conservator of his property;

18 (f) the name, residence, and mailing address of the
 19 person whom the petitioner seeks to have appointed guardian;

20 (g) the names, residences, and nature of relationship,
 21 so far as is known or can reasonably be ascertained, of the
 22 persons most closely related by blood or marriage to the
 23 alleged incapacitated person;

24 (h) the name and residence of the person or
 25 institution having the care and custody of the alleged

1 incapacitated person;

2 (i) the reasons why the appointment of a guardian is
3 sought and whether a limited guardianship or full
4 guardianship is requested;

5 (j) the facts supporting the allegations of incapacity
6 and the need for a guardian;

7 (k) the specific areas of protection and assistance
8 requested and the limitation of rights requested to be
9 included in the order of appointment;

10 (l) in the case of a petition for limited
11 guardianship, the particular powers and areas of authority
12 that the petition seeks to have vested in the limited
13 guardian as provided in [section 7] and the term for which
14 the limited guardianship is requested;

15 (m) in the case of a petition for full guardianship,
16 the length of time the guardianship is expected to last.

17 (2) The petition may also include a request for
18 temporary guardianship as provided in 72-5-317 if the
19 petitioner believes that the requisites of that section are
20 met and that the appointment of a temporary guardian,
21 pending the completion of guardianship proceedings, is
22 necessary to protect the welfare of the alleged
23 incapacitated person. The facts requiring appointment of a
24 temporary guardian shall be stated with specificity.

25 NEW SECTION. Section 7. Purposes for establishment of

1 limited guardianship. A petition seeking the establishment
2 of a limited guardianship shall specify the particular
3 powers that the limited guardian is proposed to exercise and
4 the particular areas of protection and assistance required.
5 The purposes for which a limited guardian may be appointed
6 include:

7 (1) to care for and maintain the alleged incapacitated
8 person;

9 (2) to assert and protect the rights and best
10 interests of the alleged incapacitated person;

11 (3) to provide timely and informed consent to
12 necessary medical procedures and procedures implemented in
13 connection with habilitation and training programs;

14 (4) to assist in the acquisition of necessary
15 training, habilitation, and education for the incapacitated
16 person;

17 (5) to exercise any other powers, duties, or
18 limitations in regard to the care of the incapacitated
19 person or the management of his property that the petition
20 shall explicitly specify and which may be no greater than
21 the powers a full guardian can exercise.

22 Section 8. Section 72-5-315, MCA, is amended to read:

23 "72-5-315. Procedure for court appointment of guardian
24 -- hearing -- examination -- interview -- procedural rights.

25 (1) The incapacitated person or any person interested in his

1 welfare, including the county attorney, may petition for a
2 finding of incapacity and appointment of a guardian.

3 (2) Upon the filing of a petition, the court shall set
4 a date for hearing on the issues of incapacity. The
5 allegedly incapacitated person may have counsel of his own
6 choice or the court may, in the interest of justice, appoint
7 an appropriate official or attorney to represent him in the
8 proceeding, who shall have the powers and duties of a
9 guardian ad litem.

10 (3) The person alleged to be incapacitated shall be
11 examined by a physician appointed by the court who shall
12 submit his report in writing to the court and be interviewed
13 by a visitor sent by the court. Whenever possible, the court
14 shall appoint as visitor a person who has particular
15 experience or expertise in treating, evaluating, or caring
16 for persons with the kind of disabling condition that is
17 alleged to be the cause of the incapacity. The visitor also
18 shall also interview the person seeking appointment as
19 guardian who appears to have caused the petition to be filed
20 and the person who is nominated to serve as guardian and
21 visit the present place of abode of the person alleged to be
22 incapacitated and the place it is proposed that he will be
23 detained or reside if the requested appointment is made and
24 submit his report in writing to the court. Whenever possible
25 without undue delay or expense beyond the ability to pay of

1 the alleged incapacitated person, the court, in formulating
2 the judgment, shall utilize the services of any public or
3 charitable agency that offers or is willing to evaluate the
4 condition of the allegedly incapacitated person and make
5 recommendations to the court regarding the most appropriate
6 form of state intervention in his affairs.

7 (4) The person alleged to be incapacitated is entitled
8 to be present at the hearing in person and to see or hear
9 all evidence bearing upon his condition. He is entitled to
10 be present by counsel, to present evidence, to cross-examine
11 witnesses, including the court-appointed physician and the
12 visitor, and to trial by jury. The issue may be determined
13 at a closed hearing without a jury if the person alleged to
14 be incapacitated or his counsel so requests."

15 Section 9. Section 72-5-316, MCA, is amended to read:
16 "72-5-316. Findings -- order of appointment. ~~The court~~
17 ~~may appoint a guardian as requested if it is satisfied that~~
18 ~~the person for whom a guardian is sought is incapacitated~~
19 ~~and that the appointment is necessary or desirable as a~~
20 ~~means of providing continuing care and supervision of the~~
21 ~~person of the incapacitated persons. Alternatively, the~~
22 ~~court may dismiss the proceeding or enter any other~~
23 ~~appropriate orders.~~ (1) If the court is satisfied that the
24 person for whom a guardianship is sought is incapacitated
25 and that judicial intervention in his personal freedom of

1 action and decision is necessary to meet essential
 2 requirements for his physical health or safety, it may
 3 appoint a full guardian having the powers described in
 4 72-5-321 or a limited guardian having the powers described
 5 in the order. If the court is satisfied that the allegedly
 6 incapacitated person could handle the essential requirements
 7 for physical health or safety if his financial resources
 8 were managed by another, it shall order that the petition be
 9 treated as a petition for a protective order under part 4 of
 10 this chapter and proceed accordingly. Alternatively, the
 11 court may dismiss the proceeding or enter any other
 12 appropriate order that is not inconsistent with the specific
 13 provisions of this part. In issuing its order, the court
 14 shall make specific findings of fact.

15 (2) The court may not invest a guardian with powers or
 16 duties beyond those sought in the petition and may, upon
 17 petition for a full guardianship, create a limited
 18 guardianship or conservatorship when the court determines
 19 that a limited guardianship or conservatorship is all that
 20 is required for the care and protection of the incapacitated
 21 person. The order shall specify whether a full or limited
 22 guardianship is being created. In the case of a limited
 23 guardianship, the order shall specify the particular powers
 24 and duties vested in the limited guardian, and the period
 25 for which the limited guardianship is created.

1 (3) No incapacitated person may be limited in the
 2 exercise of any civil or political rights except those that
 3 are clearly inconsistent with the exercise of the powers
 4 granted to the guardian unless the court's order
 5 specifically provides for such limitations. The order shall
 6 state that all rights not specifically limited are retained
 7 by the incapacitated person."

8 Section 10. Section 72-5-317, MCA, is amended to read:

9 "72-5-317. Temporary guardians. (1) If an
 10 incapacitated person has no guardian and an emergency
 11 exists, the court may exercise the power of a guardian
 12 pending notice and hearing.

13 (2) If an appointed guardian is not effectively
 14 performing his duties or if there is no appointed guardian
 15 and the court further finds that the welfare of the
 16 incapacitated person requires immediate action, it may, with
 17 or without notice, appoint a temporary guardian for the
 18 incapacitated person for a specified period not to exceed 6
 19 months. The court may appoint either a full or a limited
 20 temporary guardian, depending on the needs and circumstances
 21 of the incapacitated person. The court may not invest a
 22 temporary guardian with more powers than are required by the
 23 circumstances necessitating the appointment. The order of
 24 appointment of a temporary guardian shall state whether a
 25 full or limited temporary guardianship is being created and,

1 in the case of a limited temporary guardian, the specific
 2 powers and duties of the limited temporary guardian.

3 (3) In case there is no person available and willing
 4 to act as temporary guardian for an incapacitated person who
 5 is in need of a temporary guardian except a person or entity
 6 who is ineligible to act as guardian pursuant to the
 7 provisions of 72-5-312(4), the court may appoint as
 8 temporary guardian a person or entity who would otherwise be
 9 ineligible under that provision to act as guardian. This
 10 subsection does not permit the appointment of a person or
 11 entity who has an actual conflict of interest in regard to
 12 the purpose for which the temporary guardianship is sought.
 13 A temporary guardian who is otherwise ineligible shall serve
 14 until a person or entity who is not ineligible to serve as
 15 guardian and who is otherwise qualified to be guardian is
 16 appointed by the court to act as temporary guardian, but in
 17 no case may he serve for longer than 6 months.

18 ††(4) A temporary full guardian is entitled to the
 19 care and custody of the ward, and the authority of any
 20 permanent guardian previously appointed by the court is
 21 suspended so long as a temporary guardian has authority. A
 22 temporary limited guardian is entitled to exercise such
 23 powers as are specifically granted to him in the order of
 24 appointment, and the power of any permanent guardian
 25 previously appointed by the court to exercise those powers

1 is suspended so long as the temporary limited guardian has
 2 authority. The court by specific order may suspend all
 3 authority of the permanent guardian upon appointment of a
 4 temporary limited guardian. A temporary guardian may be
 5 removed at any time. A temporary guardian shall make any
 6 report the court requires. In other respects the provisions
 7 of this code concerning guardians apply to temporary
 8 guardians."

9 Section 11. Section 72-5-321, MCA, is amended to read:
 10 "72-5-321. Powers and duties of guardian of
 11 incapacitated person. (1) The powers and duties of a limited
 12 guardian are those specified in the order appointing the
 13 guardian. The limited guardian is required to report the
 14 condition of the incapacitated person and of the estate that
 15 has been subject to his possession and control, as required
 16 by the court or by court rule.

17 ††(2) A full guardian of an incapacitated person has
 18 the same powers, rights, and duties respecting his ward that
 19 a parent has respecting his unemancipated minor child,
 20 except that a guardian is not liable to third persons for
 21 acts of the ward solely by reason of the parental
 22 relationship. In particular and without qualifying the
 23 foregoing, a full guardian has the following powers and
 24 duties, except as modified limited by order of the court:

25 (a) To the extent that it is consistent with the terms

1 of any order by a court of competent jurisdiction relating
2 to detention or commitment of the ward, he is entitled to
3 custody of the person of his ward and may establish the
4 ward's place of abode within or without this state.

5 (b) If entitled to custody of his ward, he shall make
6 provision for the care, comfort, and maintenance of his ward
7 and whenever appropriate arrange for his training and
8 education. Without regard to custodial rights of the ward's
9 person, he shall take reasonable care of his ward's
10 clothing, furniture, vehicles, and other personal effects
11 and commence protective proceedings if other property of his
12 ward is in need of protection.

13 (c) A full guardian may give any consents or approvals
14 that may be necessary to enable the ward to receive medical
15 or other professional care, counsel, treatment, or service.

16 (d) If no conservator for the estate of the ward has
17 been appointed, he a full guardian may:

18 (i) institute proceedings to compel any person under a
19 duty to support the ward or to pay sums for the welfare of
20 the ward to perform his duty;

21 (ii) receive money and tangible property deliverable to
22 the ward and apply the money and property for support, care,
23 and education of the ward; but he may not use funds from his
24 ward's estate for room and board which he, his spouse,
25 parent, or child have furnished the ward unless a charge for

1 the service is approved by order of the court made upon
2 notice to at least one of the next of kin of the incompetent
3 ward, if notice is possible. He must exercise care to
4 conserve any excess for the ward's needs.

