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SFA

BILL ANALYSIS

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Senate Bills 1385 through 1390 (as introduced 9-27-00)

Sponsor: Senator Joel D. Gougeon (Senate Bill 1385)

Senator Mike Goschka (Senate Bill 1386)

Senator Mike Rogers (Senate Bill 1387)

Senator Bev Hammerstrom (Senate Bill 1388)

Senator Shirley Johnson (Senate Bill 1389)

Senator Glenn D. Steil (Senate Bill 1390)

Committee: Families, Mental Health and Human Services

Date Completed: 11-6-00

CONTENT

The bills all would amend the Estates and Protected Individuals Code (EPIC) to revise guardianship and conservatorship provisions. The bills would do all of the following:

- Require that a guardian ad litem appointed for an allegedly incapacitated individual consider an alternative to guardianship and conservatorship.
- Prohibit a person who commenced a guardianship or conservatorship proceeding from choosing or indicating a preference as to a particular person for appointment as guardian ad litem.
- Require a legally incapacitated individual's guardian to consult with him or her regarding major decisions, and require a ward's guardian to visit the ward at least every three months.
- Require that a guardian's scheduled report to the court also be provided to each "interested person".
- Require that, when a guardianship petition was filed, the court give the petitioner information regarding alternatives to guardianship.
- Regulate a guardian's or conservator's sale or other disposition of real property.

Senate Bill 1385

Guardianship Proceedings: Guardian Ad Litem

The Code specifies the duties of a guardian ad litem appointed for an individual alleged to be incapacitated. Among other things, those duties include making determinations, and informing the court of those determinations, on all of the following:

- Whether the individual wishes to be present at the hearing.
- Whether the individual wishes to contest the petition.
- Whether the individual wishes that limits be placed on the guardian's powers.
- Whether the individual objects to a particular person being appointed guardian.

The bill would add to that list whether there existed an appropriate alternative to appointment of a guardian. The alternative the guardian ad litem would have to consider would include at least all of the following:

- Appointment of a limited guardian or of a conservator.
- Requesting the court to order mediation.
- Requesting the court to issue an order giving another person authority limited to a specified purpose.
- Execution of a patient advocate designation, living will, do-not-resuscitate declaration, or durable power of attorney with or without limitations on purpose, authority, or time period.

Under EPIC, if an individual alleged to be incapacitated has legal counsel appointed for guardianship petition

proceedings, the appointment of a guardian ad litem terminates. Under the bill, if legal counsel were appointed before the guardian ad litem completed one or more of the duties specified above, the legal counsel's duties would include those duties not completed.

Conservatorship Proceedings: Consideration of Alternatives

The bill would require an attorney, guardian ad litem, physician or mental health professional, or visitor who represented, met with, examined, or evaluated an individual who was the subject of a petition for a protective order to consider whether, rather than any protective order, there was a more appropriate alternative, such as mediation. If not, the person would have to consider and recommend to the court the limits on the authority and time period that should be included in an order appointing a conservator or another protective order.

Senate Bill 1386

Under the bill, a person who commenced an action or procedure under Article V of EPIC (Protection of an Individual Under Disability and His or Her Property) or who made a motion for, or in another manner requested, the appointment of a guardian ad litem under Article V, could not choose or indicate in any manner the person's preference as to a particular person for appointment as guardian ad litem. The court could not follow a choice or recommendation for a particular person for appointment as guardian ad litem that violated the bill, unless the court stated on the record the reason, independent of the violative choice or recommendation, that the appointment was in the ward's or protected individual's best interest.

Senate Bill 1387

The Code specifies that, upon petition and after notice and hearing, the court may appoint a conservator or make another protective order for cause as provided in EPIC. The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:

- The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
- The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary or desirable to obtain or provide money.

The bill would remove "or desirable" from the second criterion above, which means that the court would have to find that protection was necessary to obtain or provide money.

Senate Bill 1388

The Code specifies that whenever meaningful communication is possible, a legally incapacitated individual's guardian "should" consult with the legally incapacitated individual before making a major decision affecting that individual. The bill, instead, would mandate that a guardian consult with the legally incapacitated individual before making those decisions. The bill also would require that a ward's guardian visit the ward within three months after the guardian's appointment and at least than once within three months after each previous visit.

