

CONSERVATORSHIPS

House Bill 5345 as passed by the House
Second Analysis (9-23-92)

Sponsor: Rep. Perry Bullard
Committee: Judiciary

THE APPARENT PROBLEM:

In response to continuing criticisms over the shortcomings of the law on guardianships for legally incapacitated adults, the legislature in 1988 enacted reforms that required guardianship petitions to include specific facts on why a guardianship was thought necessary, limited creation of guardianships to instances when it was demonstrated to be necessary, clarified the duties of a guardian ad litem, and extended certain aspects of due process of law, such as the right to be present and the right to have an attorney, to adults alleged to be in need of a guardian. Parallel reforms for the law on conservatorships were left for another time. (Basically, a guardian makes decisions affecting the person of the ward, while a conservator makes decisions regarding the ward's financial affairs. Both guardians and conservators are appointed by the probate court; a guardian may make certain financial decisions in cases where the court has not appointed a separate conservator.)

The law on conservatorships is subject to many of the same criticisms directed against the law on guardianships in 1988. The probate code does not require conservatorship petitions to be specific in their allegations, nor does it limit conservatorships and a conservator's powers to only those aspects of a person's financial affairs where outside management is needed. The code does not specify the duties of a guardian ad litem appointed in the course of conservatorship proceedings, or extend due process protections to a person alleged to need a conservator. In short, the code is criticized for failing to sufficiently protect rights and ensure that autonomy and independence are preserved to the maximum degree possible. Reports persist of people who have suffered at the hands of greedy or incompetent conservators, and the code's provisions for review of conservatorships have been found wanting. Legislation has been proposed to revise the law on conservatorships much as Public Act 398 of 1988 did for guardianships, with the aims of ensuring that conservatorships are imposed upon adults only when necessary, ensuring that a

conservator's powers are limited to the actual need of the individual, and reducing the possibility of abuse by conservators.

THE CONTENT OF THE BILL:

House Bill 5345 would amend the portion of the Revised Probate Code that deals with guardianships and conservatorships to revise provisions on conservatorships. Generally speaking, the bill would limit appointment of a conservator for an adult to situations where a need was demonstrated by clear and convincing evidence; require that the person alleged to need protection be notified of his or her rights; specify for all guardians ad litem duties equivalent to those imposed on guardians ad litem appointed in the course of guardianship proceedings; extend certain due process rights, including the right to counsel, to adults alleged to need conservators; and encourage the protected person to participate in the management of his or her financial affairs to the maximum extent possible. A more detailed explanation follows.

Conservatorship petition. The law now requires that a petition set forth the reason why appointment of a conservator or other protective order is necessary. The bill would instead require the petition to set forth specific facts about the person's condition and specific examples of the person's recent conduct that demonstrated the need for the appointment of a conservator or other protective order.

Notice and hearing; due process rights. Notice would be given to interested persons as provided by court rule, except that notice would have to be served personally on the person alleged to need protection. That person would have to receive a copy of the petition and be notified of the nature, purpose, and legal effect of the appointment of a conservator or other protective order; the notice would have to include an explanation of the person's rights.

An adult alleged to need protection would be entitled to be present in person at a hearing held under the guardianship and protective proceedings article of the probate code. If he or she wished to attend the hearing, all practical steps would be taken to ensure his or her presence, including moving the site of the hearing. An adult alleged to need protection would be entitled to see and hear all evidence bearing upon his or her condition, to be represented by legal counsel, to have a trial by jury, to present evidence, and to cross-examine witnesses, including the adult's current or former guardian ad litem. If requested by the adult alleged to need protection or by his or her attorney, a hearing could be closed and held without a jury.

