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SFA BILL ANALYSIS

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Senate Bill 863 (as enrolled) **PUBLIC ACT 463 of 2000**
Senate Bills 1385 through 1390 (as enrolled) **PUBLIC ACTS 464 through 469 of 2000**
House Bill 5919 (as enrolled) **PUBLIC ACT 312 of 2000**
House Bill 5921 (as enrolled) **PUBLIC ACT 313 of 2000**
Sponsor: Senator George Z. Hart (Senate Bill 863)
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)
Representative Andrew Richner (House Bill 5919)
Representative Gary Woronchak (House Bill 5921)
Senate Committee: Families, Mental Health and Human Services
House Committee: Family and Civil Law

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RATIONALE

The probate court appointment of guardians and conservators in Michigan is governed by Article V of the Estates and Protected Individuals Code (EPIC). Guardians are appointed to take care of individuals' personal affairs while conservators manage individuals' financial affairs. A guardian may be appointed for a person who is legally incapacitated (i.e., lacking sufficient understanding or capacity to make or communicate informed decisions), while a conservator may be appointed to protect the money or property of a person who has been confined, has disappeared, or is legally incapacitated or when, due to age or infirmity, a person requests that a conservator be appointed. Guardians also may be appointed under the Mental Health Code to care for persons with developmental disabilities.

More guardians apparently are appointed in Michigan than in other states. Reportedly, a 1990 study of 22 states by the National Center for State Courts revealed that Michigan far exceeded other states in the number of guardianship petitions filed. In addition, in recent years, news media reports and legal actions have shed public light on abuses and anomalies in Michigan's guardianship and conservatorship system. In 1996, Detroit area news outlets investigated complaints that a corporate guardianship service in Wayne County appointed to act as guardian and/or conservator for its clients had mishandled the assets of more than 300 people it was appointed to protect. The company's principals were convicted of felony fraud and abuse charges in Federal court and received prison terms. Following those developments, a task force appointed by the Michigan Supreme Court recommended changes to the guardianship and conservatorship system in the State (as described in **BACKGROUND**, below).

More news reports in the spring and summer of 2000 detailed abuses and inconsistent practices in the exercise of guardianship and conservatorship powers in particular cases in southeastern Michigan. These included the lack of visits, or even contact, with wards or protected individuals; establishment of poor living arrangements for wards; dismissal of family members' concerns; poor record-keeping and lax court reporting; sale of property at low rates; and improper possession of a ward's or protected

individual's property. The *Detroit Free Press* series suggested that the system had limited court oversight and little opportunity for families to provide input.

As a result of the task force recommendations and continued reports of problems within the guardianship and conservatorship system in Michigan, many people advocated reforms to offer greater protection to wards and protected individuals, encourage the use of alternatives to guardianships and conservatorships, and require expanded court oversight of appointed guardians' and conservators' activities.

CONTENT

The bills amended the guardianship and conservatorship provisions of the Estates and Protected Individuals Code to do all of the following:

-- **Require that a guardian ad litem appointed for an allegedly incapacitated individual consider alternatives to guardianship; and, when a guardianship petition is filed, require the court to give the petitioner information about alternatives to guardianship.**
-- **Prohibit a person who commences a guardianship or conservatorship proceeding from choosing or indicating a preference as to a particular person for appointment as guardian ad litem.**
-- **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.**
-- **Require a legally incapacitated individual's guardian to consult with him or her regarding major decisions whenever meaningful communication is possible, and require a ward's guardian to visit the ward at least every three months.**
-- **Regulate a guardian's or conservator's sale or other disposition of real property.**
-- **Limit a guardian's authority to act as a patient advocate under certain circumstances.**
-- **Reduce the length of time after appointment that a conservator has to prepare and file an inventory of the estate subject to conservatorship, and require the conservator to provide the inventory to interested persons as specified in court rules.**
-- **Require that a conservator provide a copy of an annual account of the administration of a trust to the protected individual and to interested persons.**
-- **Require that a guardian's scheduled report to the court also be given to each interested person.**

House Bills 5919 and 5921 took effect on January 1, 2001. The Senate bills will take effect on June 1, 2001.