Under EPIC, a guardian must report the condition of a ward and the ward's estate that is subject to the guardian's possession or control, as required by the court, at least annually. A report must contain all of the following:

- The ward's current mental, physical, and social condition.
- Improvement or deterioration in the ward's mental, physical, and social condition that occurred during the past year.
- The ward's present living arrangement and changes in his or her living arrangements that occurred during the past year.

- Whether the guardian recommends a more suitable living arrangement for the ward.
- Medical treatment received by the ward.
- Services received by the ward.
- A list of the guardian's visits with, and activities on behalf of, the ward.
- A recommendation as to the need for continued guardianship.

The bill would require that a guardian provide a copy of the report to the ward and to each "interested person". (Under EPIC, "interested person" includes, but is not limited to, an heir, devisee, child, spouse, creditor, and beneficiary and any other person who has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual; a person who has priority for appointment as personal representative; and a fiduciary representing an interested person. Identification of interested persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, a proceeding, and by the Supreme Court rules.)

Senate Bill 1389

The bill would require that, at the time a guardianship petition was filed, the court provide the petitioner with written information that set forth alternatives to appointment of a full guardian. Possible alternatives would have to include a limited guardian, conservator, court order giving another person authority to accomplish a specified purpose, patient advocate designation, living will, do-not-resuscitate declaration, or durable power of attorney with or without limitations on purpose, authority, or time period. The information would have to include an explanation of each alternative. If the petitioner chose an alternative, the guardianship petition filing fee would have to be applied to a petition filed to seek that alternative and any excess amount would have to be refunded to the petitioner.

Senate Bill 1390

The bill specifies that, if a conservator or a guardian with court authorization decided to sell or otherwise dispose of a protected individual's or ward's real property or interest in real property, the conservator or guardian would have to do all of the following:

- Serve notice on the ward or protected individual and each "interested person", sending with the notice a copy of a certified appraiser's appraisal of the property.
- File with the court a petition requesting approval of the sale or other disposition, along with the appraisal, a statement of one or more bases for the sale or other disposal, and proof of service.
- If the court approved, and the sale or other disposition were completed, file with the court a report that detailed the sale or other disposition.

If, after a hearing on a petition filed for the sale or disposition of real property, the court determined that the sale or other disposition was in the ward's or protected individual's best interest, the court would have to issue its approval.

Under EPIC, a minor's guardian has the powers and responsibilities of a parent who is not deprived of custody of the parent's minor and unemancipated child, except that a guardian is not legally obligated to provide for the ward from the guardian's own money and is not liable to third persons by reason of the parental relationship for the ward's acts. A guardian must take reasonable care of a ward's personal effects and commence a protective proceeding if necessary to protect the ward's other property. The bill specifies that, if a guardian commenced a protective proceeding because he or she believed that it was in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property, without appointing a conservator, the court could authorize the guardian to proceed under the provisions outlined above.

Under EPIC, a conservator acting reasonably in an effort to accomplish the purpose of his or her appointment, without court authorization or confirmation, may acquire or dispose of estate property, including land in another state, for cash or on credit, at public or private sale, or may manage, develop, improve, exchange, partition, change the character of, or abandon estate property. The bill would prohibit a conservator from selling or otherwise disposing of a protected individual's real property or interest in real property except in compliance with the provisions outlined above.

MCL 700.5305 & 700.5406 (S.B. 1385)
Proposed MCL 700.5108 (S.B. 1386)
MCL 700.5401 (S.B. 1387)
700.5314 (S.B. 1388)
700.5303 (S.B. 1389)
700.5215 et al. (S.B. 1390)

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bills would have an indeterminate impact on State and local government. The FY 2000-01 Family Independence Agency budget includes \$600,000 (80/20 Federal/State match) for guardianship contracts. Actual expenditures in FY 1998-99 totaled \$461,659. No Statewide data are available on current amounts paid by local units of government for guardians.

Fiscal Analyst: B. Bowerman

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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.