5 (e) A full guardian is required to report the
6 condition of his ward and of the estate which has been
7 subject to his possession or control, as required by the
8 court or court rule.

9 (f) If a conservator has been appointed, all of the
10 ward's estate received by the full guardian in excess of
11 those funds expended to meet current expenses for support,
12 care, and education of the ward must be paid to the
13 conservator for management as provided in this code, and the
14 full guardian must account to the conservator for funds
15 expended.

16 ~~(2)(3)~~ Any full guardian of one for whom a conservator
17 also has been appointed shall control the custody and care
18 of the ward. ~~A limited guardian of a person for whom a~~
19 ~~conservator has been appointed shall control those aspects~~
20 ~~of the custody and care of the ward over which he is given~~
21 ~~authority by the order establishing the limited~~
22 ~~guardianship, and The full guardian or limited guardian is~~
23 entitled to receive reasonable sums for his services and for
24 room and board furnished to the ward as agreed upon between
25 him and the conservator, provided the amounts agreed upon

1 are reasonable under the circumstances. The full guardian
2 ~~or limited guardian authorized to oversee such aspects of~~
3 ~~the incapacitated person's care~~ may request the conservator
4 to expend the ward's estate by payment to third persons or
5 institutions for the ward's care and maintenance.

6 ~~(4) No full guardian or limited guardian may~~
7 ~~involuntarily commit for mental health treatment or for~~
8 ~~treatment of a developmental disability or for observation~~
9 ~~or evaluation a ward who is himself unwilling or unable to~~
10 ~~give informed consent to such commitment, except as provided~~
11 ~~in 72-5-322, unless the procedures for involuntary~~
12 ~~commitment set forth in Title 53, chapters 20 and 21, are~~
13 ~~followed. This chapter does not abrogate any of the rights~~
14 ~~of mentally disabled persons provided for in Title 53,~~
15 ~~chapters 20 and 21."~~

16 Section 12. Codification instruction. Sections 1, 2,
17 5, 6, and 7 are intended to be codified as an integral part
18 of Title 72, chapter 5, part 3, and the provisions of Title
19 72, chapter 5, part 3, apply to sections 1, 2, 5, 6, and 7.

-Enj-

Approved by Committee on Judiciary

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Senate BILL NO. *404*
Margaret Mussauer
Bengtson *Lucy Komina*

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A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAW RELATING TO THE APPOINTMENT OF GUARDIANS FOR INCAPACITATED PERSONS; PROVIDING FOR LIMITED GUARDIANSHIPS; DEFINING WHO MAY BE GUARDIANS AND CLARIFYING THE PROCEDURE FOR APPOINTING GUARDIANS; AMENDING SECTIONS 72-5-312, 72-5-313, 72-5-315 THROUGH 72-5-317, AND 72-5-321, MCA."

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- (b) the spouse of the incapacitated person;
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 9 ~~care, education, or rehabilitation~~ and is an officer,
 10 employee, or special appointee of the court with no personal
 11 interest in the proceedings."

12 NEW SECTION. Section 5. Request for notice --
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 14 be notified before any order is made in a guardianship
 15 proceeding may file with the clerk a request for notice upon
 16 payment of any fee required by statute or court rule. The
 17 clerk shall mail a copy of the demand to the guardian, if
 18 one has been appointed.

19 (2) A request is not effective unless it contains a
 20 statement showing the interest of the person making it and
 21 his address or that of his attorney and is effective only as
 22 to matters occurring after the filing. Any governmental
 23 agency paying or planning to pay benefits to the alleged
 24 incapacitated person is an interested person in guardianship
 25 proceedings.

1 NEW SECTION. Section 6. Contents of petition for
 2 appointment of guardian. (1) The petition for appointment of
 3 a guardian shall contain:

4 (a) the name, residence, and mailing address of the
 5 petitioner, his relationship to the alleged incapacitated
 6 person, and his interest in the matter;

7 (b) the name, residence, and mailing address of the
 8 alleged incapacitated person;

9 (c) the nature and degree of the alleged incapacity;

10 (d) if the petition in any way affects the management
 11 of the property of the alleged incapacitated person, the
 12 approximate value and description of his property, including
 13 any compensation, pension, insurance, or allowance to which
 14 he may be entitled;

15 (e) whether there is, in any state, a full guardian or
 16 limited guardian for the person or estate of the
 17 incapacitated person or a conservator of his property;

18 (f) the name, residence, and mailing address of the
 19 person whom the petitioner seeks to have appointed guardian;

20 (g) the names, residences, and nature of relationship,
 21 so far as is known or can reasonably be ascertained, of the
 22 persons most closely related by blood or marriage to the
 23 alleged incapacitated person;

24 (h) the name and residence of the person or
 25 institution having the care and custody of the alleged

1 incapacitated person;

2 (i) the reasons why the appointment of a guardian is
3 sought and whether a limited guardianship or full
4 guardianship is requested;

5 (j) the facts supporting the allegations of incapacity
6 and the need for a guardian;

7 (k) the specific areas of protection and assistance
8 requested and the limitation of rights requested to be
9 included in the order of appointment;

10 (l) in the case of a petition for limited
11 guardianship, the particular powers and areas of authority
12 that the petition seeks to have vested in the limited
13 guardian as provided in [section 7] and the term for which
14 the limited guardianship is requested;

15 (m) in the case of a petition for full guardianship,
16 the length of time the guardianship is expected to last.

17 (2) The petition may also include a request for
18 temporary guardianship as provided in 72-5-317 if the
19 petitioner believes that the requisites of that section are
20 met and that the appointment of a temporary guardian,
21 pending the completion of guardianship proceedings, is
22 necessary to protect the welfare of the alleged
23 incapacitated person. The facts requiring appointment of a
24 temporary guardian shall be stated with specificity.

25 NEW SECTION. Section 7. Purposes for establishment of

1 limited guardianship. A petition seeking the establishment
2 of a limited guardianship shall specify the particular
3 powers that the limited guardian is proposed to exercise and
4 the particular areas of protection and assistance required.
5 The purposes for which a limited guardian may be appointed
6 include:

7 (1) to care for and maintain the alleged incapacitated
8 person;

9 (2) to assert and protect the rights and best
10 interests of the alleged incapacitated person;

11 (3) to provide timely and informed consent to
12 necessary medical procedures and procedures implemented in
13 connection with habilitation and training programs;

14 (4) to assist in the acquisition of necessary
15 training, habilitation, and education for the incapacitated
16 person;

17 (5) to exercise any other powers, duties, or
18 limitations in regard to the care of the incapacitated
19 person or the management of his property that the petition
20 shall explicitly specify and which may be no greater than
21 the powers a full guardian can exercise.

22 Section 8. Section 72-5-315, MCA, is amended to read:

23 "72-5-315. Procedure for court appointment of guardian
24 -- hearing -- examination -- interview -- procedural rights.
25 (1) The incapacitated person or any person interested in his

1 welfare, including the county attorney, may petition for a
2 finding of incapacity and appointment of a guardian.

3 (2) Upon the filing of a petition, the court shall set
4 a date for hearing on the issues of incapacity. The
5 allegedly incapacitated person may have counsel of his own
6 choice or the court may, in the interest of justice, appoint
7 an appropriate official or attorney to represent him in the
8 proceeding, who shall have the powers and duties of a
9 guardian ad litem.

10 (3) The person alleged to be incapacitated shall be
11 examined by a physician appointed by the court who shall
12 submit his report in writing to the court and be interviewed
13 by a visitor sent by the court. Whenever possible, the court
14 shall appoint as visitor a person who has particular
15 experience or expertise in treating, evaluating, or caring
16 for persons with the kind of disabling condition that is
17 alleged to be the cause of the incapacity. The visitor also
18 shall also interview the person seeking appointment as
19 guardian who appears to have caused the petition to be filed
20 and the person who is nominated to serve as guardian and
21 visit the present place of abode of the person alleged to be
22 incapacitated and the place it is proposed that he will be
23 detained or reside if the requested appointment is made and
24 submit his report in writing to the court. Whenever possible
25 without undue delay or expense beyond the ability to pay of

1 the alleged incapacitated person, the court, in formulating
2 the judgment, shall utilize the services of any public or
3 charitable agency that offers or is willing to evaluate the
4 condition of the allegedly incapacitated person and make
5 recommendations to the court regarding the most appropriate
6 form of state intervention in his affairs.

7 (4) The person alleged to be incapacitated is entitled
8 to be present at the hearing in person and to see or hear
9 all evidence bearing upon his condition. He is entitled to
10 be present by counsel, to present evidence, to cross-examine
11 witnesses, including the court-appointed physician and the
12 visitor, and to trial by jury. The issue may be determined
13 at a closed hearing without a jury if the person alleged to
14 be incapacitated or his counsel so requests."

15 Section 9. Section 72-5-316, MCA, is amended to read:
16 "72-5-316. Findings -- order of appointment. ~~The court~~
17 ~~may appoint a guardian as requested if it is satisfied that~~
18 ~~the person for whom a guardian is sought is incapacitated~~
19 ~~and that the appointment is necessary or desirable as a~~
20 ~~means of providing continuing care and supervision of the~~
21 ~~person of the incapacitated persons. Alternatively, the~~
22 ~~court may dismiss the proceeding or enter any other~~
23 ~~appropriate order.~~ (1) If the court is satisfied that the
24 person for whom a guardianship is sought is incapacitated
25 and that judicial intervention in his personal freedom of

SB-404

1 action and decision is necessary to meet essential
 2 requirements for his physical health or safety, it may
 3 appoint a full guardian having the powers described in
 4 72-5-321 or a limited guardian having the powers described
 5 in the order. If the court is satisfied that the allegedly
 6 incapacitated person could handle the essential requirements
 7 for physical health or safety if his financial resources
 8 were managed by another, it shall order that the petition be
 9 treated as a petition for a protective order under part 4 of
 10 this chapter and proceed accordingly. Alternatively, the
 11 court may dismiss the proceeding or enter any other
 12 appropriate order that is not inconsistent with the specific
 13 provisions of this part. In issuing its order the court
 14 shall make specific findings of fact.

15 (2) The court may not invest a guardian with powers or
 16 duties beyond those sought in the petition and may, upon
 17 petition for a full guardianship, create a limited
 18 guardianship or conservatorship when the court determines
 19 that a limited guardianship or conservatorship is all that
 20 is required for the care and protection of the incapacitated
 21 person. The order shall specify whether a full or limited
 22 guardianship is being created. In the case of a limited
 23 guardianship, the order shall specify the particular powers
 24 and duties vested in the limited guardian, and the period
 25 for which the limited guardianship is created.

1 (3) No incapacitated person may be limited in the
 2 exercise of any civil or political rights except those that
 3 are clearly inconsistent with the exercise of the powers
 4 granted to the guardian unless the court's order
 5 specifically provides for such limitations. The order shall
 6 state that all rights not specifically limited are retained
 7 by the incapacitated person."

