



**House
Legislative
Analysis
Section**

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PROBATE CODE: GUARDIANSHIP

House Bill 4069 Substitute H-3
First Analysis (3-10-87) Floor Copy

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Sponsor: Rep. Perry Bullard
Committee: Judiciary

Mich. State Law Library

H.B. 4069 (3-10-87)

THE APPARENT PROBLEM:

The Probate Code's provisions for guardianship for legally incapacitated adults have received fresh scrutiny in past months, in part prompted by substantial increases in the numbers of guardianship petitions being filed in recent years. Those increases appear to be largely due to heightened liability concerns on the part of care-givers. Doctors once willing to give routine flu shots to nursing home residents now refuse to give routine care without obtaining informed consent, which often leads to someone filing a guardianship petition. Hospitals now often require a guardian's permission before discharging a patient to a nursing home. Many nursing homes will not accept a person without a responsible party having been given a durable power of attorney or appointed guardian. Many doubt that the consequences of having a full guardian appointed — virtually the loss of all civil rights — are justified by the medical community's liability fears. Further, reports persist of wards who have suffered from greedy or irresponsible guardians.

The probate code has been criticized for not doing enough to prevent inappropriate use of guardianship and provide due process of law to those faced with being deprived of their rights. It provides for the appointment of a guardian *ad litem* who is supposed to "represent" a potential ward who is without an attorney, but does not specify what a guardian *ad litem*'s duties are. The role of a guardian *ad litem* is unclear, and according to many, needs to be better distinguished from that of an attorney. Further, other than authorizing representation by counsel, the code does nothing to ensure that legal counsel is available to those who want it. The code's lack of specificity regarding guardians *ad litem*, appointment of temporary guardians, and report requirements has allowed inconsistent, and sometimes inadequate, procedures across the state. Finally, the code fails to prevent a full guardianship from being created for someone who may need a guardian only for certain matters. Amendments have been proposed to meet these and other criticisms.

THE CONTENT OF THE BILL:

The bill would amend the Revised Probate Code with regard to the rights of legally incapacitated people and people alleged to be legally incapacitated. The definition of "legally incapacitated person" would be changed so that instead of being predicated on an incapacity to make or communicate "responsible" decisions, the definition would refer to "informed" decisions. Other proposed changes generally deal with the petition for a finding of incapacity and appointment of a guardian, the duties of a guardian *ad litem*, court procedure in appointing a guardian, powers of a guardian, and modification or termination of a guardianship.

Guardianship Proceedings:

The bill would require that a petition for a finding of incapacity and appointment of a guardian contain specific facts about the person's condition and specific examples of the person's recent conduct that demonstrate the need for the appointment of a guardian. A copy of the petition would be attached to the notice of hearing that is provided to interested parties. Notice to the alleged incapacitated person would have to include information on the nature and legal effects of having a guardian appointed and on the person's rights, including the right to appointed legal counsel.

The court is at present empowered to appoint a physician to examine and report on the person alleged to be incapacitated; the bill would allow a mental health professional to be appointed. The report would not be a part of the public record, but would be available to various interested parties. The bill also would provide for the right of the alleged incapacitated person to secure an independent evaluation, which would be at the expense of the state (in an amount that the court approved as reasonable) if the person were indigent. Court-ordered and independent reports would have to include: details on physical or psychological infirmities and their effects on decision-making; a listing of all medications and their effects; prognosis for improvement and a recommendation for the most appropriate rehabilitation plan; and, the signatures of everyone who performed the evaluations upon which the report was based.

If the person alleged to be incapacitated wished to be present at the hearing, the court would have to take all practical steps to ensure his or her presence, including moving the site of the hearing if necessary.

At present, the court may appoint a guardian for a legally incapacitated person if that appointment is "necessary or desirable" as a means of providing continuing care and supervision of the person. The bill would delete "or desirable" from this provision.

Guardian Ad Litem; Legal Counsel; Rights:

When a person alleged to be incapacitated does not have an attorney, the court may appoint a guardian *ad litem* — someone who represents the person in the proceeding. The bill would require a guardian *ad litem* to visit the person. He or she would have to explain the nature and legal effects of having a guardian appointed, the hearing procedure, and the person's rights. Those rights would include the right to contest the petition, request limits on a guardian's powers, object to a particular person being appointed guardian, be present at the hearing, and to have legal counsel appointed.

If the person wished to exercise any of these specific rights, or if he or she or the guardian *ad litem* requested legal counsel, the court would appoint an attorney, if one had not already been secured. The state would bear the expense of legal counsel if the person was indigent. Upon appointment of legal counsel, the appointment of the guardian *ad litem* would terminate.

