Legislative Analysis

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INCREASED PROTECTIONS FOR INDIVIDUALS WITH GUARDIAN OR CONSERVATOR

House Bill 4619 as passed by the House
Sponsor: Rep. Kate Segal

House Bill 5192 with committee amendment
Sponsor: Rep. Larry DeShazor

House Bill 6272 with committee amendment
Sponsor: Rep. Jon Switalski

Committees: Senior Health, Security, and Retirement (HB 4619)
Judiciary (HB 5192 & 6272)

First Analysis (8-3-10)

BRIEF SUMMARY: The bills would put in place additional protections for certain assets of wards and protected individuals, in order to prevent misuse or fraud by guardians and conservators.

FISCAL IMPACT: These bills would have a minimal fiscal impact on the judiciary system. The bills' new requirements may cause an increase in administrative workload for some courts, depending upon the number of relevant cases they handle.

THE APPARENT PROBLEM:

In recent years, several high profile stories about guardians and conservators bilking elderly or disabled individuals of their life savings have received media attention. In 1991 and 2000, several officials with a professional guardianship business, Guardian Inc., were sentenced to prison on charges of fraud and embezzlement involving hundreds of clients in Wayne County. More recently, dozens of seniors in Eaton County have been victims of guardians and conservators with a combined loss of over $3 million.

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 person can have both a guardian and a conservator appointed on his or her behalf. Generally speaking, a guardian is appointed when a finding is made by a court that a person is legally incapacitated—that is, unable to make informed decisions about his or her own care and custody. During the process to determine if an individual is legally incapacitated, a guardian ad litem is appointed to represent the best interests of the individual if he or she does not already have legal counsel of his or her own choosing. A person who has had a guardian assigned is referred to as a "ward" and 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."

Most often, the person appointed as a guardian or conservator is a relative, such as a spouse, child, or parent, although a guardian or conservator can also be a neighbor, attorney, bank, or business that operates a service as professional guardians and/or conservators. In some cases, the petitioner for guardianship is a government worker, i.e, a social services caseworker. Current law requires certain duties of a guardian, a conservator, and a guardian ad litem (who may be an attorney, social worker, or volunteer). For instance, guardians and conservators are required to file documentation of how the ward is cared for and how the personal property of the protected individual is managed.

Discovering why abuses continue to happen despite current protections in law and how to stop those abuses has been the subject of several formal and informal task forces convened since the mid-1990s, the largest being a task force on guardianships and conservators convened by the state Supreme Court in the mid-1990s and a more recent one convened by the governor in 2005 and 2006 on elder abuse. Though both task forces compiled recommendations believed to be necessary to protect the state's vulnerable citizens, few of those recommendations have been implemented.

For example, Michigan law prohibits a conservator from selling the home of a protected individual in his or her care without prior court approval. Yet, there are no prohibitions in place preventing the conservator from opening up a line-of-credit loan on the home's equity, or other type of home equity loan that essentially strips the home of its value, and then through fraud or mismanagement, use up the proceeds. It is believed that requiring a conservator to obtain court approval before a home equity loan could be secured would give an additional layer of oversight that could stop unnecessary or intentionally fraudulent loans from being made, thus protecting the assets of the protected individual.

In light of the growing numbers of guardian and conservator appointments, and the continuing problems with foreclosures associated with refinance loans, legislation has been offered to implement several more recommendations of the task forces.

THE CONTENT OF THE BILLS:

House Bills 4619, 5192, and 6272 taken together would amend several sections of the Estates and Protected Individuals Code (EPIC) to require a guardian ad litem to ask about the amount of assets considered as "liquid assets" belonging to the individual and include an estimate of the amount in his or her report to the court; grant a court discretion under certain circumstances to order the guardian to petition for appointment of a conservator; prohibit a conservator from selling, mortgaging, or disposing of the protected individual's property without court approval; and require, with certain exceptions, a conservator to furnish a bond.

House Bill 5192 and 6272 are tie-barred to each other and to House Bill 4619 (previously reported). Consequently, the bills could not go into effect unless the bills to which they are tie-barred are also enacted into law. House Bill 4619, previously reported by the

Senior Health, Security, and Retirement Committee, has passed the House and is pending Senate committee action.

House Bill 4916

House Bill 4619 would amend the Estates and Protected Individuals Code (MCL 700.5305). In addition to the current duties of a guardian ad litem (GAL) appointed for an individual alleged to be incapacitated, the bill would require a GAL to ask the individual and the petitioner for guardianship about the amount of cash and property readily convertible into cash that is in the individual's estate (liquid assets).

Under the bill, if a court determined that the total amount of cash and property readily convertible into cash exceeded the limit for administering a small estate under Section 3982 of the act, or if the court determined that financial protection was required for the ward for another reason, a court could order the guardian to petition for the appointment of a conservator or for another protective order for the ward's estate. If a conservator had not been appointed for a ward's estate, and the guardian determined that there were more liquid assets in the ward's estate than were reported by the guardian ad litem, the guardian would have to report the amount of the additional cash or property to the court.