8 Section 10. Section 72-5-317, MCA, is amended to read:

9 "72-5-317. Temporary guardians. (1) If an
 10 incapacitated person has no guardian and an emergency
 11 exists, the court may exercise the power of a guardian
 12 pending notice and hearing.

13 (2) If an appointed guardian is not effectively
 14 performing his duties or if there is no appointed guardian
 15 and the court further finds that the welfare of the
 16 incapacitated person requires immediate action, it may, with
 17 or without notice, appoint a temporary guardian for the
 18 incapacitated person for a specified period not to exceed 6
 19 months. The court may appoint either a full or a limited
 20 temporary guardian, depending on the needs and circumstances
 21 of the incapacitated person. The court may not invest a
 22 temporary guardian with more powers than are required by the
 23 circumstances necessitating the appointment. The order of
 24 appointment of a temporary guardian shall state whether a
 25 full or limited temporary guardianship is being created and,

1 in the case of a limited temporary guardian, the specific
 2 powers and duties of the limited temporary guardian.

3 (3) In case there is no person available and willing
 4 to act as temporary guardian for an incapacitated person who
 5 is in need of a temporary guardian except a person or entity
 6 who is ineligible to act as guardian pursuant to the
 7 provisions of 72-5-312(4), the court may appoint as
 8 temporary guardian a person or entity who would otherwise be
 9 ineligible under that provision to act as guardian. This
 10 subsection does not permit the appointment of a person or
 11 entity who has an actual conflict of interest in regard to
 12 the purpose for which the temporary guardianship is sought.
 13 A temporary guardian who is otherwise ineligible shall serve
 14 until a person or entity who is not ineligible to serve as
 15 guardian and who is otherwise qualified to be guardian is
 16 appointed by the court to act as temporary guardian, but in
 17 no case may he serve for longer than 6 months.

18 (3)(4) A temporary full guardian is entitled to the
 19 care and custody of the ward, and the authority of any
 20 permanent guardian previously appointed by the court is
 21 suspended so long as a temporary guardian has authority. A
 22 temporary limited guardian is entitled to exercise such
 23 powers as are specifically granted to him in the order of
 24 appointment, and the power of any permanent guardian
 25 previously appointed by the court to exercise those powers

1 is suspended so long as the temporary limited guardian has
 2 authority. The court by specific order may suspend all
 3 authority of the permanent guardian upon appointment of a
 4 temporary limited guardian. A temporary guardian may be
 5 removed at any time. A temporary guardian shall make any
 6 report the court requires. In other respects the provisions
 7 of this code concerning guardians apply to temporary
 8 guardians."

9 Section 11. Section 72-5-321, MCA, is amended to read:
 10 "72-5-321. Powers and duties of guardian of
 11 incapacitated person. (1) The powers and duties of a limited
 12 guardian are those specified in the order appointing the
 13 guardian. The limited guardian is required to report the
 14 condition of the incapacitated person and of the estate that
 15 has been subject to his possession and control, as required
 16 by the court or by court rule.

17 (2) A full guardian of an incapacitated person has
 18 the same powers, rights, and duties respecting his ward that
 19 a parent has respecting his unemancipated minor child,
 20 except that a guardian is not liable to third persons for
 21 acts of the ward solely by reason of the parental
 22 relationship. In particular and without qualifying the
 23 foregoing, a full guardian has the following powers and
 24 duties, except as modified limited by order of the court:

25 (a) To the extent that it is consistent with the terms

SB-404

1 of any order by a court of competent jurisdiction relating
2 to detention or commitment of the ward, he is entitled to
3 custody of the person of his ward and may establish the
4 ward's place of abode within or without this state.

5 (b) If entitled to custody of his ward, he shall make
6 provision for the care, comfort, and maintenance of his ward
7 and whenever appropriate arrange for his training and
8 education. Without regard to custodial rights of the ward's
9 person, he shall take reasonable care of his ward's
10 clothing, furniture, vehicles, and other personal effects
11 and commence protective proceedings if other property of his
12 ward is in need of protection.

13 (c) A full guardian may give any consents or approvals
14 that may be necessary to enable the ward to receive medical
15 or other professional care, counsel, treatment, or service.

16 (d) If no conservator for the estate of the ward has
17 been appointed, he a full guardian may:

18 (i) institute proceedings to compel any person under a
19 duty to support the ward or to pay sums for the welfare of
20 the ward to perform his duty;

21 (ii) receive money and tangible property deliverable to
22 the ward and apply the money and property for support, care,
23 and education of the ward; but he may not use funds from his
24 ward's estate for room and board which he, his spouse,
25 parent, or child have furnished the ward unless a charge for

1 the service is approved by order of the court made upon
2 notice to at least one of the next of kin of the incompetent
3 ward, if notice is possible. He must exercise care to
4 conserve any excess for the ward's needs.

5 (e) A full guardian is required to report the
6 condition of his ward and of the estate which has been
7 subject to his possession or control, as required by the
8 court or court rule.

9 (f) If a conservator has been appointed, all of the
10 ward's estate received by the full guardian in excess of
11 those funds expended to meet current expenses for support,
12 care, and education of the ward must be paid to the
13 conservator for management as provided in this code, and the
14 full guardian must account to the conservator for funds
15 expended.

16 ~~(2)(3)~~ Any full guardian of one for whom a conservator
17 also has been appointed shall control the custody and care
18 of the ward. A limited guardian of a person for whom a
19 conservator has been appointed shall control those aspects
20 of the custody and care of the ward over which he is given
21 authority by the order establishing the limited
22 guardianship, and The full guardian or limited guardian is
23 entitled to receive reasonable sums for his services and for
24 room and board furnished to the ward as agreed upon between
25 him and the conservator, provided the amounts agreed upon

1 are reasonable under the circumstances. The full guardian
2 or limited guardian authorized to oversee such aspects of
3 the incapacitated person's care may request the conservator
4 to expend the ward's estate by payment to third persons or
5 institutions for the ward's care and maintenance.

6 (4) No full guardian or limited guardian may
7 involuntarily commit for mental health treatment or for
8 treatment of a developmental disability or for observation
9 or evaluation a ward who is himself unwilling or unable to
10 give informed consent to such commitment, except as provided
11 in 72-5-322, unless the procedures for involuntary
12 commitment set forth in Title 53, chapters 20 and 21, are
13 followed. This chapter does not abrogate any of the rights
14 of mentally disabled persons provided for in Title 53,
15 chapters 20 and 21."

16 Section 12. Codification instruction. Sections 1, 2,
17 5, 6, and 7 are intended to be codified as an integral part
18 of Title 72, chapter 5, part 3, and the provisions of Title
19 72, chapter 5, part 3, apply to sections 1, 2, 5, 6, and 7.

-End-

SB-104

Approved by Committee on Judiciary

1 INTRODUCTION BY *Senators* BILL NO. *404*
2 *Thurgood Marshall* *Lucy Kamin*
3 *Bengton*

4 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE
5 LAW RELATING TO THE APPOINTMENT OF GUARDIANS FOR
6 INCAPACITATED PERSONS; PROVIDING FOR LIMITED GUARDIANSHIPS;
7 DEFINING WHO MAY BE GUARDIANS AND CLARIFYING THE PROCEDURE
8 FOR APPOINTING GUARDIANS; AMENDING SECTIONS 72-5-312,
9 72-5-313, 72-5-315 THROUGH 72-5-317, AND 72-5-321, MCA."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 NEW SECTION. Section 1. Definitions. In this part,
12 unless the context requires otherwise, the following
13 definitions apply:

14 (1) "Full guardian" means a guardian who possesses all
15 the legal duties and powers enumerated in 72-5-321.

16 (2) "Limited guardian" means a guardian who possesses
17 fewer than all of the legal duties and powers of a full
18 guardian and whose rights, powers, and duties have been
19 specifically enumerated by the court.

20 (3) "Guardian" includes a full guardian and a limited
21 guardian.

22 NEW SECTION. Section 2. Purpose and basis for
23 guardianship. Guardianship for an incapacitated person may
24 be used only as is necessary to promote and protect the
25

1 well-being of the person. The guardianship must be designed
2 to encourage the development of maximum self-reliance and
3 independence in the person and may be ordered only to the
4 extent that the person's actual mental and physical
5 limitations require it. An incapacitated person for whom a
6 guardian has been appointed is not presumed to be
7 incompetent and retains all legal and civil rights except
8 those that have been expressly limited by court order or
9 have been specifically granted to the guardian by the court.

10 Section 3. Section 72-5-312, MCA, is amended to read:

11 "72-5-312. Who may be guardian -- priorities. (1) Any
12 competent person or a suitable institution, association, or
13 nonprofit corporation or any of its members may be appointed
14 guardian of an incapacitated person.

15 (2) Persons who are not disqualified have priority for
16 appointment as guardian in the following order:

17 (a) a person, association, or private nonprofit
18 corporation nominated by the incapacitated person, if the
19 court specifically finds that at the time of the nomination
20 the incapacitated person had the capacity to make a
21 reasonably intelligent choice;

- 22 (b) the spouse of the incapacitated person;
- 23 (c) an adult child of the incapacitated person;
- 24 (d) a parent of the incapacitated person, including
- 25 a person nominated by will or other writing signed by a

SB 404

1 deceased parent;

2 ~~(d)(e)~~ any relative of the incapacitated person with
3 whom he has resided for more than 6 months prior to the
4 filing of the petition;

5 ~~(f) a relative or friend who has demonstrated a~~
6 ~~sincere, longstanding interest in the welfare of the~~
7 ~~incapacitated person;~~

8 ~~(g) a private association or nonprofit corporation~~
9 ~~with a guardianship program for incapacitated persons, a~~
10 ~~member of such private association or nonprofit corporation~~
11 ~~approved by the association or corporation to act as a~~
12 ~~guardian for the incapacitated person, or a person included~~
13 ~~on an official list of such association or organization as~~
14 ~~willing and suitable to act as guardian of incapacitated~~
15 ~~persons;~~

16 ~~(e)(h)~~ a person nominated by the person who is caring
17 for him or paying benefits to him.

18 ~~(3) The priorities established in subsection (2) are~~
19 ~~not binding, and the court shall select the person,~~
20 ~~association, or nonprofit corporation that is best qualified~~
21 ~~and willing to serve.~~

22 ~~(4) Except as provided in subsection (5), the court~~
23 ~~may not appoint a person, institution, association, or~~
24 ~~nonprofit corporation to be the guardian of an incapacitated~~
25 ~~person if the person, institution, association, or nonprofit~~

1 ~~corporation;~~

2 ~~(a) provides or is likely to provide during the~~
3 ~~guardianship substantial services to the incapacitated~~
4 ~~person in the professional or business capacity other than~~
5 ~~in the capacity of guardian;~~

6 ~~(b) is or is likely to become during the guardianship~~
7 ~~period a creditor of the incapacitated person, other than in~~
8 ~~the capacity of guardian;~~

9 ~~(c) has or is likely to have during the guardianship~~
10 ~~period interests that may conflict with those of the~~
11 ~~incapacitated person; or~~

12 ~~(d) is employed by a person, institution, association,~~
13 ~~or nonprofit corporation who or which would be disqualified~~
14 ~~under subsections (4)(a) through (4)(c).~~

15 ~~(5) If the court determines that there is no qualified~~
16 ~~person willing and able to serve as guardian, the court may~~
17 ~~appoint an agency of the state or federal government that is~~
18 ~~authorized or required by statute to provide services to the~~
19 ~~person or to persons suffering from the kind of disability~~
20 ~~from which the incapacitated person is suffering or a~~
21 ~~designee of the agency, notwithstanding the provisions of~~
22 ~~subsection (4). Whenever an agency is appointed guardian,~~
23 ~~the court may also appoint a limited guardian to represent~~
24 ~~a specified interest of the incapacitated person. Whenever a~~
25 ~~limited guardian is appointed pursuant to this subsection,~~

1 the specified interest of the incapacitated person is the
 2 sole responsibility of the limited guardian and is removed
 3 from the responsibility of the agency."