The bill would delete provisions for appointment of a visitor charged with interviewing the prospective guardian and the person who examined the potential ward, and visiting where the potential ward lives and is proposed to live.

Temporary Guardians:

The bill would modify the circumstances under which the court may, in an emergency, act as guardian or appoint a temporary guardian. Under the bill, there would have to be a hearing with notice to the person alleged to be incapacitated, a showing that the person was legally incapacitated, and it would have to appear that no other person had authority to act. A hearing with notice to various interested parties would have to be held within 28 days after the court had acted.

Choice of Guardian:

The court, when appointing a guardian, must appoint a person designated by the legally incapacitated person, providing the designated person was suitable and willing to serve. The bill would authorize the court to appoint a person named as attorney in fact through a durable power of attorney, if a specific designation was not made or the designated person was not suitable or willing (an attorney in fact also would be notified along with other interested parties of any guardianship hearings). Next in order of priority for appointment are various relatives, and of these, spouses and parents may name a guardian by will. The bill would limit this ability to name a guardian to those spouses and parents who were serving as guardian.

The court would be prohibited from appointing any agency that was directly providing housing, medical, or social services to the legally incapacitated person.

Powers and Duties; Limited Guardianships:

The court could grant to a guardian certain powers for only the period of time necessary to provide for the demonstrated need of the incapacitated person, and the guardianship would have to be designed to encourage the development of maximum self-reliance and independence in the person. A court order establishing guardianship would have to specify any limitations on powers and duration of the guardianship.

If the court found by clear and convincing evidence that the person was legally incapacitated and lacked the capacity to do some, but not all, of the tasks necessary to care for himself or herself, the court could appoint a limited guardian to provide guardianship services, but could not appoint a full guardian. (A "limited guardian" would be one who possessed fewer than all of the legal rights and powers of a full guardian, and whose rights, powers, and duties had been specifically enumerated by court order.) If by clear and convincing evidence the court found that the person was totally without capacity to care for himself or herself, the court would specify that finding of fact in any order, and could appoint a full guardian.

Language granting a guardian general parental powers and duties would be replaced with a statement that the guardian is responsible for the care, custody, and control of the ward, but is not liable to third persons by reason of that responsibility for acts of the ward. Specific powers enumerated by the code would be retained.

A guardian's report to the court would have to be made at least annually, and would have to include: details on the ward's mental, physical, and social condition and any change during the past year; the ward's living arrangement, any changes in the past year, and whether the guardian recommends a more suitable living arrangement; any services and medical treatment received by the ward; a list of the guardian's visits with and activities on behalf of the ward; and, a recommendation as to the need for continued guardianship.

To encourage self-reliance, the court may authorize an incapacitated person to handle part of his or her money without the consent or supervision of the guardian. This provision does not apply if a conservator has been appointed or protective orders issued; the bill would extend the provision to these situations, and authorize the court to allow the incapacitated person limited use of his or her money without the consent or supervision of a conservator.

A guardian would have to notify the court within 28 days of any change in the ward's place of residence.

Review, Change of Guardianships:

The court would have to review a guardianship not later than one year after appointing a guardian, and not later than every three years thereafter.

At present, the court may accept a guardian's resignation but does not have to. The bill would require the court to do so upon the filing and approval of a report meeting the requirements for the annual report.

The bill would delete language that allows the court to specify a period of up to one year during which no one may, without special leave, petition for an adjudication that the ward is no longer legally incapacitated. A ward or anyone interested in his or her welfare could request the court to remove a guardian, appoint a successor guardian, modify the terms of the guardianship, or terminate the guardianship. The court would schedule a hearing on a date within 28 days after receiving the request (MCL 700.8 et al.).

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The bill would improve protections for people subject to guardianship under the Probate Code. It recognizes that the potential consequences of a guardianship proceeding — the loss of personal freedom and civil rights — demand strong assurances of due process of law. Provisions requiring specific details in a guardianship petition, articulating the rights of a potential ward, ensuring proper notice and hearing, and requiring appointment of legal counsel upon request are among those that ensure due process and safeguard rights without interfering with necessary judicial discretion.

With its provisions for guardianships, especially limited guardianships, the bill ensures that no rights will be lost unnecessarily, that opportunities for self-determination will be preserved, that the least restrictive alternative will be favored, and that maximum flexibility will be provided to meet individual needs. These principles echo those embodied in the Mental Health Code's provisions for guardianship of the developmentally disabled, and the Uniform Guardianship and Protective Proceedings Act crafted by the National Conference of Commissioners on Uniform State Laws (both of which encourage limited

guardianships), and are consistent with recommendations of the Michigan Adult Protective Services Task Force of the State Court Administrative Office and the Department of Social Services.

