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BILL ANALYSIS

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**House Bill 4069 (Substitute S-1 as reported)****Sponsor:** Representative Perry Bullard**House Committee:** Judiciary**Senate Committee:** Judiciary**Date Completed:** 10-12-88**RATIONALE**

The Revised Probate Code's provisions for guardianship of legally incapacitated adults have been the subject of scrutiny in recent months, in part prompted by a substantial increase in the number of guardianship petitions filed in recent years. The increase reportedly is due largely to heightened liability concerns on the part of health care providers. Many people doubt, however, that the medical community's liability fears justify the consequences of having a guardian appointed (the loss of many privileges and rights, such as signing a lease, driving a car, and consenting to medical treatment). Further, reports persist of wards who have suffered from greedy or irresponsible guardians, and the growth of guardianship as an unregulated profit making business has alarmed advocates for the elderly.

The Code has been criticized for failing both to prevent inappropriate use of guardianship responsibilities and to provide due process of law to those faced with being declared legally incapacitated. Under the Code, any person can petition for the appointment of a guardian for another, and any "competent" person may be appointed guardian. Reportedly, guardians are perfunctorily granted extensive powers over elderly people considered to be legally incapacitated or unable to manage their own affairs. Although the Code provides for the appointment of a guardian ad litem to "represent" a potential ward who is without an attorney, it does not specify the duties of a guardian ad litem or distinguish the role of guardian ad litem from that of an attorney. Further, the Code authorizes representation by counsel but does not require that legal counsel be appointed for those who need it. Critics claim that the Code's lack of specificity regarding guardians ad litem, appointment of temporary guardians, and report requirements has allowed inconsistent, and sometimes inadequate, procedures to persist throughout the State. Finally, they claim, the Code fails to provide for partial guardianship for someone who may need a guardian only for certain matters.

**CONTENT**

The bill would amend the Revised Probate Code to change the definition of "legally incapacitated person". The definition currently is predicated on an incapacity to make or communicate "responsible" decisions; the bill would change that to "informed" decisions. The bill also would do all of the following:

- Make changes to the procedure by which persons can petition the court for a finding of incapacity and the

appointment of a guardian.

- Specify the duties of a guardian ad litem.
- Revise the procedures for the appointment of a guardian of an incapacitated person, and specify certain requirements of a guardian.
- Specify requirements of the report that a guardian must offer, as required by the court.
- Make other provisions pertaining to the removal of a guardian; notice of hearings; and temporary guardians.

The bill would apply to petitions filed on or after April 1, 1989.

**Petition for a Finding of Incapacity**

The bill would require that a petition for a finding of incapacity, whether filed by a person in his or her own behalf or by someone else interested in the person's welfare, contain facts about the person's condition and examples of recent conduct that demonstrated the need for appointment of a guardian.

The Code allows a court to order the allegedly incapacitated person to be examined by a physician appointed by the court. The bill would extend that provision to allow the court to order the examination to be performed by a "mental health professional", which the bill would define as someone trained and experienced in mental illness who also was a licensed physician, licensed psychologist, registered certified social worker, or registered licensed nurse who was a graduate of a State-approved school of nursing. The bill would require that the subsequent report be submitted to the court at least five days before the hearing. The report could not be made part of the public record of the proceeding, but would have to be available to the court or an appellate court, the allegedly incapacitated person and his or her legal counsel, the petitioner and his or her legal counsel, and to other persons that the court directed, and could be used pursuant to the Michigan Rules of Evidence. The bill specifies that the allegedly incapacitated person would have the right to secure independent evaluation at his or her own expense or, if indigent, at State expense. A report prepared subsequent to an evaluation would have to contain all of the following:

- A description of the person's physical or psychological infirmities.
- An explanation of the infirmities' interference with the person's ability to receive or evaluate information in making decisions.

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- A list of medication that the person was receiving, including the dosage and a description of the effects of the medication on his or her behavior.
- A prognosis for improvement and a recommendation for the most appropriate rehabilitation plan.
- The signatures of all persons who performed the evaluations.

The Code specifies that the person alleged to be incapacitated is entitled to be present at a hearing and to see or hear all evidence. The bill would require that all practical steps be taken to ensure his or her presence, if the person wished to be present, including moving the hearing.