4 Section 4. Section 72-5-313, MCA, is amended to read:

5 "72-5-313. Visitor in guardianship proceedings
 6 defined. A visitor is, with respect to guardianship
 7 proceedings, a person who is trained in law, nursing, or
 8 social work, medical care, mental health care, pastoral
 9 care, education, or rehabilitation and is an officer,
 10 employee, or special appointee of the court with no personal
 11 interest in the proceedings."

12 NEW SECTION. Section 5. Request for notice --
 13 interested person. (1) Any interested person who desires to
 14 be notified before any order is made in a guardianship
 15 proceeding may file with the clerk a request for notice upon
 16 payment of any fee required by statute or court rule. The
 17 clerk shall mail a copy of the demand to the guardian, if
 18 one has been appointed.

19 (2) A request is not effective unless it contains a
 20 statement showing the interest of the person making it and
 21 his address or that of his attorney and is effective only as
 22 to matters occurring after the filing. Any governmental
 23 agency paying or planning to pay benefits to the alleged
 24 incapacitated person is an interested person in guardianship
 25 proceedings.

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 2 appointment of guardian. (1) The petition for appointment of
 3 a guardian shall contain:

4 (a) the name, residence, and mailing address of the
 5 petitioner, his relationship to the alleged incapacitated
 6 person, and his interest in the matter;

7 (b) the name, residence, and mailing address of the
 8 alleged incapacitated person;

9 (c) the nature and degree of the alleged incapacity;

10 (d) if the petition in any way affects the management
 11 of the property of the alleged incapacitated person, the
 12 approximate value and description of his property, including
 13 any compensation, pension, insurance, or allowance to which
 14 he may be entitled;

15 (e) whether there is, in any state, a full guardian or
 16 limited guardian for the person or estate of the
 17 incapacitated person or a conservator of his property;

18 (f) the name, residence, and mailing address of the
 19 person whom the petitioner seeks to have appointed guardian;

20 (g) the names, residences, and nature of relationship,
 21 so far as is known or can reasonably be ascertained, of the
 22 persons most closely related by blood or marriage to the
 23 alleged incapacitated person;

24 (h) the name and residence of the person or
 25 institution having the care and custody of the alleged

1 incapacitated person;

2 (i) the reasons why the appointment of a guardian is
3 sought and whether a limited guardianship or full
4 guardianship is requested;

5 (j) the facts supporting the allegations of incapacity
6 and the need for a guardian;

7 (k) the specific areas of protection and assistance
8 requested and the limitation of rights requested to be
9 included in the order of appointment;

10 (l) in the case of a petition for limited
11 guardianship, the particular powers and areas of authority
12 that the petition seeks to have vested in the limited
13 guardian as provided in [section 7] and the term for which
14 the limited guardianship is requested;

15 (m) in the case of a petition for full guardianship,
16 the length of time the guardianship is expected to last.

17 (2) The petition may also include a request for
18 temporary guardianship as provided in 72-5-317 if the
19 petitioner believes that the requisites of that section are
20 met and that the appointment of a temporary guardian,
21 pending the completion of guardianship proceedings, is
22 necessary to protect the welfare of the alleged
23 incapacitated person. The facts requiring appointment of a
24 temporary guardian shall be stated with specificity.

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1 limited guardianship. A petition seeking the establishment
2 of a limited guardianship shall specify the particular
3 powers that the limited guardian is proposed to exercise and
4 the particular areas of protection and assistance required.
5 The purposes for which a limited guardian may be appointed
6 include:

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8 person;

9 (2) to assert and protect the rights and best
10 interests of the alleged incapacitated person;

11 (3) to provide timely and informed consent to
12 necessary medical procedures and procedures implemented in
13 connection with habilitation and training programs;

14 (4) to assist in the acquisition of necessary
15 training, habilitation, and education for the incapacitated
16 person;

17 (5) to exercise any other powers, duties, or
18 limitations in regard to the care of the incapacitated
19 person or the management of his property that the petition
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21 the powers a full guardian can exercise.

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2 finding of incapacity and appointment of a guardian.

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4 a date for hearing on the issues of incapacity. The
5 allegedly incapacitated person may have counsel of his own
6 choice or the court may, in the interest of justice, appoint
7 an appropriate official or attorney to represent him in the
8 proceeding, who shall have the powers and duties of a
9 guardian ad litem.

10 (3) The person alleged to be incapacitated shall be
11 examined by a physician appointed by the court who shall
12 submit his report in writing to the court and be interviewed
13 by a visitor sent by the court. ~~Whenever possible, the court~~
14 ~~shall appoint as visitor a person who has particular~~
15 ~~experience or expertise in treating, evaluating, or caring~~
16 ~~for persons with the kind of disabling condition that is~~
17 ~~alleged to be the cause of the incapacity.~~ The visitor also
18 shall also interview the person seeking--appointment-as
19 ~~guardian who appears to have caused the petition to be filed~~
20 ~~and the person who is nominated to serve as guardian~~ and
21 visit the present place of abode of the person alleged to be
22 incapacitated and the place it is proposed that he will be
23 detained or reside if the requested appointment is made and
24 submit his report in writing to the court. ~~Whenever possible~~
25 ~~without undue delay or expense beyond the ability to pay of~~

1 ~~the alleged incapacitated person, the court, in formulating~~
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3 ~~charitable agency that offers or is willing to evaluate the~~
4 ~~condition of the allegedly incapacitated person and make~~
5 ~~recommendations to the court regarding the most appropriate~~
6 ~~form of state intervention in his affairs.~~

7 (4) The person alleged to be incapacitated is entitled
8 to be present at the hearing in person and to see or hear
9 all evidence bearing upon his condition. He is entitled to
10 be present by counsel, to present evidence, to cross-examine
11 witnesses, including the court-appointed physician and the
12 visitor, and to trial by jury. The issue may be determined
13 at a closed hearing without a jury if the person alleged to
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16 "72-5-316. Findings -- order of appointment. ~~The court~~
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19 ~~and that the appointment is necessary or desirable as a~~
20 ~~means of providing continuing care and supervision of the~~
21 ~~person of the incapacitated person. Alternatively, the~~
22 ~~court may dismiss the proceeding or enter any other~~
23 ~~appropriate order.~~ (1) If the court is satisfied that the
24 person for whom a guardianship is sought is incapacitated
25 and that judicial intervention in his personal freedom of

1 ~~action and decision is necessary to meet essential~~
 2 ~~requirements for his physical health or safety, it may~~
 3 ~~appoint a full guardian having the powers described in~~
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 6 ~~incapacitated person could handle the essential requirements~~
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 13 ~~provisions of this part. In issuing its order the court~~
 14 ~~shall make specific findings of fact.~~

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 16 ~~duties beyond those sought in the petition and may, upon~~
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 19 ~~that a limited guardianship or conservatorship is all that~~
 20 ~~is required for the care and protection of the incapacitated~~
 21 ~~person. The order shall specify whether a full or limited~~
 22 ~~guardianship is being created. In the case of a limited~~
 23 ~~guardianship, the order shall specify the particular powers~~
 24 ~~and duties vested in the limited guardian, and the period~~
 25 ~~for which the limited guardianship is created.~~

1 ~~(3) No incapacitated person may be limited in the~~
 2 ~~exercise of any civil or political rights except those that~~
 3 ~~are clearly inconsistent with the exercise of the powers~~
 4 ~~granted to the guardian unless the court's order~~
 5 ~~specifically provides for such limitations. The order shall~~
 6 ~~state that all rights not specifically limited are retained~~
 7 ~~by the incapacitated person."~~

8 Section 10. Section 72-5-317, MCA, is amended to read:

9 *72-5-317. Temporary guardians. (1) If an
 10 incapacitated person has no guardian and an emergency
 11 exists, the court may exercise the power of a guardian
 12 pending notice and hearing.

13 (2) If an appointed guardian is not effectively
 14 performing his duties or if there is no appointed guardian
 15 and the court further finds that the welfare of the
 16 incapacitated person requires immediate action, it may, with
 17 or without notice, appoint a temporary guardian for the
 18 incapacitated person for a specified period not to exceed 6
 19 months. ~~The court may appoint either a full or a limited~~
 20 ~~temporary guardian, depending on the needs and circumstances~~
 21 ~~of the incapacitated person. The court may not invest a~~
 22 ~~temporary guardian with more powers than are required by the~~
 23 ~~circumstances necessitating the appointment. The order of~~
 24 ~~appointment of a temporary guardian shall state whether a~~
 25 ~~full or limited temporary guardianship is being created and,~~

1 in the case of a limited temporary guardian, the specific
 2 powers and duties of the limited temporary guardian.

3 (3) In case there is no person available and willing
 4 to act as temporary guardian for an incapacitated person who
 5 is in need of a temporary guardian except a person or entity
 6 who is ineligible to act as guardian pursuant to the
 7 provisions of 72-5-312(4), the court may appoint as
 8 temporary guardian a person or entity who would otherwise be
 9 ineligible under that provision to act as guardian. This
 10 subsection does not permit the appointment of a person or
 11 entity who has an actual conflict of interest in regard to
 12 the purpose for which the temporary guardianship is sought.
 13 A temporary guardian who is otherwise ineligible shall serve
 14 until a person or entity who is not ineligible to serve as
 15 guardian and who is otherwise qualified to be guardian is
 16 appointed by the court to act as temporary guardian, but in
 17 no case may he serve for longer than 6 months.

18 (3)(4) A temporary full guardian is entitled to the
 19 care and custody of the ward, and the authority of any
 20 permanent guardian previously appointed by the court is
 21 suspended so long as a temporary guardian has authority. A
 22 temporary limited guardian is entitled to exercise such
 23 powers as are specifically granted to him in the order of
 24 appointment, and the power of any permanent guardian
 25 previously appointed by the court to exercise those powers

1 is suspended so long as the temporary limited guardian has
 2 authority. The court by specific order may suspend all
 3 authority of the permanent guardian upon appointment of a
 4 temporary limited guardian. A temporary guardian may be
 5 removed at any time. A temporary guardian shall make any
 6 report the court requires. In other respects the provisions
 7 of this code concerning guardians apply to temporary
 8 guardians."