Guardian ad litem. Upon receiving a petition for appointment of a conservator or other protective order, the court would appoint a guardian ad litem for the person alleged to need protection, unless the person had legal counsel or had brought the petition voluntarily. Appointment of a guardian ad litem would not be required for a minor. A guardian ad litem would represent the person in the proceeding, and would have specific duties along the lines of those imposed by Public Act 398 of 1988 for guardians ad litem appointed in the course of guardianship proceedings. Duties specified by the bill would apply to all guardians ad litem appointed for adults under the guardianships and protective proceedings article of the probate code. Those duties would include: personally visiting the adult alleged to need protection and explaining his or her rights and the legal process; and, determining and informing the court of whether the person wished to be present at the hearing, to contest the petition, to have limits placed on the conservator's powers, or to object to a particular person being appointed conservator. If the person alleged to need protection obtained legal counsel, the appointment of a guardian ad litem would terminate.

Establishment of conservatorship. The law at present allows appointment of a conservator for an adult when "necessary or desirable" to manage the protected person's funds; the bill would allow appointment only when necessary. After a hearing, the court could appoint a conservator or issue a protective order for a minor if it was satisfied that the minor's situation met current requirements for a demonstrated need for someone to manage the minor's financial affairs. For an adult, a conservator could be appointed only if a hearing revealed clear and convincing evidence that

requirements for appointment of a conservator were met.

A conservator would be granted power over only those assets for only the period of time necessary to provide for the demonstrated need of the protected person. As is currently the case, the court could choose to promote self-reliance by authorizing the individual to manage part of his or her money or property without interference from the conservator. A court order establishing a conservatorship would have to specify any assets and income not subject to the conservatorship, any other limitations on the conservator's powers, and any time limits on the conservatorship.

Powers and duties of conservator. The bill would expressly state that the general duty of a conservator would be to manage the estate and financial affairs of the protected person for the benefit of that person and his or her dependents. The powers and duties of a conservator would be much as they are now. However, the bill would specifically require a conservator to allow and encourage a protected person to participate to the maximum extent of his or her abilities in all decisions that affect him or her. The conservator also would have to allow and encourage the protected person to develop or regain as much as possible his or her capacity to manage his or her estate and financial affairs. The conservator and the court would have to take into account any known wishes of the protected person when exercising any power over the protected person's estate and financial affairs.

Selection of conservator. A court may now appoint an individual or a corporation with trustee powers to serve as a conservator; the bill would in addition allow appointment of a nonprofit corporation whose principal business is providing fiduciary services. The bill would explicitly forbid appointment of a public or private agency that financially benefits from directly providing housing, medical services, or social services to the protected person. The probate code lists possible conservators for consideration in a certain order of priority; the bill would place third on the list a person previously designated as attorney-in-fact through a durable power of attorney. At present, the nominee of a protected person is second on the list if the protected person is at least 14 years old and in the opinion of the court has sufficient mental capacity to make an intelligent choice; the bill would eliminate the

language calling for an evaluation of the protected person's mental capacity, and instead allow the nominee if he or she was suitable and willing to serve. The bill would delete language allowing a person on the priority list to nominate a person to serve in his or her place.

Inventory of estate. The probate code requires a conservator to complete an inventory of the protected person's estate soon after appointment. Under the bill, a copy of the inventory would be given to the protected person if he or she was at least 14 years old; the bill would delete language that required a copy to go to the protected person only if he or she had sufficient mental capacity. The court could waive the requirement for minors. Copies of the inventory also would go to all interested parties. Upon the objection of an interested party, the court could order the inventory amended.

Annual accounting. The law now calls for a conservator to account to the court on the administration of the trust upon resignation or removal or at other times as the court may direct (court rule, however, provides for an annual accounting). The bill would require a complete itemized account at least annually, as well as when called for by current statute and under other circumstances (such as when the protected person entered the age of majority). For minors' estates, the court could waive the annual accounting requirement if the funds were held in a restricted account under restrictions approved by the court and by the court-approved fiduciary holding the account. A copy of the account would be provided to the protected person and to all other interested parties. If the court did not hold a hearing after an account was filed, the court would have to either review the account or order a guardian ad litem to do so. The court would have to hold a hearing if an interested party or guardian ad litem filed an objection to an account.