#### Guardian Ad Litem

The bill specifies that the duties of a guardian ad litem would include all of the following:

- Visiting the allegedly incapacitated person.
- Explaining to the person the nature, purpose, and legal effects of the appointment of a guardian.
- Explaining the hearing procedure and the person's rights in the hearing procedure.
- Informing the person of the names of persons known to be seeking appointment as guardian.

(A guardian ad litem is a guardian appointed to represent a person for the purposes of a suit.)

A guardian ad litem also would have to determine whether the allegedly incapacitated person desired to be present at the hearing, desired to contest the petition, wished limits to be placed on a guardian's powers, or objected to a particular individual being appointed guardian. The guardian ad litem would have to inform the court of those determinations.

If the allegedly incapacitated person wished to contest the petition, to limit the guardian's powers, or to object to a particular person's being named guardian, the court would have to appoint legal counsel if counsel had not been secured, to represent that person. If he or she were indigent, the State would have to bear the cost of legal counsel. If the allegedly incapacitated person requested legal counsel or the guardian ad litem determined that legal counsel was in the person's best interest, the court would have to appoint legal counsel. Appointment of legal counsel would terminate the appointment of a guardian ad litem.

#### Guardianship

The Code allows the court to appoint a guardian for a person if it is shown by clear and convincing evidence that the person is legally incapacitated and that the appointment is "necessary or desirable" for providing care and supervision of the person. The bill would remove "desirable" as a criterion for appointment of a guardian.

The bill specifies that a guardian could be given only those powers "necessary to provide for the demonstrated need of the legally incapacitated person" and only for a necessary period of time. The guardianship would have to encourage the development of self-reliance and independence. A court order that established guardianship would have to specify any limitations on the guardian's powers and any time limits on the guardianship.

If the court found that the person lacked the capacity to do some, but not all, of the necessary tasks of self-care, the court could appoint a limited guardian. If the court found the person to be totally incapacitated, it would have

to specify that finding in any order and could appoint a full guardian. The court would have to review a guardianship within one year after appointment, and not later than every three years thereafter. The bill would prohibit the appointment as guardian of an agency that benefited financially from directly providing housing, medical, or social services to the incapacitated person. If a specific designation were not made or a designated guardian were not suitable or willing to serve, the court could appoint as guardian a person named as attorney in fact through a durable power of attorney.

The Code specifies that a guardian has the same rights and duties concerning his or her ward that a parent has concerning an unemancipated minor. The bill would delete that provision and, instead, specify that a guardian would be "responsible for the care, custody, and control of the ward". The bill also specifies that a guardian would have to notify the court of any change in the ward's address within 14 days of that change.

#### Guardian's Report

The Code requires a guardian to report on the condition of his or her ward and the estate subject to the guardian's possession or control. The bill would require that such a report be issued at least on an annual basis. Under the bill, the report would have to contain all of the following:

- The ward's mental, physical, and social condition.
- Any improvement or deterioration in the ward's physical, mental, and social condition that occurred during the past year.
- The ward's living arrangement and changes in the living arrangement that occurred during the past year.
- Whether the guardian recommended a more suitable living arrangement for the ward.
- A recommendation as to the need for continued guardianship.
- Any services or medical treatment received by the ward.
- A list of the guardian's visits with and activities on behalf of the ward.

#### Other Provisions

Removal of a Guardian. The Code provides that an order adjudicating incapacity can specify a minimum period during which a petition to end guardianship cannot be filed without special leave. The bill would remove that provision. The bill, instead, specifies that the ward, or a person interested in the ward's welfare, could petition for an order to remove the guardian, appoint a successor guardian, modify the terms of guardianship, or terminate guardianship. In addition, the bill specifies that the court would have to set a date for a hearing to be held within 28 days of receiving the petition.

Notice of Hearing. The Code requires notice of hearing for the appointment or removal of a guardian to be given to several specific persons. The bill would require that such notice be given to a person named as attorney in fact under a durable power of attorney. The bill also would remove a requirement that the notice be given to the spouse and parents of the allegedly incapacitated person if they could be found within this State.

Temporary Guardianship. The Code allows the court to exercise the power of guardian or to appoint a temporary guardian with only specified limited powers for a limited period of time if a legally incapacitated person does not have a guardian and an emergency exists. The bill specifies that, before acting in such a situation, the court would have to serve notice to the person and hold a hearing.

