



**House
Legislative
Analysis
Section**

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CONSERVATORSHIPS

**House Bills 5345 and 5346
Sponsor: Rep. Perry Bullard
Committee: Judiciary**

Complete to 12-2-91

A SUMMARY OF HOUSE BILLS 5345 and 5346 AS INTRODUCED 11-21-91

House Bill 5345 would amend the portion of the Revised Probate Code (MCL 700.461 et al.) that deals with guardianships and conservatorships to revise provisions on conservatorships. (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.) Generally speaking, the bill would limit appointment of a conservator 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 people 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.

House Bill 5346 would amend the Revised Judicature Act (MCL 600.875 et al.) to establish a \$30 filing fee in the probate court for any of several types of proceedings, including guardianship, conservatorship, and paternity; there is no fee at present. The court would waive the fee if the moving party was unable to pay; also excused from the fee would be certain state and federal agencies. Fees would go into a state fund that would be used by the state court administrator to defray certain costs of guardianship and conservatorship proceedings when the estate of the respondent, minor, legally incapacitated person, or protected person was insufficient to cover those costs. (The bill also would explicitly authorize the probate court to charge the estates of such persons for certain services.) After required expenditures were paid, any balance in the fund attributable to the immediately preceding fiscal year could be used for reasonable expenses in administering the fund and for educational efforts on guardianship and conservatorship issues.

Either bill could take effect without the other being enacted. A more detailed description of House Bill 5345 follows.

Conservatorship petition. In addition to information now required, a petition for the appointment of a conservator or other protective order would have 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

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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, including the right to appointed legal counsel.

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 have to 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.

The court would have to appoint legal counsel for an adult alleged to need protection if he or she requested it, contested the petition, sought limits on a conservator's powers, or objected to a particular person being appointed conservator; the court also would have to appoint an attorney if the guardian ad litem determined it was in the person's best interest. The state would bear the expense of legal counsel for an indigent adult.

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. Upon appointment of legal counsel under the bill, 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 charge a conservator with allowing and encouraging 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.

Choice 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 stead.

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. The bill would require a complete itemized account at least annually, as well as when called for by current law and under other circumstances (such as when the protected person entered the age of majority). A copy of the account would be provided to the protected person and to all other interested parties. If the protected person was a

minor, the court could waive the requirement to provide him or her with a copy. 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.