Senate Bill 863

Currently, the probate court may appoint or approve as a guardian, limited or temporary guardian, or conservator under EPIC, or as a plenary guardian or partial guardian under the Mental Health Code, a nonprofit corporation whose primary function is to provide fiduciary services in the same manner as other fiduciaries under EPIC. The bill, instead, allows the 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. Under the bill, a "professional guardian" or "professional conservator" is a person that provides guardianship or conservatorship services for a fee, but not an individual who is related to all but two of the wards or protected individuals for whom he or she is appointed.

As currently provided regarding a nonprofit corporation, the court may appoint a professional guardian or professional conservator only if the appointment is in the best interests of the ward, developmentally disabled individual, incapacitated individual, or protected individual, and no other person is competent, suitable, and willing to serve in that fiduciary capacity.

The bill requires a professional guardian to establish and maintain a visitation schedule

so that an individual associated with the professional guardian who is responsible for the ward's care visits 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 must ensure that a sufficient number of employees are 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 deletes reference to a nonprofit corporation. Under the Code, in appointing a guardian of 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. Under the bill, a competent person includes 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 deletes a nonprofit corporation from that authorization and adds a professional conservator.

The bill also specifies that, if the court appoints a for-profit or nonprofit nonbanking corporation organized under the laws of this State to serve in a fiduciary capacity as a conservator, the nonbanking corporation may act in that fiduciary capacity. This authorization, however, confers fiduciary capacity only to the extent necessary in the particular matter of each appointment and is not a general grant of fiduciary authority. A nonbanking corporation is not authorized to act in any other fiduciary capacity. (These provisions apply for the purposes of the statutory authorization required by a section of the Banking Code, under which a nonbanking corporation may act as a fiduciary only to the extent it is specifically authorized to do so by another Michigan statute (MCL 487.11105).)

Senate Bill 1385

Under EPIC, when a petition for a finding of incapacity and appointment of a guardian is filed, the court must appoint a guardian ad litem to represent the allegedly incapacitated person unless he or she has legal counsel. The guardian ad litem must personally visit the individual; explain to him or her the nature, purpose, and legal effects of a guardian's appointment; explain the hearing procedure and the individual's rights in the hearing; inform the individual of the name of any person seeking appointment as guardian; and determine, and inform the court of, the individual's wishes regarding the petition.

The bill also requires a guardian ad litem to determine whether there are 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 must 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 believes 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 must determine and inform the court whether a disagreement or dispute related to the guardianship petition can be resolved through court-ordered mediation.

In addition, the bill requires a guardian ad litem, physician, mental health professional, or visitor appointed under EPIC's conservatorship provisions, who meets with, examines, or evaluates an individual who is the subject of a petition in a protective

proceeding, to consider whether there is an appropriate alternative to a conservatorship; consider the desirability of limiting the scope and duration of the conservator's authority, if a conservatorship is appropriate; and report to the court based on those considerations. (A "visitor" is an individual appointed in a guardianship or protective proceeding who is trained in law, nursing, or social work, is an officer, employee, or special appointee of the court, and has no personal interest in the proceeding. When a petition for a conservator's appointment or another protective order is filed, the court may send a visitor to interview the individual to be protected.)

Senate Bill 1386

The bill provides that a person who commences an action or procedure under Article V of EPIC or who makes a motion for, or in another manner requests, the appointment of a guardian ad litem under Article V, may 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

The bill requires a court to find that protection is 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 removes "or desirable" from that criterion.

Senate Bill 1388

The bill mandates that a guardian consult with a legally incapacitated individual before making a major decision affecting that individual, whenever meaningful communication is possible. (Currently, EPIC provides that whenever meaningful communication is possible, a legally incapacitated individual's guardian "should" consult with the individual.) The bill also requires 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.

Senate Bill 1389

The bill requires that, before a guardianship petition is filed, the court provide the person intending to file the petition with written information that sets forth alternatives to the appointment of a full guardian. Possible alternatives must 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 must include an explanation of each alternative.

Senate Bill 1390

Under EPIC, 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 commences a protective proceeding because he or she believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property, the court may appoint the guardian as special conservator and authorize the special conservator to proceed as described below. A guardian may not otherwise sell the ward's real property or interest in real property.

