S T A T E O F N E W Y O R K

3108

2011-2012 Regular Sessions

I N A S S E M B L Y

January 24, 2011

Introduced by M. of A. CALHOUN -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to making technical corrections thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 1201 of the civil practice law and rules, as amended by chapter 115 of the laws of 1981, is amended to read as follows:

S 1201. Representation of infant, incompetent person, or conservatee. Unless the court appoints a guardian ad litem, an infant shall appear by the guardian of his OR HER property or, if there is no such guardian, by a parent having legal custody, or, if there is no such parent, by another person or agency having legal custody, or, if the infant is married, by an adult spouse residing with the infant, a person judicially declared to be incompetent shall appear by the committee of his OR HER property, and a conservatee shall appear by the conservator of his OR HER property. A person shall appear by his OR HER guardian ad litem if he OR SHE is an infant and has no guardian of his OR HER property, parent, or other person or agency having legal custody, or adult spouse with whom he OR SHE resides, or if he OR SHE is an infant, person judicially declared to be incompetent, or a conservatee [as defined in section 77.01 of the mental hygiene law] and the court so directs because of a conflict of interest or for other cause, or if he OR SHE is an adult incapable of adequately prosecuting or defending his OR HER rights.

S 2. Rule 1202 of the civil practice law and rules, subdivisions (a) and (b) as amended by chapter 115 of the laws of 1981, is amended to read as follows:

Rule 1202. Appointment of guardian ad litem. (a) By whom motion made. The court in which an action is triable may appoint a guardian ad litem

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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at any stage in the action upon its own initiative or upon the motion of:

1. an infant party if he OR SHE is more than fourteen years of age; or

2. a relative, friend or a guardian, committee of the property, or conservator; or

3. any other party to the action if a motion has not been made under paragraph one or two OF THIS SUBDIVISION within ten days after completion of service.

(b) Notice of motion. Notice of a motion for appointment of a guardian ad litem for a person shall be served upon the guardian of his OR HER property, upon his OR HER committee or upon his OR HER conservator, or if he OR SHE has no such guardian, committee, or conservator, upon the person with whom he OR SHE resides. Notice shall also be served upon the person who would be represented if he OR SHE is more than fourteen years of age and has not been judicially declared to be incompetent.

(c) Consent. No order appointing a guardian ad litem shall be effective until a written consent of the proposed guardian has been submitted to the court together with an affidavit stating facts showing his OR HER ability to answer for any damage sustained by his OR HER negligence or misconduct.

S 3. Section 1203 of the civil practice law and rules is amended to read as follows:

S 1203. Default judgment. No judgment by default may be entered against an infant or a person judicially declared to be incompetent unless his OR HER representative appeared in the action or twenty days have expired since appointment of a guardian ad litem for him OR HER. No default judgment may be entered against an adult incapable of adequately protecting his OR HER rights for whom a guardian ad litem has been appointed unless twenty days have expired since the appointment.

S 4. Section 1206 of the civil practice law and rules, as amended by chapter 115 of the laws of 1981, the opening paragraph as amended by chapter 635 of the laws of 1988, subdivision (b) as amended by chapter 205 of the laws of 1995 and subdivision (c) as amended by chapter 464 of the laws of 1995, is amended to read as follows:

S 1206. Disposition of proceeds of claim of infant, judicially declared incompetent or conservatee. [Except as provided in EPTL 7-4.9, any] ANY property to which an infant, a person judicially declared to be incompetent or a conservatee is entitled, after deducting any expenses allowed by the court, shall be distributed to the guardian of his OR HER property, the committee of his OR HER property or conservator to be held for the use and benefit of such infant, incompetent, or conservatee except that:

(a) in the case of an infant who is married to and resides with an adult spouse, the court may order that the property be distributed to such adult spouse for the use and benefit of the infant; or

(b) if the value of the property does not exceed ten thousand dollars the court may order the property distributed to a person with whom such infant, incompetent or conservatee resides or who has some interest in his OR HER welfare to be held for the use and benefit of such infant, incompetent or conservatee; or

(c) the court may order that money constituting any part of the property be deposited in one or more specified insured banks or trust companies or savings banks or insured state or federal credit unions or be invested in one or more specified accounts in insured savings and loan associations, or it may order that a structured settlement agreement be executed, which shall include any settlement whose terms contain

provisions for the payment of funds on an installment basis, provided that with respect to future installment payments, the court may order that each party liable for such payments shall fund such payments, in an amount necessary to assure the future payments, in the form of an annuity contract executed by a qualified insurer and approved by the superintendent of insurance pursuant to articles fifty-A and fifty-B of this chapter. The court may elect that the money be deposited in a high interest yield account such as an insured "savings certificate" or an insured "money market" account. The court may further elect to invest the money in one or more insured or guaranteed United States treasury or municipal bills, notes or bonds. This money is subject to withdrawal only upon order of the court, except that no court order shall be required to pay over to the infant who has attained the age of eighteen years all moneys so held unless the depository is in receipt of an order from a court of competent jurisdiction directing it to withhold such payment beyond the infant's eighteenth birthday. Notwithstanding the preceding sentence, the ability of an infant who has attained the age of eighteen years to accelerate the receipt of future installment payments pursuant to a structured settlement agreement shall be governed by the terms of such agreement. The reference to the age of twenty-one years in any order made pursuant to this subdivision or its predecessor, prior to September first, nineteen hundred seventy-four, directing payment to the infant without further court order when he OR SHE reaches the age of twenty-one years, shall be deemed to designate the age of eighteen years; or

(d) the court may order that the property be held for the use and benefit of such infant, incompetent or conservatee as provided by subdivision (d) of [section] RULE 1210.

