House
Legislative
Analysis
Section

House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

GUARDIANS AND CONSERVATORS

Senate Bill 863 with committee amendment
Sponsor: Sen. George Z. Hart

Senate Bill 1385 as passed by the Senate
Sponsor: Sen. Joel D. Gougeon

Senate Bill 1386 as passed by the Senate
Sponsor: Sen. Mike Goschka

Senate Bill 1387 as passed by the Senate
Sponsor: Sen. Mike Rogers

Senate Bill 1388 (Substitute H-1)
Sponsor: Sen. Bev Hammerstrom

Senate Bill 1389 as passed by the Senate
Sponsor: Sen. Shirley Johnson

Senate Bill 1390 (Substitute H-1)
Sponsor: Sen. Glenn D. Steil

First Analysis (12-5-00)

House Committee: Family and Civil Law
Senate Committee: Families, Mental Health and Human Services

THE APPARENT PROBLEM:

The Estates and Protected Individuals Code establishes the rules for when a guardian may be appointed to take care of an individual and when a conservator may be appointed to take care of an individual's financial affairs. A guardian may be appointed for a person who is legally incapacitated - that is, unable to make informed decisions about his or her own care and custody. The reasons for such inability are varied and can include mental deficiency, mental illness, physical illness or disability, or substance abuse. A person who has had a guardian assigned to care for him or her is referred to as a "ward." A person who has had a conservator appointed to take care of his or her money or property is referred to as a "protected individual." A conservator may be assigned to protect the money or property of a person who has been confined, has disappeared, or is legally incapacitated, or when a person due to age or infirmity specifically requests that a conservator be appointed on his or her behalf. A person can have both a guardian and a conservator appointed on his or her behalf. [It should also be noted that persons with developmental disabilities may also have guardians appointed to care for them; however, the provisions outlining when and how such guardianships may be established are contained in the Mental Health Code.]

While most guardians and conservators are friends or family members, there are a number of individuals and corporations that serve as professional fiduciaries, and there are also a number of public and volunteer guardians. While problems may arise in any situation where one person is given authority over the person or belongings of another, a myriad of abuses have been chronicled regarding the actions of certain professional guardianship companies. These abuses have ranged from the outright theft of money and property to neglect of the wards themselves. In 1996, in response

to publicity over reports that a professional company appointed to act as guardian and/or conservator for its clients had mishandled the assets of more than 300 people in Wayne County, the Michigan Supreme Court established a task force to provide recommendations for improving the ability of trial courts to protect the rights and interests of those unable to protect themselves. The Task Force on Guardianships and Conservatorships released its report and recommendations on September 10, 1998. Legislation has been proposed to place some of those recommendations into statute.

THE CONTENT OF THE BILLS:

Senate Bill 863 would amend the Estates and Protected Individuals Code (EPIC) to allow a court to appoint or approve a "professional guardian" or "professional conservator", as appropriate, as a guardian, limited or temporary guardian, or conservator under EPIC or as a plenary guardian or partial guardian under the Mental Health Code. "Professional guardian" would mean a person that provided guardianship services for a fee and that was appointed for three or more individuals, but would not include an individual who was related to all but two of the wards for whom he or she was appointed. "Professional conservator" would mean a person that provided conservatorship services for a fee and that was appointed for three or more protected individuals, but would not include an individual who was related to all but two of the protected individuals for whom he or she was appointed. The bill would take effect on June 1, 2001.

Instead of broadly allowing a court to appoint a nonprofit corporation or a corporation as a guardian, limited or temporary guardian, conservator, plenary guardian, or partial guardian, the bill would allow a court could appoint or approve a professional guardian or professional conservator. A professional guardian or professional conservator could be appointed for the same reasons that currently apply regarding the appointment of a corporation -- that is, the court could appoint a professional only if the appointment were in the incapacitated individual's or protected individual's best interests and no other person were competent, suitable, and willing to serve in that fiduciary capacity.

A professional guardian would have to establish and maintain a visitation schedule so someone associated with the professional guardian visited the ward within three months after the professional guardian's appointment and at least once within three months after each previous visit. In addition, a professional guardian would have to ensure that there were a sufficient number of employees assigned to the care of wards for the purpose of providing proper and appropriate care.

The code specifically allows the court to appoint a competent person, including a nonprofit corporation whose primary function is to provide fiduciary services, as guardian of an incapacitated individual. The bill would delete reference to a nonprofit corporation. In appointing a guardian for an incapacitated individual, the court must appoint a person designated by the individual who is the subject of the petition, including a designation made in a durable power of attorney. If a person is not designated, or the person designated is not suitable or willing to serve, the court may appoint someone who is related to the incapacitated individual, in the following order of preference: 1) the individual's spouse; 2) an adult child of the individual; 3) a parent of the individual; 4) a relative of the individual with whom he or she has resided for more than six months before the filing of the petition; and 5) a person nominated by someone who is caring for the individual or paying benefits to him or her. If none of those persons is suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve. The bill would allow the appointment of a competent person, including a professional guardian.

The code allows the court to appoint an individual, a corporation authorized to exercise fiduciary powers, or a nonprofit corporation to serve as conservator of a protected individuals' estate. The bill would delete a nonprofit corporation from that authorization and add a professional conservator.

Senate Bills 1385-1390 would amend guardianship and conservatorship provisions of the Estates and Protected Individuals Code (EPIC) to do the following:

-- Require that a guardian ad litem appointed for an allegedly incapacitated individual consider alternatives to guardianship.
-- 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.

