House Legislative Analysis Section

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GUARDIANSHIPS FOR MINORS

House Bill 6018 (Substitute H-2)
Sponsor: Rep. David M. Gubow

House Bill 6019 (Substitute H-1)
Sponsor: Rep. Nick Ciaramitaro

First Analysis (11-14-90)
Committee: Judiciary

THE APPARENT PROBLEM:

Reports are that the numbers of children living with their parents' relatives or friends, rather than with their parents, have been increasing dramatically in recent years, and this rise has highlighted a number of deficiencies in the law on guardianships and child custody. In one of the saddest and most publicized examples, an aunt and uncle were granted limited guardianship of an infant upon his mother's request. Five years later, the child's mother petitioned the probate court to end the guardianship, the state supreme court held that a limited guardianship must be terminated upon petition of the parent at whose request the limited guardianship was created, and the child, Antwon Dumas, was returned to his mother. Although the supreme court also held that the probate court could issue various orders to assist the child in the transition from the home of the guardian to the home of the parent, no transition plan was devised for Antwon Dumas. Less than a year after the supreme court issued its decision (In re Rankin, In Re Dumas, 433 Mich. 592 [1989]), Antwon Dumas was beaten to death; his mother and her boyfriend plead guilty to a reduced charge of manslaughter on October 25, 1990. (The plea bargain evidently was offered to avoid having another child in the home testify against her mother.)

The Dumas case illustrates a trend in the use of limited guardianships. It appears that such guardianships originally functioned to enable a child to receive medical care and be enrolled in school while a parent was away for a fixed period of time — say away at school or receiving military training. However, more recently it appears that limited guardianships are being used to place unwanted children with family members, or to forestall action by the authorities investigating allegations of abuse or neglect in the parent's home. Such children are perceived to be at risk, but the probate code offers little to ensure adequate monitoring of the creation or termination of limited guardianships.

Problems with the law on guardianships are not confined to those of limited guardianships, however. A regular guardianship for a minor can be created only when parental rights have been terminated or suspended or when necessary for the immediate physical well-being of the minor. Thus, when a grandmother who has long been caring for a child abandoned by its mother must enroll the child in school or obtain medical treatment or health insurance for the child, she discovers that she cannot because she lacks the status of a guardian, and the court cannot appoint her guardian if parental rights have not been terminated.

Amendments have been proposed to remedy these and other problems associated with the law on guardianships.

THE CONTENT OF THE BILLS:

House Bill 6018 would amend the Revised Probate Code (MCL 700.424 et al.) to require placement plans for children placed under limited guardianships, require annual court review of guardianship placements for children under six years of age, specify procedures for termination of both limited and regular guardianships for children, and authorize the court to order various investigations and evaluations in child guardianship situations. Provisions for termination of guardianships would apply to all guardianships established prior to the effective date of the bill, as well as those established after. The bill could not take effect unless House Bill 6019 and Senate Bill 1039 were enacted. A more detailed explanation follows.

Creation of regular guardianships. The probate court could appoint a guardian when the parent(s) had allowed a minor to reside with another person and had not provided the other person with legal authority for the minor's care. A limited guardian could petition the court to be appointed guardian, except that the petition could not be based on the suspension of parental rights created by the order that established the limited guardianship. The court could continue to appoint a guardian when parental rights had been terminated or suspended. However, the bill would remove authority to appoint a guardian when the appointment was necessary for the immediate physical well being of the minor. The court could order the DSS to conduct an investigation of a proposed guardianship, or it could undertake an investigation itself. The court could at any time, for the welfare of the minor ward, order reasonable visitation and contact between the child and his or her parent(s).

Creation of limited guardianships. A limited guardianship could continue to be created upon request from a parent, but any created after the bill took effect would have to first have a placement plan developed by the parent(s) and guardian and approved by the court. The plan would have to include the parent's reason for seeking a limited guardianship, and provisions on visitation, guardianship duration, and financial support for the minor. A plan could be modified later if approved by both parties and the court. Plans would be developed using a court form that notified the parent that substantial failure to comply with the plan without good cause could result in the termination of parental rights.

Court review. The court would have to annually review a guardianship for a child under six years of age, and could review other minors' guardianships as it deemed necessary. A review would have to consider parties' compliance with the guardianship plan, whether the guardian had adequately provided for the welfare of the minor, the necessity of continuing the guardianship, the willingness and ability of the guardian to

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continue to provide for the welfare of the minor, and the effect on the minor's welfare if the guardianship was continued. Following review, the court could continue the guardianship, order institution or modification of a guardianship plan (the court could structure a plan for regular guardianships), terminate the guardianship and order the reintegration of the minor into the parent's home (the DSS could be ordered to supervise and help in the transition), continue the guardianship for one year, appoint an attorney to represent the minor, or refer the matter to the DSS.