Removal of conservator. Provisions for resignation or removal of a conservator would be much as they are now. However, the bill would explicitly allow the protected person, the conservator, or any other interested person to ask the court to remove the conservator, modify the terms of the conservatorship, or terminate the conservatorship, and this request could be by informal letter to the court or judge. Someone who knowingly interfered with this type of request would be subject to a

finding of contempt of court. If there was not clear and convincing evidence that the conditions for appointment of a conservator were met, the court would have to terminate a conservatorship.

MCL 700.461 et al.

FISCAL IMPLICATIONS:

The House Fiscal Agency says that the bill could create additional costs for local units of government, and would have no fiscal implications for the state. (8-25-92)

ARGUMENTS:

For:

The bill would improve protections for people subject to conservatorship under the probate code. It recognizes that many of the protections appropriate for people facing the appointment of guardians are also necessary for people facing conservatorships; while a conservator may not be formally authorized to make decisions about the person of an individual, the power to make financial decisions carries with it the power to control many aspects of a person's life. The loss of independence that can come with appointment of a conservator demands strong assurances of due process of law; the bill thus extends to the law on conservatorships many of the protections enacted by the 1988 reforms of the law on guardianships. Provisions requiring specific details in a conservatorship petition, articulating the rights of the person alleged to need protection, ensuring proper notice and hearing, and specifying a right to counsel are among those that would ensure due process and safeguard rights without interfering with necessary judicial discretion.

The bill's reforms would help to ensure that no rights are 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 1988 guardianship reforms, the Mental Health Code's provisions for guardianship of the developmentally disabled, and the Uniform Guardianship and Protective Proceedings Act drafted by the National Conference of Commissioners on Uniform State Laws. As the general population ages, the need for well-considered laws on guardians and conservators

grows. The bill and its companion reforms of 1988 thus are timely improvements to ensure that guardianships and conservatorships are appropriately crafted to meet individual needs.

Response:

The bill may be premature. A committee of the state bar has for some time been working on adapting the Uniform Probate Code for adoption in Michigan. While the bill, like the statute it amends, contains much that is in the model code, there are differences. For example, the model code differs from the bill in providing for a court-ordered medical examination of the person alleged to need protection, and in requiring the appointment of an attorney to represent and act as a guardian ad litem for any unrepresented adult alleged to need protection. The bill, on the other hand, proposes to delete current provisions for medical examination, distinguishes between the roles of attorney and guardian ad litem, and requires a guardian ad litem to be appointed only under certain circumstances. While many of the differences between the bill, current statute, and the model code are relatively minor, all differences should be carefully considered before a major revision is enacted.

Rebuttal:

The bill distinguishes between the roles of a guardian ad litem and an attorney for good reason. An attorney's proper 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. Other differences between the bill and the model code also exist for good reason: for example, the need for a medical examination is unclear when the issue is one of a person's financial mismanagement and there is no need to determine mental capacity.

Against:

The bill would be ineffective; it would do nothing to prevent the sorts of abuses, such as overcharging, that are among the more common problems with conservatorships. Under the bill, a conservator could still pay himself or herself "reasonable expenses", and it would still be up to the court to monitor conservatorships effectively. Rather than prevent abuses, the bill could make it too hard to appoint a conservator, something that should be able to be done relatively simply. After all, there are many people who are not legally mentally incapacitated and can manage their daily lives, but cannot manage their finances so that dependents are not harmed; common examples are compulsive

gamblers and besotted lovers. The bill, with its higher standards of proof and many procedural requirements, would raise impediments to the appointment of conservators. The process would become too expensive; it would add to burdens on court resources, and, ironically, increase costs for the very estate that the process is intended to conserve. The bill would continue to rely on courts to ensure that conservatorships were created and conducted appropriately, but could hamper a court's ability to identify and deal with problem cases by creating procedural burdens for all cases. Abuses with conservatorships evidently are not a great problem. A larger problem is that of recruiting and retaining qualified guardians and conservators, and this problem the bill would do nothing to solve. The bill would increase costs for an uncertain benefit.