## **SENATE COMMITTEE ACTION**

The Senate Judiciary Committee adopted a substitute (S-1) to the bill which specifies that a court-ordered report of a physician or mental health professional could be used pursuant to the Michigan Rules of Evidence. The House-passed version of the bill merely would require that the report be made available to the court, the allegedly incapacitated person, the petitioner, and others whom the court directed to receive it. In addition, the substitute would prohibit the court from appointing as guardian any agency "which financially benefits from" providing direct care to a legally incapacitated person, while the House-passed version's prohibition would include any agency that directly provided care regardless of whether it benefited financially. Finally, the substitute specifies that it would apply to petitions filed on and after April 1, 1989.

## **FISCAL IMPACT**

The bill would have an indeterminate impact on State and local government. The costs of assigned counsel and independent evaluations would depend on the number of indigents who were alleged to be legally incapacitated.

## **ARGUMENTS**

### ***Supporting Argument***

The bill would improve protections for allegedly incapacitated persons. It recognizes that the potential consequences of a guardianship (i.e., the loss of personal freedoms and rights) demand strong assurances of due process of law. Provisions of the bill that would require details to be included in a guardianship petition, specify the rights of a potential ward, ensure proper notice and hearing procedures, and require appointment of legal counsel would go a long way toward ensuring due process and providing safeguards for the allegedly incapacitated person's rights without interfering with judicial discretion.

The bill's requirements for guardianships, and allowance for the appointment of limited guardians, would guard against the unnecessary loss of rights and would ensure that opportunities for self-determination were preserved, that the least restrictive alternative was favored, and that the process was flexible enough to meet individual needs. These provisions are similar to those found in the Mental Health Code and the Uniform Guardianship and Protective Proceedings Act drafted 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.

In addition, the bill would promote high standards and statewide consistency through its requirements for detailed evaluations and reports, provisions that specify the duties of a guardian ad litem, and clarification of the respective roles of guardians ad litem and attorneys. Finally, the bill would help to ensure responsible guardianships, and discourage guardianship as a business, through requirements for regular reports and a prohibition against appointing a service provider whose appointment could present a conflict of interest.

### ***Supporting Argument***

Allowing the appointment of limited guardians would address the liability fears of health care providers because a limited guardian could be appointed solely to make

health care decisions for a ward. Under existing law, doctors once willing to give routine flu shots to nursing home residents, for instance, often refuse to give routine care without obtaining informed consent, which often leads to the filing of a guardianship petition. Hospitals frequently 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's either being given a durable power of attorney or having been appointed as guardian.

### ***Supporting Argument***

The Code's provisions for appointment of a temporary guardian in emergencies are susceptible to inconsistent interpretation. In some counties, a temporary guardianship sometimes is imposed without a hearing, which some people claim is permitted under the Code, but is contrary to court rule. The bill would require that a hearing be held with notice to the potential ward.

### ***Opposing Argument***

By allowing full guardianships for only those who were totally without capacity to care for themselves, the bill could mandate limited guardianships for all but the comatose. A limited guardianship would lack the flexibility necessary to meet a ward's changing needs, and could require frequent returns to court in order for the guardian to obtain newly-needed powers. It would be too time-consuming and costly to go through the whole shopping list of things a person can or cannot do. The danger in specifying the powers of 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 would be unable to serve adequately the ward's best interests. Current law, which allows the court to enter any appropriate order, accommodates situations in which action is warranted, but full guardianship may not be necessary.

**Response:** Considering the sweeping removal of rights that a full guardianship often means, guardianship should be tailored to restrict only those activities that the person no longer can perform competently.

### ***Opposing Argument***

The bill's requirement of regular court review of a guardianship is vague and potentially costly. The bill simply states that a court would have to review a guardianship within one year after appointment, and every three years thereafter. If review were 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 perhaps, unnecessary. In most situations, the ward's condition would not improve, and little would be gained by time-consuming review procedures.

**Response:** The continued need for a guardianship should not be presumed. It should have to be demonstrated that a guardianship remains necessary. One should remember that, under the law, a guardian has the "responsibility of securing services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time" (emphasis added).

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.