The bills would take effect on June 1, 2001.

Senate Bill 1385 would require a guardian ad litem appointed for an individual alleged to be incapacitated to determine whether there were one or more appropriate alternatives to the appointment of a full guardian. Before informing the court of his or her determination, the guardian ad litem would have to consider the appropriateness of, at least, the appointment of a limited guardian, including the specific powers and limitation on the powers that the guardian ad litem believed appropriate; appointment of a conservator or another protective order under EPIC; and execution of a patient advocate designation, do-not-resuscitate declaration, or durable power of attorney with or without limitations on purpose, authority, or duration. The guardian ad litem also would have to determine and inform the court whether a disagreement or dispute related to the guardianship petition could be resolved through court-ordered mediation.

The bill would require a guardian ad litem, physician or mental health professional, or visitor appointed under EPIC's conservatorship provisions, who met with, examined, or evaluated an individual who was the subject of a petition in a protective proceeding, to consider whether there was an appropriate alternative to a conservatorship; consider the desirability of limiting the scope and duration of the conservator's authority, if a conservatorship were appropriate; and report to the court based on those considerations.

Senate Bill 1386 provides that 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.

Senate Bill 1387 would require a court to find that protection was necessary to obtain or provide money, when appointing a conservator or making another protective order. The code specifies that, upon petition and after notice and hearing, the court may appoint a conservator or make another protective order for cause in relation to an individual's estate and affairs if the court determines that 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, and that the individual has property that will be wasted or dissipated unless proper management is provided, or that money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and protection is "necessary or desirable" to obtain or provide money. The bill would remove "or desirable" from that criterion.

Senate Bill 1388 would mandate that a guardian consult with a legally incapacitated individual before making a major decision affecting that individual. (Currently, whenever meaningful communication is possible, a legally incapacitated individual's guardian "should" consult with the individual.) The bill also would require that a ward's guardian visit the ward within three months after the guardian's appointment and at least 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. The bill would require that a guardian provide a copy of the report to the ward and to each "interested person" as specified in the Michigan Court Rules. (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 would require that, before a guardianship petition was filed, the court provide the person intending to file the petition with written information that set forth alternatives to the appointment of a full guardian. Possible alternatives would have to include a limited guardian, conservator, patient advocate designation, 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.

Senate Bill 1390 would prohibit a conservator from selling real property or an interest in real property without court approval. The court could approve the sale only if, after a hearing with notice to interested persons as specified in the Michigan Court Rules, the court considered evidence of the value of the property or interest and otherwise determined the sale to be in the protected individual's best interest. The bill specifies that, if a guardian commences a protective proceeding because he or she believes it was in the ward's best interest to sell or otherwise dispose of the ward's real property or an interest in real property, the court could appoint the guardian as special conservator and authorize the special conservator to proceed. A guardian could not otherwise sell the ward's real property or interest in real property.

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 without court approval. The court could approve the sale only if, after a hearing with notice to interested persons as specified in the Michigan Court Rules, the court considered evidence of the value of the property or interest and otherwise determined the sale to be in the protected individual's best interest.

The bill would also require a guardian to visit his or her ward within three months after his or her appointment as guardian and at least once during each succeeding three months.

MCL 700.1106 et al.

HOUSE COMMITTEE ACTION:

The House Committee reinserted a reference to developmentally disabled individuals that had been accidentally removed in Senate Bill 863. The committee also adopted substitutes for Senate Bills 1388 and 1390 to clarify language and to eliminate conflicts in the overlapping portions of the bills.

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bills would have an indeterminate impact on state and local government. The fiscal year 2000-2001 Family Independence Agency budget includes $600,000 (80/20 federal/state match) for guardianship contracts. Actual expenditures in fiscal year 1998-99 totaled $461,659. No statewide data are available on current amounts paid by local units of government for guardians. (11-13-00)

ARGUMENTS:

For:

Michigan is apparently leading the nation in the number of assigned guardians. According to an article in the *Detroit Free Press* (May 26, 2000), in the past 20 years the number of guardianships has quadrupled, to over 100,000. While Michigan is not the only state that has had problems with guardians, given the number of guardianships in the state it is important to provide for meaningful oversight. The provisions of the bills are the product of a task force on guardianships and conservatorships intended to improve the quality of life for people who have guardians or conservators appointed on their behalf. The changes will make the process work better not only for the courts, but for all the interested parties, without placing an undue burden on guardians and conservators or on the court system. Setting quality standards for professional guardians, for example, will make it less likely that unscrupulous people will be able to be appointed to guardianships.

Against:

Senate Bills 1388 and 1390 strike language that limits the requirement that a guardian consult with a legally incapacitated person "whenever meaningful communication is possible". This could be read to require a guardian to consult with a ward who was comatose or otherwise incapable of meaningful communication. Current law doesn't require this level of effort and it seems unlikely that it would be beneficial to require guardians to take such actions.

POSITIONS:

Representatives from the following groups either testified, submitted written testimony or otherwise indicated support for the bills (11-30-00):

• Adult Well-Being Services

• The Arc Michigan

• The Association for Community Advocacy

• Citizens for Better Care

• The Developmental Disabilities Council

• The Elder Law and Advocacy Section of the State Bar of Michigan

• Jewish Home and Aging Services

• Lutheran Social Services of Michigan

• Michigan Association of Centers for Independent Living

• The Michigan Probate Judges Association

• The Task Force on Guardianships and Conservatorships

Analyst: W. Flory

#This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.