9 Section 11. Section 72-5-321, MCA, is amended to read:
 10 "72-5-321. Powers and duties of guardian of
 11 incapacitated person. (1) The powers and duties of a limited
 12 guardian are those specified in the order appointing the
 13 guardian. The limited guardian is required to report the
 14 condition of the incapacitated person and of the estate that
 15 has been subject to his possession and control, as required
 16 by the court or by court rule.

17 (2) A full guardian of an incapacitated person has
 18 the same powers, rights, and duties respecting his ward that
 19 a parent has respecting his unemancipated minor child,
 20 except that a guardian is not liable to third persons for
 21 acts of the ward solely by reason of the parental
 22 relationship. In particular and without qualifying the
 23 foregoing, a full guardian has the following powers and
 24 duties, except as modified limited by order of the court:

25 (a) To the extent that it is consistent with the terms

SB-104

1 of any order by a court of competent jurisdiction relating
2 to detention or commitment of the ward, he is entitled to
3 custody of the person of his ward and may establish the
4 ward's place of abode within or without this state.

5 (b) If entitled to custody of his ward, he shall make
6 provision for the care, comfort, and maintenance of his ward
7 and whenever appropriate arrange for his training and
8 education. Without regard to custodial rights of the ward's
9 person, he shall take reasonable care of his ward's
10 clothing, furniture, vehicles, and other personal effects
11 and commence protective proceedings if other property of his
12 ward is in need of protection.

13 (c) A full guardian may give any consents or approvals
14 that may be necessary to enable the ward to receive medical
15 or other professional care, counsel, treatment, or service.

16 (d) If no conservator for the estate of the ward has
17 been appointed, he a full guardian may:

18 (i) institute proceedings to compel any person under a
19 duty to support the ward or to pay sums for the welfare of
20 the ward to perform his duty;

21 (ii) receive money and tangible property deliverable to
22 the ward and apply the money and property for support, care,
23 and education of the ward; but he may not use funds from his
24 ward's estate for room and board which he, his spouse,
25 parent, or child have furnished the ward unless a charge for

1 the service is approved by order of the court made upon
2 notice to at least one of the next of kin of the incompetent
3 ward, if notice is possible. He must exercise care to
4 conserve any excess for the ward's needs.

5 (e) A full guardian is required to report the
6 condition of his ward and of the estate which has been
7 subject to his possession or control, as required by the
8 court or court rule.

9 (f) If a conservator has been appointed, all of the
10 ward's estate received by the full guardian in excess of
11 those funds expended to meet current expenses for support,
12 care, and education of the ward must be paid to the
13 conservator for management as provided in this code, and the
14 full guardian must account to the conservator for funds
15 expended.

16 ~~(2)(3)~~ Any full guardian of one for whom a conservator
17 also has been appointed shall control the custody and care
18 of the ward. ~~A limited guardian of a person for whom a~~
19 ~~conservator has been appointed shall control those aspects~~
20 ~~of the custody and care of the ward over which he is given~~
21 ~~authority by the order establishing the limited~~
22 ~~guardianship, and The full guardian or limited guardian is~~
23 entitled to receive reasonable sums for his services and for
24 room and board furnished to the ward as agreed upon between
25 him and the conservator, provided the amounts agreed upon

1 are reasonable under the circumstances. The full guardian
2 ~~or limited guardian authorized to oversee such aspects of~~
3 ~~the incapacitated person's care~~ may request the conservator
4 to expend the ward's estate by payment to third persons or
5 institutions for the ward's care and maintenance.

6 ~~(4) No full guardian or limited guardian may~~
7 ~~involuntarily commit for mental health treatment or for~~
8 ~~treatment of a developmental disability or for observation~~
9 ~~or evaluation a ward who is himself unwilling or unable to~~
10 ~~give informed consent to such commitment, except as provided~~
11 ~~in 72-5-322, unless the procedures for involuntary~~
12 ~~commitment set forth in Title 53, chapters 20 and 21, are~~
13 ~~followed. This chapter does not abrogate any of the rights~~
14 ~~of mentally disabled persons provided for in Title 53,~~
15 ~~chapters 20 and 21."~~

16 Section 12. Codification instruction. Sections 1, 2,
17 5, 6, and 7 are intended to be codified as an integral part
18 of Title 72, chapter 5, part 3, and the provisions of Title
19 72, chapter 5, part 3, apply to sections 1, 2, 5, 6, and 7.

-End-

SB-404

1 *Senate* BILL NO. *404*
 2 INTRODUCED BY *Michael Neumann* *Deputy* *Comma*
 3 *Bentson*

4 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE
 5 LAW RELATING TO THE APPOINTMENT OF GUARDIANS FOR
 6 INCAPACITATED PERSONS; PROVIDING FOR LIMITED GUARDIANSHIPS;
 7 DEFINING WHO MAY BE GUARDIANS AND CLARIFYING THE PROCEDURE
 8 FOR APPOINTING GUARDIANS; AMENDING SECTIONS 72-5-312,
 9 72-5-313, 72-5-315 THROUGH 72-5-317, AND 72-5-321, MCA."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 NEW SECTION. Section 1. Definitions. In this part,
 12 unless the context requires otherwise, the following
 13 definitions apply:

14 (1) "Full guardian" means a guardian who possesses all
 15 the legal duties and powers enumerated in 72-5-321.

16 (2) "Limited guardian" means a guardian who possesses
 17 fewer than all of the legal duties and powers of a full
 18 guardian and whose rights, powers, and duties have been
 19 specifically enumerated by the court.

20 (3) "Guardian" includes a full guardian and a limited
 21 guardian.

22 NEW SECTION. Section 2. Purpose and basis for
 23 guardianship. Guardianship for an incapacitated person may
 24 be used only as is necessary to promote and protect the
 25

1 well-being of the person. The guardianship must be designed
 2 to encourage the development of maximum self-reliance and
 3 independence in the person and may be ordered only to the
 4 extent that the person's actual mental and physical
 5 limitations require it. An incapacitated person for whom a
 6 guardian has been appointed is not presumed to be
 7 incompetent and retains all legal and civil rights except
 8 those that have been expressly limited by court order or
 9 have been specifically granted to the guardian by the court.

10 Section 3. Section 72-5-312, MCA, is amended to read:

11 "72-5-312. Who may be guardian -- priorities. (1) Any
 12 competent person or a suitable institution, association, or
 13 nonprofit corporation or any of its members may be appointed
 14 guardian of an incapacitated person.

15 (2) Persons who are not disqualified have priority for
 16 appointment as guardian in the following order:

17 (a) a person, association, or private nonprofit
 18 corporation nominated by the incapacitated person, if the
 19 court specifically finds that at the time of the nomination
 20 the incapacitated person had the capacity to make a
 21 reasonably intelligent choice;

- 22 (a)(b) the spouse of the incapacitated person;
- 23 (b)(c) an adult child of the incapacitated person;
- 24 (c)(d) a parent of the incapacitated person, including
- 25 a person nominated by will or other writing signed by a

1 deceased parent;

2 ~~(d)(e)~~ any relative of the incapacitated person with
3 whom he has resided for more than 6 months prior to the
4 filing of the petition;

5 ~~(f) a relative or friend who has demonstrated a~~
6 ~~sincere, longstanding interest in the welfare of the~~
7 ~~incapacitated person;~~

8 ~~(g) a private association or nonprofit corporation~~
9 ~~with a guardianship program for incapacitated persons, a~~
10 ~~member of such private association or nonprofit corporation~~
11 ~~approved by the association or corporation to act as a~~
12 ~~guardian for the incapacitated person, or a person included~~
13 ~~on an official list of such association or organization as~~
14 ~~willing and suitable to act as guardian of incapacitated~~
15 ~~persons;~~

16 ~~(e)(h)~~ a person nominated by the person who is caring
17 for him or paying benefits to him.

18 ~~(3) The priorities established in subsection (2) are~~
19 ~~not binding, and the court shall select the person,~~
20 ~~association, or nonprofit corporation that is best qualified~~
21 ~~and willing to serve.~~

22 ~~(4) Except as provided in subsection (5), the court~~
23 ~~may not appoint a person, institution, association, or~~
24 ~~nonprofit corporation to be the guardian of an incapacitated~~
25 ~~person if the person, institution, association, or nonprofit~~

1 corporation;

2 ~~(a) provides or is likely to provide during the~~
3 ~~guardianship substantial services to the incapacitated~~
4 ~~person in the professional or business capacity other than~~
5 ~~in the capacity of guardian;~~

6 ~~(b) is or is likely to become during the guardianship~~
7 ~~period a creditor of the incapacitated person, other than in~~
8 ~~the capacity of guardian;~~

9 ~~(c) has or is likely to have during the guardianship~~
10 ~~period interests that may conflict with those of the~~
11 ~~incapacitated person; or~~

12 ~~(d) is employed by a person, institution, association,~~
13 ~~or nonprofit corporation who or which would be disqualified~~
14 ~~under subsections (4)(a) through (4)(c).~~

15 ~~(5) If the court determines that there is no qualified~~
16 ~~person willing and able to serve as guardian, the court may~~
17 ~~appoint an agency of the state or federal government that is~~
18 ~~authorized or required by statute to provide services to the~~
19 ~~person or to persons suffering from the kind of disability~~
20 ~~from which the incapacitated person is suffering or a~~
21 ~~designee of the agency, notwithstanding the provisions of~~
22 ~~subsection (4). Whenever an agency is appointed guardian,~~
23 ~~the court may also appoint a limited guardian to represent~~
24 ~~a specified interest of the incapacitated person. Whenever a~~
25 ~~limited guardian is appointed pursuant to this subsection,~~

1 ~~the specified interest of the incapacitated person is the~~
 2 ~~sole responsibility of the limited guardian and is removed~~
 3 ~~from the responsibility of the agency."~~

4 Section 4. Section 72-5-313, MCA, is amended to read:

5 "72-5-313. Visitor in guardianship proceedings
 6 defined. A visitor is, with respect to guardianship
 7 proceedings, a person who is trained in law, nursing, or
 8 social work, ~~medical care, mental health care, pastoral~~
 9 ~~care, education, or rehabilitation~~ and is an officer,
 10 employee, or special appointee of the court with no personal
 11 interest in the proceedings."

12 **NEW SECTION.** Section 5. Request for notice --
 13 interested person. (1) Any interested person who desires to
 14 be notified before any order is made in a guardianship
 15 proceeding may file with the clerk a request for notice upon
 16 payment of any fee required by statute or court rule. The
 17 clerk shall mail a copy of the demand to the guardian, if
 18 one has been appointed.

19 (2) A request is not effective unless it contains a
 20 statement showing the interest of the person making it and
 21 his address or that of his attorney and is effective only as
 22 to matters occurring after the filing. Any governmental
 23 agency paying or planning to pay benefits to the alleged
 24 incapacitated person is an interested person in guardianship
 25 proceedings.