Termination of guardianships. A parent could ask the court to terminate a guardianship, but if it was a limited guardianship, the parent would have to have a right to custody of the minor. After a petition was filed, the court could order the DSS or a court employee to conduct an investigation into the best interests of the minor, seek expert advice in what constituted the best interests of the minor, appoint a guardian ad litem or attorney to represent the minor, or take any other action considered necessary in a particular case.

For a limited guardianship, if the parent(s) had substantially complied with the placement plan, the court would have to terminate the limited guardianship. The court could issue orders to ease the reintegration of the child into the parent's home; the transition period could last up to six months prior to termination.

For regular guardianships and for limited guardianships where the parent(s) had not complied with the placement plan, the court could terminate the guardianship if termination was in the best interests of the minor. With termination, the court could arrange for a DSS-supervised and -aided transition period. The court could instead continue the guardianship for up to one year, if in the best interests of the minor, and order compliance with a placement plan (for a limited guardianship that preceded enactment of the bill, and for a regular guardianship, the court would develop a plan that would enable the child to return to the parent's home). If a guardianship was temporarily continued, the court would have to hold a hearing during the continuation period and decide whether to terminate the guardianship, appoint an attorney to represent the child, or refer the matter to the DSS. The attorney or the DSS could petition the juvenile court to take jurisdiction over the child.

The bill would define "best interests of the minor" much as it is in the Child Custody Act. The definition would encompass the child's emotional ties, the disposition of each party involved, the parties' abilities to meet the child's material needs, the permanence of the family units involved, the moral fitness of the parties involved, and other matters.

The above provisions on termination of guardianships would apply to all guardianships established before, on, or after the bill's effective date.

Custody actions. The probate court would have to terminate a guardianship, whether regular or limited, when notified that the circuit court has issued a custody order under House Bill 6019.

House Bill 6019 would amend the Child Custody Act (MCL 722.26 and 722.26b) to specify that a guardian or limited guardian of a child would have standing to bring an action in the circuit court seeking custody of the child. However, a limited guardian would not be allowed to bring the action if the parent(s) had substantially complied with the limited guardianship placement plan that the parties had developed under House Bill 6018. Upon the filing of the child custody action, all guardianship proceedings in the probate court would be suspended until the custody issue was settled. The guardianship would remain in effect during that time. In actions under the bill, the circuit court could request the supreme court to assign the probate judge involved to serve as a judge of the circuit court and decide the child custody matter. The bill could not take effect unless House Bill 6018 and Senate Bill 1039 were enacted.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The bills would go far toward improving protections for children placed in guardianship situations. They would demand guardianship placement plans, mandate regular and thorough court review of situations involving young children, suggest to the probate court that it issue orders to ease a child's transition back into his or her parent's home, and require the best interests of the child to be considered in most guardianship disputes. That "best interests of the child" standard would make reuniting parent and child secondary to a consideration of where the child would be happiest and best cared for. They would allow someone with a custodial role to be appointed regular guardian, and they would explicitly provide for a guardian or limited guardian to petition for custody in the circuit court, where the custody decision would be made applying the same considerations used in all custody disputes.

Against:

House Bill 6019 would encourage the assignment of a probate judge to decide a custody action brought by a guardian. Such assignments should not be encouraged, as it is circuit judges who are experienced in deciding custody disputes and are accustomed to determining what is in the best interests of the child; a presumption in favor of continuity for the child guides the Child Custody Act. Probate judges, on the other hand, operate under the probate code, which has a presumption for reuniting parents and children. In addition, by granting guardians standing to seek custody, the bill could be construed to prevent other third parties in custodial roles from seeking custody. Those situations could be very good places for the children involved, and the law should do all it can to ensure the child's best interest, not some legal status, rules.

Against:

With their inroads on parental authority, the bills could discourage the use of limited guardianships, even where such guardianships would be beneficial for the child.

Response: A parent who complied with the limited guardianship placement plan, in which he or she played a role in devising, would be able to have the guardianship terminated when he or she requested it, and the limited guardian would not be able to seek custody of the youngster in circuit court.

Against:

The bills could prove expensive for the probate court and the state, occupying court time and increasing funding needs.

POSITIONS:

The Department of Social Services supports the bills. (11-13-90)

The Michigan Probate Judges Association supports the concept of the bills. (11-13-90)

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The Family Law Section of the State Bar of Michigan has not yet reviewed the bills and does not yet have a formal position on them. (11-13-90)