Response:

The bill would guard against conservatorship abuses by barring an agency with a conflict of interest from being a conservator, and by ensuring that interested parties are notified of the right to object to an accounting. Any questions over a conservator's fees could continue to be dealt with as they are now: the court would have oversight functions, and if it determined that unreasonable fees had been charged, it could order the conservator to reimburse the estate, with interest. As for the additional costs presented by the bill's procedures, it should be noted that these are appropriate expenses to ensure that a person's right to make independent decisions is not curtailed unnecessarily. Questions of the need for a conservator generally arise only if there is a substantial estate, in which case any attorney fees would be deducted from the estate and would be money well-spent. Finally, a separate proposal, in the form of House Bill 5346, has been made to create a filing fee for certain kinds of probate proceedings and to use this money to defray certain costs of guardianship and conservatorship proceedings when the estate was insufficient to cover these costs. With such legislation, any public burdens under the bill would be minimal.

Against:

Earlier versions of the bill would have provided for court-appointed counsel at state expense. As control over a person's finances can be tantamount to control over a person's life, it is important to ensure protection for the rights of a person alleged to need a conservator; such protection comes with legal representation. While some may have misgivings over the perceived cost of court-

appointed counsel, actual costs of such a requirement would be low. The state would bear the expense only if the person was indigent, as in a situation where a conservator was thought necessary to manage a person's meager income to pay nursing home expenses.

Response:

Generally, the issue of a conservatorship only arises when there is a substantial estate, in which case the estate should pay for any legal representation that was requested by the person alleged to need a conservator. To provide for court-appointed counsel at state expense would be at best unnecessary, and could lead to increased costs for the state. The bill assures a right to counsel, without specifying who is to be responsible for payment. This should be sufficient.

Against:

Minors, especially young minors, are at least as susceptible as adults to conservatorship abuses, yet the bill would do nothing to secure minors' rights and could fail to adequately protect them from incompetent or unscrupulous conservators. The bill does not address whether a minor should have the right to attend hearings, whether he or she should be entitled to a guardian ad litem and legal representation, or whether the principle of "the least restrictive alternative" is to apply. Some shortcomings would make it too easy for a minor's estate to be wrongfully diminished, while others might tend to prevent older minors from participating in decisions on secondary and higher education, from expressing preferences or distaste for certain kinds of investments, or from being kept informed on financial matters in general, and thus unprepared for decision-making at age 18. In addition, the bill retains current provisions that call for a minor's attorney, if appointed by the court, to perform the role of a guardian ad litem. This is inconsistent with the rest of the bill and with the 1988 guardianship reforms, which distinguish between the roles of an attorney, who advocates for the client, and a guardian ad litem, who considers what is in the client's best interest.

Response:

A minor is presumed incompetent under the law, and many of the rights and procedural requirements appropriate for adults are not appropriate for minors. Perhaps more to the point, the bill is not intended to make changes in the law on conservatorships for minors; its focus is on the deficiencies in the law affecting adults. In any event, there appears to be nothing to prevent a

court from authorizing an older minor to participate in his or her financial affairs, in those rare cases where such circumstances arise.

Against:

The bill may express inappropriate expectations in demanding that a conservator allow and encourage a protected person to develop or regain his or her capacity to manage his or her estate and financial affairs. Such efforts would not be within a financial manager's expertise. While the bill surely does not mean for conservators to operate as therapists and social workers, the language is confusing and should be clarified.

Against:

The bill may not do enough to prevent conservatorships from being created under inappropriate circumstances. For example, the court would not have to appoint a guardian ad litem if the person alleged to need protection was the petitioner. However, what of situations where the person was bringing the petition under coercion from a relative or other person who aimed to be the conservator? It is not clear that there would be adequate procedural safeguards to bring this sort of situation to light.

POSITIONS:

The Department of Social Services has no position at this time. (8-27-92)

The Michigan Probate Judges Association supported the bill as reported from committee, but has not re-evaluated its position since the bill was amended by the House. (8-27-92)

The Michigan State Legislative Committee of the American Association of Retired Persons supported earlier versions of the bill that provided for appointment of counsel. (9-23-92)