1 **NEW SECTION.** Section 6. Contents of petition for
 2 appointment of guardian. (1) The petition for appointment of
 3 a guardian shall contain:

4 (a) the name, residence, and mailing address of the
 5 petitioner, his relationship to the alleged incapacitated
 6 person, and his interest in the matter;

7 (b) the name, residence, and mailing address of the
 8 alleged incapacitated person;

9 (c) the nature and degree of the alleged incapacity;

10 (d) If the petition in any way affects the management
 11 of the property of the alleged incapacitated person, the
 12 approximate value and description of his property, including
 13 any compensation, pension, insurance, or allowance to which
 14 he may be entitled;

15 (e) whether there is, in any state, a full guardian or
 16 limited guardian for the person or estate of the
 17 incapacitated person or a conservator of his property;

18 (f) the name, residence, and mailing address of the
 19 person whom the petitioner seeks to have appointed guardian;

20 (g) the names, residences, and nature of relationship,
 21 so far as is known or can reasonably be ascertained, of the
 22 persons most closely related by blood or marriage to the
 23 alleged incapacitated person;

24 (h) the name and residence of the person or
 25 institution having the care and custody of the alleged

1 Incapacitated person;

2 (i) the reasons why the appointment of a guardian is
3 sought and whether a limited guardianship or full
4 guardianship is requested;

5 (j) the facts supporting the allegations of incapacity
6 and the need for a guardian;

7 (k) the specific areas of protection and assistance
8 requested and the limitation of rights requested to be
9 included in the order of appointment;

10 (l) in the case of a petition for limited
11 guardianship, the particular powers and areas of authority
12 that the petition seeks to have vested in the limited
13 guardian as provided in [section 7] and the term for which
14 the limited guardianship is requested;

15 (m) in the case of a petition for full guardianship,
16 the length of time the guardianship is expected to last.

17 (2) The petition may also include a request for
18 temporary guardianship as provided in 72-5-317 if the
19 petitioner believes that the requisites of that section are
20 met and that the appointment of a temporary guardian,
21 pending the completion of guardianship proceedings, is
22 necessary to protect the welfare of the alleged
23 incapacitated person. The facts requiring appointment of a
24 temporary guardian shall be stated with specificity.

25 NEW SECTION. Section 7. Purposes for establishment of

1 limited guardianship. A petition seeking the establishment
2 of a limited guardianship shall specify the particular
3 powers that the limited guardian is proposed to exercise and
4 the particular areas of protection and assistance required.
5 The purposes for which a limited guardian may be appointed
6 include:

7 (1) to care for and maintain the alleged incapacitated
8 person;

9 (2) to assert and protect the rights and best
10 interests of the alleged incapacitated person;

11 (3) to provide timely and informed consent to
12 necessary medical procedures and procedures implemented in
13 connection with habilitation and training programs;

14 (4) to assist in the acquisition of necessary
15 training, habilitation, and education for the incapacitated
16 person;

17 (5) to exercise any other powers, duties, or
18 limitations in regard to the care of the incapacitated
19 person or the management of his property that the petition
20 shall explicitly specify and which may be no greater than
21 the powers a full guardian can exercise.

22 Section 8. Section 72-5-315, MCA, is amended to read:
23 "72-5-315. Procedure for court appointment of guardian
24 -- hearing -- examination -- interview -- procedural rights.
25 (1) The incapacitated person or any person interested in his

1 welfare, including the county attorney, may petition for a
2 finding of incapacity and appointment of a guardian.

3 (2) Upon the filing of a petition, the court shall set
4 a date for hearing on the issues of incapacity. The
5 allegedly incapacitated person may have counsel of his own
6 choice or the court may, in the interest of justice, appoint
7 an appropriate official or attorney to represent him in the
8 proceeding, who shall have the powers and duties of a
9 guardian ad litem.

10 (3) The person alleged to be incapacitated shall be
11 examined by a physician appointed by the court who shall
12 submit his report in writing to the court and be interviewed
13 by a visitor sent by the court. Whenever possible, the court
14 shall appoint as visitor a person who has particular
15 experience or expertise in treating, evaluating, or caring
16 for persons with the kind of disabling condition that is
17 alleged to be the cause of the incapacity. The visitor ~~also~~
18 shall ~~also~~ interview the person seeking ~~appointment as~~
19 ~~guardian who appears to have caused the petition to be filed~~
20 ~~and the person who is nominated to serve as guardian~~ and
21 visit the present place of abode of the person alleged to be
22 incapacitated and the place it is proposed that he will be
23 detained or reside if the requested appointment is made and
24 submit his report in writing to the court. Whenever possible
25 without undue delay or expense beyond the ability to pay of

1 the alleged incapacitated person, the court, in formulating
2 the judgment, shall utilize the services of any public or
3 charitable agency that offers or is willing to evaluate the
4 condition of the allegedly incapacitated person and make
5 recommendations to the court regarding the most appropriate
6 form of state intervention in his affairs.

7 (4) The person alleged to be incapacitated is entitled
8 to be present at the hearing in person and to see or hear
9 all evidence bearing upon his condition. He is entitled to
10 be present by counsel, to present evidence, to cross-examine
11 witnesses, including the court-appointed physician and the
12 visitor, and to trial by jury. The issue may be determined
13 at a closed hearing without a jury if the person alleged to
14 be incapacitated or his counsel so requests.*

15 Section 9. Section 72-5-316, MCA, is amended to read:

16 "72-5-316. Findings -- order of appointment. ~~The court~~
17 ~~may appoint a guardian as requested if it is satisfied that~~
18 ~~the person for whom a guardian is sought is incapacitated~~
19 ~~and that the appointment is necessary or desirable as a~~
20 ~~means of providing continuing care and supervision of the~~
21 ~~person of the incapacitated person. Alternatively the~~
22 ~~court may dismiss the proceeding or enter any other~~
23 ~~appropriate orders (1) If the court is satisfied that the~~
24 ~~person for whom a guardianship is sought is incapacitated~~
25 ~~and that judicial intervention in his personal freedom of~~

1 action and decision is necessary to meet essential
 2 requirements for his physical health or safety, it may
 3 appoint a full guardian having the powers described in
 4 72-5-321 or a limited guardian having the powers described
 5 in the order. If the court is satisfied that the allegedly
 6 incapacitated person could handle the essential requirements
 7 for physical health or safety if his financial resources
 8 were managed by another, it shall order that the petition be
 9 treated as a petition for a protective order under part 4 of
 10 this chapter and proceed accordingly. Alternatively, the
 11 court may dismiss the proceeding or enter any other
 12 appropriate order that is not inconsistent with the specific
 13 provisions of this part. In issuing its order, the court
 14 shall make specific findings of fact.

15 (2) The court may not invest a guardian with powers or
 16 duties beyond those sought in the petition and may, upon
 17 petition for a full guardianship, create a limited
 18 guardianship or conservatorship when the court determines
 19 that a limited guardianship or conservatorship is all that
 20 is required for the care and protection of the incapacitated
 21 person. The order shall specify whether a full or limited
 22 guardianship is being created. In the case of a limited
 23 guardianship, the order shall specify the particular powers
 24 and duties vested in the limited guardian, and the period
 25 for which the limited guardianship is created.

1 (3) No incapacitated person may be limited in the
 2 exercise of any civil or political rights except those that
 3 are clearly inconsistent with the exercise of the powers
 4 granted to the guardian unless the court's order
 5 specifically provides for such limitations. The order shall
 6 state that all rights not specifically limited are retained
 7 by the incapacitated person."

8 Section 10. Section 72-5-317, MCA, is amended to read:
 9 "72-5-317. Temporary guardians. (1) If an
 10 incapacitated person has no guardian and an emergency
 11 exists, the court may exercise the power of a guardian
 12 pending notice and hearing.

13 (2) If an appointed guardian is not effectively
 14 performing his duties or if there is no appointed guardian
 15 and the court further finds that the welfare of the
 16 incapacitated person requires immediate action, it may, with
 17 or without notice, appoint a temporary guardian for the
 18 incapacitated person for a specified period not to exceed 6
 19 months. The court may appoint either a full or a limited
 20 temporary guardian, depending on the needs and circumstances
 21 of the incapacitated person. The court may not invest a
 22 temporary guardian with more powers than are required by the
 23 circumstances necessitating the appointment. The order of
 24 appointment of a temporary guardian shall state whether a
 25 full or limited temporary guardianship is being created and,

1 in the case of a limited temporary guardian, the specific
 2 powers and duties of the limited temporary guardian.

3 (3) In case there is no person available and willing
 4 to act as temporary guardian for an incapacitated person who
 5 is in need of a temporary guardian except a person or entity
 6 who is ineligible to act as guardian pursuant to the
 7 provisions of 72-5-312(4), the court may appoint as
 8 temporary guardian a person or entity who would otherwise be
 9 ineligible under that provision to act as guardian. This
 10 subsection does not permit the appointment of a person or
 11 entity who has an actual conflict of interest in regard to
 12 the purpose for which the temporary guardianship is sought.
 13 A temporary guardian who is otherwise ineligible shall serve
 14 until a person or entity who is not ineligible to serve as
 15 guardian and who is otherwise qualified to be guardian is
 16 appointed by the court to act as temporary guardian, but in
 17 no case may he serve for longer than 6 months.

18 (3)(4) A temporary full guardian is entitled to the
 19 care and custody of the ward, and the authority of any
 20 permanent guardian previously appointed by the court is
 21 suspended so long as a temporary guardian has authority. A
 22 temporary limited guardian is entitled to exercise such
 23 powers as are specifically granted to him in the order of
 24 appointment, and the power of any permanent guardian
 25 previously appointed by the court to exercise those powers

1 is suspended so long as the temporary limited guardian has
 2 authority. The court by specific order may suspend all
 3 authority of the permanent guardian upon appointment of a
 4 temporary limited guardian. A temporary guardian may be
 5 removed at any time. A temporary guardian shall make any
 6 report the court requires. In other respects the provisions
 7 of this code concerning guardians apply to temporary
 8 guardians."

9 Section 11. Section 72-5-321, MCA, is amended to read:
 10 *72-5-321. Powers and duties of guardian of
 11 incapacitated person. (1) The powers and duties of a limited
 12 guardian are those specified in the order appointing the
 13 guardian. The limited guardian is required to report the
 14 condition of the incapacitated person and of the estate that
 15 has been subject to his possession and control, as required
 16 by the court or by court rule.

17 (2) A full guardian of an incapacitated person has
 18 the same powers, rights, and duties respecting his ward that
 19 a parent has respecting his unemancipated minor child,
 20 except that a guardian is not liable to third persons for
 21 acts of the ward solely by reason of the parental
 22 relationship. In particular and without qualifying the
 23 foregoing, a full guardian has the following powers and
 24 duties, except as modified limited by order of the court:

25 (a) To the extent that it is consistent with the terms

1 of any order by a court of competent jurisdiction relating
2 to detention or commitment of the ward, he is entitled to
3 custody of the person of his ward and may establish the
4 ward's place of abode within or without this state.

5 (b) If entitled to custody of his ward, he shall make
6 provision for the care, comfort, and maintenance of his ward
7 and whenever appropriate arrange for his training and
8 education. Without regard to custodial rights of the ward's
9 person, he shall take reasonable care of his ward's
10 clothing, furniture, vehicles, and other personal effects
11 and commence protective proceedings if other property of his
12 ward is in need of protection.