The bill would promote high standards and statewide consistency through detailed provisions for evaluations and reports, duties of a guardian *ad litem*, and clarification of the respective roles of guardians *ad litem* and attorneys. An attorney's role is to be the client's advocate, irrespective of what the attorney believes to be best for the client. A guardian *ad litem*'s role is to act upon what he or she believes to be in the client's best interest. The bill would remedy the Probate Code's vagueness with regard to guardians *ad litem*, and with it the tendency for varying and sometimes inadequate procedures across the state. (For example, some guardians *ad litem* visit the potential ward, some do not; some interview people and write extensive reports, some simply review files.)

Also susceptible to inconsistent interpretation are the code's provisions for appointment of a temporary guardian in emergencies. In some counties, a temporary guardianship is imposed without a hearing, which arguably is permitted by the code, but is contrary to court rule. The bill would require that a hearing be held with notice to the potential ward. Finally, the bill would help to ensure responsible guardianships through requirements for regular reports and a prohibition against appointing a service provider whose appointment would present a conflict of interest.

Against:

By allowing full guardianships for only those totally without capacity to care for themselves, the bill would mandate limited guardianships for all but the comatose. A limited guardianship lacks the flexibility to meet a ward's changing needs, and raises the prospect of frequent returns to court to obtain newly-needed powers. The difficulty with enumerating powers for a limited guardian is that something may be omitted, and health care providers are sensitive to giving only authorized treatment. Without sufficient authority, a guardian will be unable to adequately serve the ward's best interests. Current law, which allows the court to enter any appropriate order, not necessarily an order for guardianship, accommodates individual situations where action is warranted, but guardianship is not necessary.

Against:

The bill should ensure that legal representation is provided to all people alleged to be incapacitated. An attorney should be available to every person facing the deprivation of rights that guardianship proceedings can cause, but the bill would provide for a court-appointed attorney only under certain conditions. Moreover, the bill may in effect deny legal counsel to people who have a few assets but cannot afford an attorney; the indigency standard is subject to judicial interpretation, and may be too strictly construed. Although automatic provision of counsel could increase state costs, those costs could be recouped by an increase in probate court fees. Further, cost increases would be minimized, because a number of counties are already paying attorneys to be guardians *ad litem*; those attorneys could instead be assigned to act as legal counsel.

Response: There is no need to provide legal counsel at government expense for anyone who wants it, and stronger provisions for appointment of an attorney could turn every guardianship proceeding into an adversarial one. Families are reluctant enough to petition for guardianship, and stringent requirements could discourage some from undertaking the traumatic task of obtaining a legal guardianship, and encourage others to disregard the law

and simply take over a relative's affairs. There rarely is any question over the need for a guardian; an attorney simply is not necessary most of the time.

Moreover, an attorney is no guarantee of protection, as an attorney could enter into a guardianship agreement with the counsel for the petitioner, and the court could approve it without a hearing. In some rural counties, it would be difficult to appoint a qualified attorney who was not familiar with the family of the potential ward. In fact, there are many who argue that the rights of the potential ward can be adequately protected by the guardian *ad litem*, who commonly is an attorney anyway.

Against:

The bill's provision for regular court review of a guardianship is vague and potentially costly. The bill simply states that a court must review a guardianship within one year after appointment, and every three years thereafter. If review is considered to include full hearings or a repeat of the procedures required to appoint a guardian, then the review requirement would be very expensive, and unnecessarily so. In most situations, the ward's condition will not improve, and little is to be gained by time-consuming review.

Response: The need for a guardianship should not be presumed. It should be up to the system to demonstrate that a guardianship is necessary.

POSITIONS:

The Department of Social Services supports the bill (3-9-87).

The Department of Mental Health supports the bill as a clear improvement over current law, but would prefer the bill to provide for an automatic right to legal counsel (3-5-87).

The Michigan Protection and Advocacy Service supports the bill, but would prefer automatic availability of counsel for all potential wards (3-9-87).

The Probate and Estate Planning Section of the State Bar of Michigan supports the bill, but would prefer that provisions that in effect prohibit a full guardianship be amended to give more discretion to the judge (3-6-87).

The Probate Judges Association supported the bill as originally introduced, but does not have a formal position on Substitute H-3 at this time (3-6-87).

The Office of Services to the Aging is reviewing the bill, and has no position at this time (3-9-87).

The American Association of Retired Persons is studying the bill and has no position at this time (3-6-87).

The Mental Health Association in Michigan has no position on the bill (3-9-87).