S 5. Rule 1208 of the civil practice law and rules, as amended by chapter 844 of the laws of 1968, is amended to read as follows:

Rule 1208. Settlement procedure; papers; representation.

(a) Affidavit of infant's or incompetent's representative. An affidavit of the infant's or incompetent's representative shall be included in the supporting papers and shall state:

1. his OR HER name, residence and relationship to the infant or incompetent;

2. the name, age and residence of the infant or incompetent;

3. the circumstances giving rise to the action or claim;

4. the nature and extent of the damages sustained by the infant or incompetent, and if the action or claim is for damages for personal injuries to the infant or incompetent, the name of each physician who attended or treated the infant or incompetent or who was consulted, the medical expenses, the period of disability, the amount of wages lost, and the present physical condition of the infant or incompetent;

5. the terms and proposed distribution of the settlement and his OR HER approval of both;

6. the facts surrounding any other motion or petition for settlement of the same claim, of an action to recover on the same claim or of the same action;

7. whether reimbursement for medical or other expenses has been received from any source; and

8. whether the infant's or incompetent's representative or any member of the infant's or incompetent's family has made a claim for damages alleged to have been suffered as a result of the same occurrence giving rise to the infant's or incompetent's claim and, if so, the amount paid

or to be paid in settlement of such claim or if such claim has not been settled the reasons therefor.

(b) Affidavit of attorney. If the infant or incompetent or his OR HER representative is represented by an attorney, an affidavit of the attorney shall be included in the supporting papers and shall state:

1. his OR HER reasons for recommending the settlement;

2. that directly or indirectly he OR SHE has neither become concerned in the settlement at the instance of a party or person opposing, or with interests adverse to, the infant or incompetent nor received nor will receive any compensation from such party, and whether or not he OR SHE has represented or now represents any other person asserting a claim arising from the same occurrence; and

3. the services rendered by him OR HER.

(c) Medical or hospital report. If the action or claim is for damages for personal injuries to the infant or incompetent, one or more medical or hospital reports, which need not be verified, shall be included in the supporting papers.

(d) Appearance before court. On the hearing, the moving party or petitioner, the infant or incompetent, and his OR HER attorney shall attend before the court unless attendance is excused for good cause.

(e) Representation. No attorney having or representing any interest conflicting with that of an infant or incompetent may represent the infant or incompetent.

(f) Preparation of papers by attorney for adverse party. If the infant or incompetent is not represented by an attorney the papers may be prepared by the attorney for an adverse party or person and shall state that fact.

S 6. Rule 1210 of the civil practice law and rules, as amended by judicial conference proposal number 2 for the year 1969, subdivision (d) as amended by chapter 464 of the laws of 1995, is amended to read as follows:

Rule 1210. Guardian of infant. (a) Petition for appointment; by whom presented; contents. An infant, if of the age of fourteen years or more, or a relative or friend of an infant, may present a petition to the court for appointment of a guardian. The petition shall state the age and residence of the infant, the name and residence of any living parent and of the person proposed as guardian, the relationship if any which such person bears to the infant, and the nature, status and value of the infant's estate.

(b) Hearing. The court shall ascertain the age of the infant, the amount of his OR HER personal property, the gross amount or value of the rents and profits of his OR HER real estate during his OR HER minority, and the sufficiency of the security offered by the proposed guardian. If the infant is of the age of fourteen years or more, the court shall examine him OR HER as to his OR HER voluntary nomination of or preference for a suitable guardian; if he OR SHE is under the age of fourteen, the court shall select and appoint a suitable guardian.

(c) Undertaking. The court shall make an order requiring or dispensing wholly or partly with an undertaking, in an amount and according to the conditions set forth in section seventeen hundred eight of the surrogate's court procedure act.

(d) Direction as to management of estate. The court in its discretion may direct that the principal of the estate or any part of it be invested in bonds of the state of New York or of the United States, or invested in bonds or other obligations of any county, city, town, village or school district of the state of New York, or deposited with

any bank, trust company, insured savings and loan association or insured savings bank or insured state or federal credit union which has been designated as a depository for such fund; or invested in a bond and mortgage on unincumbered and improved property within the state, having a value, to be shown to the satisfaction of the court, of at least double the amount of principal invested, for the benefit of the infant, and may direct that only the interest or income be received by the guardian.

(e) Filing of certified copy of order of appointment. Upon the appointment of a guardian of the person or property, or both, of an infant, the guardian shall file a certified copy of the order of his OR HER appointment with the clerk of the surrogate's court of the county in which he OR SHE has been appointed.

S 7. Rule 1211 of the civil practice law and rules, subdivision (a) as amended by chapter 276 of the laws of 1972, is amended to read as follows:

Rule 1211. Allowance for infant's support. (a) Petition to supreme court, county court or surrogate's court; contents. A petition to the supreme court, county court or the surrogate's court for the application of an infant's property or a portion thereof to the infant's support, maintenance or education shall set forth in detail:

1. the amount and nature of the infant's property, where it is situated and how invested, his OR HER income from such property or any other source and any claim against the infant;

2. whether or not the infant's parents are living and, if either of them is living, all circumstances relative to their ability to support the infant, and, if neither of them is living, the names of other persons legally obligated to support the infant and the circumstances relative to their ability to support the infant; and

3. the terms of any previous order made by any court within or without the state for similar relief and the disposition made of any property pursuant thereto.

(b) Notice. Such notice as the court shall direct shall be given to:

1. the guardian of the property of the infant, if the petition is presented by a person other than such guardian;

2. the infant's father if he is living or, if not, then to the infant's mother or, if neither parent is living, then to the person with whom the infant resides; and

3. the infant if he OR SHE is of the age of fourteen years or more.

S 8. This act shall take effect immediately.