13 (c) A full guardian may give any consents or approvals
14 that may be necessary to enable the ward to receive medical
15 or other professional care, counsel, treatment, or service.

16 (d) If no conservator for the estate of the ward has
17 been appointed, he a full guardian may:

18 (i) institute proceedings to compel any person under a
19 duty to support the ward or to pay sums for the welfare of
20 the ward to perform his duty;

21 (ii) receive money and tangible property deliverable to
22 the ward and apply the money and property for support, care,
23 and education of the ward; but he may not use funds from his
24 ward's estate for room and board which he, his spouse,
25 parent, or child have furnished the ward unless a charge for

1 the service is approved by order of the court made upon
2 notice to at least one of the next of kin of the incompetent
3 ward, if notice is possible. He must exercise care to
4 conserve any excess for the ward's needs.

5 (e) A full guardian is required to report the
6 condition of his ward and of the estate which has been
7 subject to his possession or control, as required by the
8 court or court rule.

9 (f) If a conservator has been appointed, all of the
10 ward's estate received by the full guardian in excess of
11 those funds expended to meet current expenses for support,
12 care, and education of the ward must be paid to the
13 conservator for management as provided in this code, and the
14 full guardian must account to the conservator for funds
15 expended.

16 ~~(g) Any full guardian of one for whom a conservator~~
17 ~~also has been appointed shall control the custody and care~~
18 ~~of the ward. A limited guardian of a person for whom a~~
19 ~~conservator has been appointed shall control those aspects~~
20 ~~of the custody and care of the ward over which he is given~~
21 ~~authority by the order establishing the limited~~
22 ~~guardianship, and The full guardian or limited guardian is~~
23 ~~entitled to receive reasonable sums for his services and for~~
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25 ~~him and the conservator, provided the amounts agreed upon~~

1 are reasonable under the circumstances. The full guardian
2 ~~or limited guardian authorized to oversee such aspects of~~
3 ~~the incapacitated person's care~~ may request the conservator
4 to expend the ward's estate by payment to third persons or
5 institutions for the ward's care and maintenance.

6 ~~(4) No full guardian or limited guardian may~~
7 ~~involuntarily commit for mental health treatment or for~~
8 ~~treatment of a developmental disability or for observation~~
9 ~~or evaluation a ward who is himself unwilling or unable to~~
10 ~~give informed consent to such commitment, except as provided~~
11 ~~in 72-5-322, unless the procedures for involuntary~~
12 ~~commitment set forth in Title 53, chapters 20 and 21, are~~
13 ~~followed. This chapter does not abrogate any of the rights~~
14 ~~of mentally disabled persons provided for in Title 53,~~
15 ~~chapters 20 and 21."~~

16 Section 12. Codification instruction. Sections 1, 2,
17 5, 6, and 7 are intended to be codified as an integral part
18 of Title 72, chapter 5, part 3, and the provisions of Title
19 72, chapter 5, part 3, apply to sections 1, 2, 5, 6, and 7.

-End-

SB404

SENATE BILL NO. 404

INTRODUCED BY MAZUREK, DUSSAULT, HOLLIDAY, KEMMIS, BENGTON

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAW RELATING TO THE APPOINTMENT OF GUARDIANS FOR INCAPACITATED PERSONS; PROVIDING FOR LIMITED GUARDIANSHIPS; DEFINING WHO MAY BE GUARDIANS AND CLARIFYING THE PROCEDURE FOR APPOINTING GUARDIANS; AMENDING SECTIONS 72-5-312, 72-5-313, 72-5-315 THROUGH 72-5-317, AND 72-5-321, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. In this part, unless the context requires otherwise, the following definitions apply:

(1) "Full guardian" means a guardian who possesses all the legal duties and powers enumerated in 72-5-321.

(2) "Limited guardian" means a guardian who possesses fewer than all of the legal duties and powers of a full guardian and whose rights, powers, and duties have been specifically enumerated by the court.

(3) "Guardian" includes a full guardian and a limited guardian.

NEW SECTION. Section 2. Purpose and basis for guardianship. Guardianship for an incapacitated person may be used only as is necessary to promote and protect the

well-being of the person. The guardianship must be designed to encourage the development of maximum self-reliance and independence in the person and may be ordered only to the extent that the person's actual mental and physical limitations require it. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been specifically granted to the guardian by the court.

Section 3. Section 72-5-312, MCA, is amended to read:

"72-5-312. Who may be guardian -- priorities. (1) Any competent person or a suitable institution, association, or nonprofit corporation or any of its members may be appointed guardian of an incapacitated person.

(2) Persons who are not disqualified have priority for appointment as guardian in the following order:

(a) a person, association, or private nonprofit corporation nominated by the incapacitated person, if the court specifically finds that at the time of the nomination the incapacitated person had the capacity to make a reasonably intelligent choice;

~~(b)~~ (b) the spouse of the incapacitated person;
~~(c)~~ (c) an adult child of the incapacitated person;
~~(d)~~ (d) a parent of the incapacitated person, including a person nominated by will or other writing signed by a

1 deceased parent;

2 ~~(e)~~ any relative of the incapacitated person with
3 whom he has resided for more than 6 months prior to the
4 filing of the petition;

5 (f) a relative or friend who has demonstrated a
6 sincere, longstanding interest in the welfare of the
7 incapacitated person;

8 (g) a private association or nonprofit corporation
9 with a guardianship program for incapacitated persons, a
10 member of such private association or nonprofit corporation
11 approved by the association or corporation to act as a
12 guardian for the incapacitated person, or a person included
13 on an official list of such association or organization as
14 willing and suitable to act as guardian of incapacitated
15 persons;

16 ~~(h)~~ a person nominated by the person who is caring
17 for him or paying benefits to him.

18 (3) The priorities established in subsection (2) are
19 not binding, and the court shall select the person,
20 association, or nonprofit corporation that is best qualified
21 and willing to serve.

22 (4) Except as provided in subsection (5), the court
23 may not appoint a person, institution, association, or
24 nonprofit corporation to be the guardian of an incapacitated
25 person if the person, institution, association, or nonprofit

1 corporation;

2 (a) provides or is likely to provide during the
3 guardianship substantial services to the incapacitated
4 person in the professional or business capacity other than
5 in the capacity of guardian;

6 (b) is or is likely to become during the guardianship
7 period a creditor of the incapacitated person, other than in
8 the capacity of guardian;

9 (c) has or is likely to have during the guardianship
10 period interests that may conflict with those of the
11 incapacitated person; or

12 (d) is employed by a person, institution, association,
13 or nonprofit corporation who or which would be disqualified
14 under subsections (4)(a) through (4)(c).

15 (5) If the court determines that there is no qualified
16 person willing and able to serve as guardian, the court may
17 appoint an agency of the state or federal government that is
18 authorized or required by statute to provide services to the
19 person or to persons suffering from the kind of disability
20 from which the incapacitated person is suffering or a
21 designee of the agency, notwithstanding the provisions of
22 subsection (4). Whenever an agency is appointed guardian,
23 the court may also appoint a limited guardian to represent
24 a specified interest of the incapacitated person. Whenever a
25 limited guardian is appointed pursuant to this subsection,

1 the specified interest of the incapacitated person is the
 2 sole responsibility of the limited guardian and is removed
 3 from the responsibility of the agency."

4 Section 4. Section 72-5-313, MCA, is amended to read:
 5 "72-5-313. Visitor in guardianship proceedings
 6 defined. A visitor is, with respect to guardianship
 7 proceedings, a person who is trained in law, nursing, or
 8 social work, medical care, mental health care, pastoral
 9 care, education, or rehabilitation and is an officer,
 10 employee, or special appointee of the court with no personal
 11 interest in the proceedings."

12 NEW SECTION. Section 5. Request for notice —
 13 interested person. (1) Any interested person who desires to
 14 be notified before any order is made in a guardianship
 15 proceeding may file with the clerk a request for notice upon
 16 payment of any fee required by statute or court rule. The
 17 clerk shall mail a copy of the demand to the guardian, if
 18 one has been appointed.

19 (2) A request is not effective unless it contains a
 20 statement showing the interest of the person making it and
 21 his address or that of his attorney and is effective only as
 22 to matters occurring after the filing. Any governmental
 23 agency paying or planning to pay benefits to the alleged
 24 incapacitated person is an interested person in guardianship
 25 proceedings.

1 NEW SECTION. Section 6. Contents of petition for
 2 appointment of guardian. (1) The petition for appointment of
 3 a guardian shall contain:

4 (a) the name, residence, and mailing address of the
 5 petitioner, his relationship to the alleged incapacitated
 6 person, and his interest in the matter;

7 (b) the name, residence, and mailing address of the
 8 alleged incapacitated person;

9 (c) the nature and degree of the alleged incapacity;

10 (d) if the petition in any way affects the management
 11 of the property of the alleged incapacitated person, the
 12 approximate value and description of his property, including
 13 any compensation, pension, insurance, or allowance to which
 14 he may be entitled;

15 (e) whether there is, in any state, a full guardian or
 16 limited guardian for the person or estate of the
 17 incapacitated person or a conservator of his property;

18 (f) the name, residence, and mailing address of the
 19 person whom the petitioner seeks to have appointed guardian;

20 (g) the names, residences, and nature of relationship,
 21 so far as is known or can reasonably be ascertained, of the
 22 persons most closely related by blood or marriage to the
 23 alleged incapacitated person;

24 (h) the name and residence of the person or
 25 institution having the care and custody of the alleged

1 incapacitated person;

2 (i) the reasons why the appointment of a guardian is
3 sought and whether a limited guardianship or full
4 guardianship is requested;

5 (j) the facts supporting the allegations of incapacity
6 and the need for a guardian;

7 (k) the specific areas of protection and assistance
8 requested and the limitation of rights requested to be
9 included in the order of appointment;

10 (l) in the case of a petition for limited
11 guardianship, the particular powers and areas of authority
12 that the petition seeks to have vested in the limited
13 guardian as provided in [section 7] and the term for which
14 the limited guardianship is requested;

15 (m) in the case of a petition for full guardianship,
16 the length of time the guardianship is expected to last.

17 (2) The petition may also include a request for
18 temporary guardianship as provided in 72-5-317 if the
19 petitioner believes that the requisites of that section are
20 met and that the appointment of a temporary guardian,
21 pending the completion of guardianship proceedings, is
22 necessary to protect the welfare of the alleged
23 incapacitated person. The facts requiring appointment of a
24 temporary guardian shall be stated with specificity.

25 NEW SECTION. Section 7. Purposes for establishment of

1 limited guardianship. A petition seeking the establishment
2 of a limited guardianship shall specify the particular
3 powers that the limited guardian is proposed to exercise and
4 the particular areas of protection and assistance required.
5 The purposes for which a limited guardian may be appointed
6 include:

7 (1) to care for and maintain the alleged incapacitated
8 person;

9 (2) to assert and protect the rights and best
10 interests of the alleged incapacitated person;

11 (3) to provide timely and informed consent to
12 necessary medical procedures and procedures implemented in
13 connection with habilitation and training programs;

14 (4) to assist in the acquisition of necessary
15 training, habilitation, and education for the incapacitated
16 person;

17 (5) to exercise any other powers, duties, or
18 limitations in regard to the care of the incapacitated
19 person or the management of his property that the petition
20 shall explicitly specify and which may be no greater than
21 the powers a full guardian can exercise.