The bill prohibits a conservator from selling or otherwise disposing of a protected individual's real property or interest in real property without court approval. The court may approve the sale or other disposal only if, after a hearing with notice to interested persons as specified in the Michigan Court Rules, the court considers evidence of the value of the real property or interest in it and otherwise determines the sale or other

disposal to be in the protected individual's best interest.

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. Under the bill, a conservator has this authority except as described above.

House Bill 5919

The bill does all of the following:

-- Restricts the ability of a court to grant a guardian the powers of a patient advocate (as described below).
-- Requires a court to include restrictions in letters of guardianship, or order a guardian to furnish a bond, if the court determines that a ward's property needs protection.
-- Reduces, from 63 days to 56 days, the period after appointment during which a conservator must prepare and file with the court a complete inventory of an estate subject to conservatorship.
-- Requires a conservator to give a copy of an inventory of an estate to the protected individual if he or she can be found and is at least 14 years old, and to interested persons as specified in the Michigan Court Rules (MCR). (Previously, a conservator had to give a copy to a protected individual who was at least 14, could be located, and had sufficient mental capacity to understand the arrangement.)
-- Requires a conservator to give a copy of an annual account of a trust's administration to a protected individual who can be located and is at least 14, and to interested persons as specified in the MCR.

The bill prohibits a court from granting a guardian the powers held by a patient advocate, if the court is aware that an individual has executed a patient advocate designation. If an individual executed a patient advocate designation before the court determines that he or she became legally incapacitated, a guardian may not exercise the power or duty of making medical treatment decisions that the patient advocate is designated to make. If, however, a guardianship petition alleges and the court finds that the patient advocate designation was not executed in compliance with EPIC, that the patient advocate is not complying with the terms of the designation or of EPIC, or that the patient advocate is not acting consistently with the ward's best interests, the court may modify the guardianship's terms to grant those powers to a guardian.

In addition, the bill provides that a legally incapacitated individual who has a guardian with responsibility for making medical treatment decisions cannot then designate another individual to make medical treatment decisions for the legally incapacitated individual.

House Bill 5921

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 but not less than annually. The bill requires that the guardian also serve the report on the ward and the interested persons as specified in the MCR.

MCL 700.1106 et al. (S.B. 863)
700.5305 & 700.5406 (S.B. 1385)
700.5108 (S.B. 1386)
700.5401 (S.B. 1387)
700.5314 (S.B. 1388)
700.5303 (S.B. 1389)
700.5215 et al. (S.B. 1390)
700.5306 et al. (H.B. 5919)
700.5314 (H.B. 5921)

BACKGROUND

In November 1996, at the urging of the State Bar and the State Court Administrative Office, the Michigan Supreme Court appointed 25 people to the Task Force on Guardianships and Conservatorships. Task force membership included probate court judges; legislators; executive branch officials; probate court registers and staff members; representatives of several advocacy groups; members of the State Bar, including probate practitioners; and representatives of academia. The task force was charged with examining "how the judiciary, legislature, and executive branch agencies can better protect

the interests of those for whom guardianship or conservatorship is sought" (Final Report of the Task Force on Guardianships and Conservatorships, September 10, 1998).

The task force convened in February 1997 and identified four subgoals for achieving the main goal of improving Michigan's guardianship and conservatorship system: 1) reducing the use of guardianships and conservatorships; 2) guaranteeing an appropriate number of qualified and concerned guardians; 3) guaranteeing adequate monitoring of guardians and court operations; and 4) instituting needed standards, training, and education. The task force divided itself into four committees based on the subgoals, with each assigned to develop recommendations for reaching the subgoals.

At its November 1997 meeting, the task force reviewed the committees' recommendations and reached consensus on 11 recommendations to be forwarded to the Supreme Court. The recommendations are summarized below.

1) Counties should establish a local resource to help citizens assess the need for guardianships and conservatorships, share resources, resolve issues outside the probate court system, and assist in developing alternatives to guardianship and conservatorship.
2) Legislation should be explored to address the inadequacy or poor recognition of existing statutory provisions for medical treatment decisions.
3) A broad educational effort, emphasizing the presumption of competency, and alternatives to guardianship, should be targeted at hospitals, nursing homes, and medical or psychological personnel.
4) Statutes and court rules should clarify that patient advocates' decisions have priority over the decisions of all other substitute decision-makers.
5) Probate court forms should be amended to provide for more screening information and separate findings on functional capacity and the necessity for appointment of guardians and conservators.
6) Guardians ad litem should include information evaluating functional capacity in their investigations and reports, and recommend the use of mediation services to resolve disputes over the terms of a prospective guardian.
7) Judges' training should include instruction on cognitive and physical impairments, mental illness, and the aging process, and they should receive subsequent training that refreshes old standards and introduces new issues.
8) Minimum ethical standards for professional guardians and professional conservators should be promulgated and enforced.
9) Courts that fail to follow statutory and court rule requirements should be compelled by the Supreme Court to do so.
10) Statutes, court rules, forms, and practices should require courts to review the annual accountings of guardians and conservators, order bonds or restrictions in relation to property and estates, and confirm both the decision to sell real estate and the sale price.
11) Courts should increase the recruitment and training of volunteer guardians, and more guardians who are funded and monitored by State agencies should be provided as guardians of last resort.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Ideally, guardianships and conservatorships are supposed to protect disabled or incapacitated individuals with an eye toward returning them to independence. Inherently, however, guardianships and conservatorships represent an intrusion into an individual's personal affairs and upon his or her privacy and independence. Although protection often is necessary, guardians are appointed in too many cases in Michigan and there is inadequate oversight of the guardianship and conservatorship system.

According to an article that was part of a *Detroit Free Press* series in the spring and summer of 2000 that focused on problems in

the guardianship system, the number of guardianship cases in Michigan has quadrupled in the past 20 years, to more than 100,000. In addition, court oversight of guardians' and conservators' activities is often lacking. The *Free Press* series highlighted particular cases in southeastern Michigan, pointing out various abuses, inconsistent practices, and glaring examples of poor administration. These included failure to meet with wards or protected individuals; making inconvenient or unhealthy living arrangements for wards; disallowing any input by family members; failing to comply with court reporting requirements; and selling property at below-market rates and without consulting wards or their families.

The bills address some of the problems in the guardianship and conservatorship system brought to light by these media reports and the recommendations of the Supreme Court task force. While not encompassing all of the task force recommendations, the bills should slow the growth of guardianship appointments, by requiring that courts and guardians ad litem consider alternatives such as power of attorney. Indeed, the *Free Press* series pointed out that in Washtenaw County, where families are educated on guardianship alternatives, the number of guardianship petitions declined from 185 in 1994 to 85 in 1999. Also, by requiring that professional guardians and professional conservators meet with wards and protected individuals on a regular basis and that reports be filed not only with the court, but with the families of the wards and protected individuals, the bills will enhance the protection of those vulnerable citizens for whom guardians and conservators are appointed. In addition, limiting guardians' and conservators' ability to sell a ward's or protected individual's real property and requiring court approval of such sales will protect those individuals' assets.

Response: While the bills may be a step toward improving the guardianship and conservatorship system, they do not go far enough. Legislation also should include task force recommendations regarding training and ethical standards. Those who serve as guardians and conservators should have to meet certain minimum criteria and be certified by professional associations. Lawyers who practice in this area of law and probate judges should be required to participate in periodic training in issues surrounding guardianship and conservatorship and in how to evaluate incapacitated individuals.

In addition, there should be restraints on certain relationships within the system. Judges should be prohibited from appointing guardians and conservators who have contributed greatly to their election campaigns, attorneys who serve as guardians or conservators in some cases should not be appointed guardians ad litem in other cases, and there should be limits or staff ratios applied to the number of guardianship cases one guardian may oversee.

Further, perhaps the guardianship and conservatorship system should be uniformly administered by the State, rather than by county probate courts. One of the biggest problems with Michigan's system may be its variance from county to county. A uniform system would ensure that all wards and protected individuals were treated fairly and consistently.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bills will have an indeterminate impact on State and local government. The FY 2000-01 Family Independence Agency budget included $600,000 (21.8 Federal/78.2 State match) for guardianship contracts. 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.