22 Section 8. Section 72-5-315, MCA, is amended to read:
23 "72-5-315. Procedure for court appointment of guardian
24 -- hearing -- examination -- interview -- procedural rights.
25 (1) The incapacitated person or any person interested in his

1 welfare, including the county attorney, may petition for a
2 finding of incapacity and appointment of a guardian.

3 (2) Upon the filing of a petition, the court shall set
4 a date for hearing on the issues of incapacity. The
5 allegedly incapacitated person may have counsel of his own
6 choice or the court may, in the interest of justice, appoint
7 an appropriate official or attorney to represent him in the
8 proceeding, who shall have the powers and duties of a
9 guardian ad litem.

10 (3) The person alleged to be incapacitated shall be
11 examined by a physician appointed by the court who shall
12 submit his report in writing to the court and be interviewed
13 by a visitor sent by the court. Whenever possible, the court
14 shall appoint as visitor a person who has particular
15 experience or expertise in treating, evaluating, or caring
16 for persons with the kind of disabling condition that is
17 alleged to be the cause of the incapacity. The visitor also
18 shall also interview the person seeking appointment as
19 guardian who appears to have caused the petition to be filed
20 and the person who is nominated to serve as guardian and
21 visit the present place of abode of the person alleged to be
22 incapacitated and the place it is proposed that he will be
23 detained or reside if the requested appointment is made and
24 submit his report in writing to the court. Whenever possible
25 without undue delay or expense beyond the ability to pay of

1 the alleged incapacitated person, the court, in formulating
2 the judgment, shall utilize the services of any public or
3 charitable agency that offers or is willing to evaluate the
4 condition of the allegedly incapacitated person and make
5 recommendations to the court regarding the most appropriate
6 form of state intervention in his affairs.

7 (4) The person alleged to be incapacitated is entitled
8 to be present at the hearing in person and to see or hear
9 all evidence bearing upon his condition. He is entitled to
10 be present by counsel, to present evidence, to cross-examine
11 witnesses, including the court-appointed physician and the
12 visitor, and to trial by jury. The issue may be determined
13 at a closed hearing without a jury if the person alleged to
14 be incapacitated or his counsel so requests."

15 Section 9. Section 72-5-316, MCA, is amended to read:

16 "72-5-316. Findings -- order of appointment. ~~The court~~
17 ~~may appoint a guardian as requested if it is satisfied that~~
18 ~~the person for whom a guardian is sought is incapacitated~~
19 ~~and that the appointment is necessary or desirable as a~~
20 ~~means of providing continuing care and supervision of the~~
21 ~~person of the incapacitated person. Alternatively, the~~
22 ~~court may dismiss the proceeding or enter any other~~
23 ~~appropriate order.~~ (1) If the court is satisfied that the
24 person for whom a guardianship is sought is incapacitated
25 and that judicial intervention in his personal freedom of

1 action and decision is necessary to meet essential
 2 requirements for his physical health or safety, it may
 3 appoint a full guardian having the powers described in
 4 72-5-321 or a limited guardian having the powers described
 5 in the order. If the court is satisfied that the allegedly
 6 incapacitated person could handle the essential requirements
 7 for physical health or safety if his financial resources
 8 were managed by another, it shall order that the petition be
 9 treated as a petition for a protective order under part 4 of
 10 this chapter and proceed accordingly. Alternatively, the
 11 court may dismiss the proceeding or enter any other
 12 appropriate order that is not inconsistent with the specific
 13 provisions of this part. In issuing its order the court
 14 shall make specific findings of fact.

15 (2) The court may not invest a guardian with powers or
 16 duties beyond those sought in the petition and may, upon
 17 petition for a full guardianship, create a limited
 18 guardianship or conservatorship when the court determines
 19 that a limited guardianship or conservatorship is all that
 20 is required for the care and protection of the incapacitated
 21 person. The order shall specify whether a full or limited
 22 guardianship is being created. In the case of a limited
 23 guardianship, the order shall specify the particular powers
 24 and duties vested in the limited guardian, and the period
 25 for which the limited guardianship is created.

1 (3) No incapacitated person may be limited in the
 2 exercise of any civil or political rights except those that
 3 are clearly inconsistent with the exercise of the powers
 4 granted to the guardian unless the court's order
 5 specifically provides for such limitations. The order shall
 6 state that all rights not specifically limited are retained
 7 by the incapacitated person."

8 Section 10. Section 72-5-317, MCA, is amended to read:
 9 "72-5-317. Temporary guardians. (1) If an
 10 incapacitated person has no guardian and an emergency
 11 exists, the court may exercise the power of a guardian
 12 pending notice and hearing.

13 (2) If an appointed guardian is not effectively
 14 performing his duties or if there is no appointed guardian
 15 and the court further finds that the welfare of the
 16 incapacitated person requires immediate action, it may, with
 17 or without notice, appoint a temporary guardian for the
 18 incapacitated person for a specified period not to exceed 6
 19 months. The court may appoint either a full or a limited
 20 temporary guardian, depending on the needs and circumstances
 21 of the incapacitated person. The court may not invest a
 22 temporary guardian with more powers than are required by the
 23 circumstances necessitating the appointment. The order of
 24 appointment of a temporary guardian shall state whether a
 25 full or limited temporary guardianship is being created and,

1 in the case of a limited temporary guardian, the specific
2 powers and duties of the limited temporary guardian.

3 (3) In case there is no person available and willing
4 to act as temporary guardian for an incapacitated person who
5 is in need of a temporary guardian except a person or entity
6 who is ineligible to act as guardian pursuant to the
7 provisions of 72-5-312(4), the court may appoint as
8 temporary guardian a person or entity who would otherwise be
9 ineligible under that provision to act as guardian. This
10 subsection does not permit the appointment of a person or
11 entity who has an actual conflict of interest in regard to
12 the purpose for which the temporary guardianship is sought.
13 A temporary guardian who is otherwise ineligible shall serve
14 until a person or entity who is not ineligible to serve as
15 guardian and who is otherwise qualified to be guardian is
16 appointed by the court to act as temporary guardian, but in
17 no case may he serve for longer than 6 months.

18 †3†(4) A temporary full guardian is entitled to the
19 care and custody of the ward, and the authority of any
20 permanent guardian previously appointed by the court is
21 suspended so long as a temporary guardian has authority. A
22 temporary limited guardian is entitled to exercise such
23 powers as are specifically granted to him in the order of
24 appointment, and the power of any permanent guardian
25 previously appointed by the court to exercise those powers

1 is suspended so long as the temporary limited guardian has
2 authority. The court by specific order may suspend all
3 authority of the permanent guardian upon appointment of a
4 temporary limited guardian. A temporary guardian may be
5 removed at any time. A temporary guardian shall make any
6 report the court requires. In other respects the provisions
7 of this code concerning guardians apply to temporary
8 guardians."

9 Section 11. Section 72-5-321, MCA, is amended to read:
10 "72-5-321. Powers and duties of guardian of
11 incapacitated person. (1) The powers and duties of a limited
12 guardian are those specified in the order appointing the
13 guardian. The limited guardian is required to report the
14 condition of the incapacitated person and of the estate that
15 has been subject to his possession and control, as required
16 by the court or by court rule.

17 ††(2) A full guardian of an incapacitated person has
18 the same powers, rights, and duties respecting his ward that
19 a parent has respecting his unemancipated minor child,
20 except that a guardian is not liable to third persons for
21 acts of the ward solely by reason of the parental
22 relationship. In particular and without qualifying the
23 foregoing, a full guardian has the following powers and
24 duties, except as modified limited by order of the court:

25 (a) To the extent that it is consistent with the terms

1 of any order by a court of competent jurisdiction relating
2 to detention or commitment of the ward, he is entitled to
3 custody of the person of his ward and may establish the
4 ward's place of abode within or without this state.

5 (b) If entitled to custody of his ward, he shall make
6 provision for the care, comfort, and maintenance of his ward
7 and whenever appropriate arrange for his training and
8 education. Without regard to custodial rights of the ward's
9 person, he shall take reasonable care of his ward's
10 clothing, furniture, vehicles, and other personal effects
11 and commence protective proceedings if other property of his
12 ward is in need of protection.

13 (c) A full guardian may give any consents or approvals
14 that may be necessary to enable the ward to receive medical
15 or other professional care, counsel, treatment, or service.

16 (d) If no conservator for the estate of the ward has
17 been appointed, he a full guardian may:

18 (i) institute proceedings to compel any person under a
19 duty to support the ward or to pay sums for the welfare of
20 the ward to perform his duty;

21 (ii) receive money and tangible property deliverable to
22 the ward and apply the money and property for support, care,
23 and education of the ward; but he may not use funds from his
24 ward's estate for room and board which he, his spouse,
25 parent, or child have furnished the ward unless a charge for

1 the service is approved by order of the court made upon
2 notice to at least one of the next of kin of the incompetent
3 ward, if notice is possible. He must exercise care to
4 conserve any excess for the ward's needs.

5 (e) A full guardian is required to report the
6 condition of his ward and of the estate which has been
7 subject to his possession or control, as required by the
8 court or court rule.

9 (f) If a conservator has been appointed, all of the
10 ward's estate received by the full guardian in excess of
11 those funds expended to meet current expenses for support,
12 care, and education of the ward must be paid to the
13 conservator for management as provided in this code, and the
14 full guardian must account to the conservator for funds
15 expended.

16 ~~(2)~~(3) Any full guardian of one for whom a conservator
17 also has been appointed shall control the custody and care
18 of the ward. A limited guardian of a person for whom a
19 conservator has been appointed shall control those aspects
20 of the custody and care of the ward over which he is given
21 authority by the order establishing the limited
22 guardianship. and The full guardian or limited guardian is
23 entitled to receive reasonable sums for his services and for
24 room and board furnished to the ward as agreed upon between
25 him and the conservator, provided the amounts agreed upon

1 are reasonable under the circumstances. The full guardian
2 or limited guardian authorized to oversee such aspects of
3 the incapacitated person's care may request the conservator
4 to expend the ward's estate by payment to third persons or
5 institutions for the ward's care and maintenance.

6 (4) No full guardian or limited guardian may
7 involuntarily commit for mental health treatment or for
8 treatment of a developmental disability or for observation
9 or evaluation a ward who is himself unwilling or unable to
10 give informed consent to such commitment, except as provided
11 in 72-5-322, unless the procedures for involuntary
12 commitment set forth in Title 53, chapters 20 and 21, are
13 followed. This chapter does not abrogate any of the rights
14 of mentally disabled persons provided for in Title 53,
15 chapters 20 and 21."

16 Section 12. Codification instruction. Sections 1, 2,
17 5, 6, and 7 are intended to be codified as an integral part
18 of Title 72, chapter 5, part 3, and the provisions of Title
19 72, chapter 5, part 3, apply to sections 1, 2, 5, 6, and 7.

-End-