As a part of his or her duties, a guardian ad litem must also make numerous determinations. The determinations must be included in the report the GAL prepares for the court. The bill would revise one of the required determinations. Currently, the GAL must determine whether there are one or more appropriate alternatives to the appointment of a full guardian. The code lists as alternatives the appointment of a limited guardian; appointment of a conservator or another protective order; or execution of a patient advocate designation, do-not-resuscitate declaration (DNR), or durable power of attorney. The bill would require the GAL to also determine whether one or more actions should be taken in addition to the appointment of a guardian, and would require the GAL to consider the appropriateness of at least each of the listed alternatives described above as alternatives or additional actions to the appointment of a guardian (e.g., guardian and conservator, or guardian and DNR order, etc.). In addition, in the report informing the court of the determinations, a GAL would have to include an estimate of the amount of cash and property readily convertible into cash that is in the individual’s estate.

House Bill 5192

The bill would amend the Estates and Protected Individuals Code (MCL 700.5410) to require a conservator to furnish a bond if the estate in question exceeded the small estate threshold. Specifically, a court would have to require the conservator, with some exceptions, to furnish a bond if the court determined that the value of cash and property readily convertible into cash in the estate and in the conservator's control exceeded the small estate threshold for administering a decedent's estate, adjusted under Section 1210 for the year in which the conservator was appointed. This requirement would not apply if one or more of the following applied:

- The estate contained no property readily convertible to cash and the cash was in a restricted account with a financial institution.
- The conservator had been granted trust powers under Section 4401 of the Banking Code.
- The court determined that requiring a bond would impose a financial hardship on the estate.
- The court stated on the record the reasons why a bond was not necessary.

The bill would take effect April 1, 2011.

House Bill 6272

The bill would amend the Estates and Protected Individuals Code (MCL 700.5422 and 700.5423) to specifically prohibit a conservator from mortgaging, pledging, or causing a lien to be placed on the protected individual's home without court approval. Currently, a conservator must obtain approval from the court in order to sell or otherwise dispose of the protected individual's real property (in general, land and buildings or fixtures on the land) or interest in real property. A sale or other disposal of real property or an interest in real property can only be approved if, after a hearing with notice to interested persons and consideration of evidence of the value of the property, the court determines the sale or disposal of the real property is in the protected individual's best interest. Under the bill, these provisions would also extend to a conservator's ability to mortgage, pledge, or cause a lien to be placed on the protected individual's real property or interest in real property.

A conservator would be required to record an order allowing the sale, disposal, mortgage, or pledge or placement of a lien on real property in the records of the register of deeds for the county in which the real property is located. Unless the order had been recorded or a person to whom an interest in the property was transferred had been given a copy of the order, the person would not be entitled to presume that the conservator had the power to make the transaction.

The bill would take effect April 1, 2011.

BACKGROUND INFORMATION:

The bills are reintroductions of House Bills 5186-5188 of the 2007-2008 legislative session. Those bills were passed by the House of Representatives but failed to see Senate action. Supporters of last year's initiative included the AARP Michigan, the Michigan Probate Judges Association, and the Michigan Probate Court Association.

ARGUMENTS:

For:

In many cases, petitions to appoint guardians for individuals are filed by people unfamiliar with the duties of guardians or conservators. Petitions are also filed by social

service workers or health care workers who may not be familiar with the personal details of the individual. Thus, it often happens that an individual for whom a guardian is appointed has a substantial estate that should be under the management of a conservator. If the guardian is not astute in money management, or is corrupt, the ward's assets can easily be frittered away or stolen.

One easy way to identify those cases in which a conservator should also be appointed is to have the guardian ad litem (GAL) assigned by the court make some initial inquiries as to the amount of cash and personal or real property – that could be easily converted into cash – that is owned by the individual. The GAL process is a fairly quick assessment of the individual's situation, and many GALs are either volunteers or paid below current market for their services. Therefore, the bill would not require an exact figure, which could take days or weeks to determine. However, even a few well placed questions can identify an estate that perhaps should be under the management of a conservator.

To that end, House Bill 4196 would require the GAL to include an estimate of the individual's liquid assets in the section of his or her report to the court in which a determination of whether or not an appointment of a conservator or another protective order would be an appropriate alternative or additional action to appointment of a guardian. The bill would also establish a threshold for the size of the estate for which a court could--but would not be mandated to--require the newly appointed guardian to petition for a conservator to manage the estate. If the guardian found assets that the GAL did not know about, and therefore did not report to the court, the bill would put an onus on the guardian to report those assets. The court could then reconsider whether a conservator should be appointed.

Identifying the amount of the liquid assets up front could also alert the potential guardian that if a conservator were not appointed, it would be his or her duty to responsibly manage the ward's estate. Knowing the amount of the funds involved may also help the court in its determination as to the suitability of a particular person's appointment as guardian.

For:

House Bill 6272 would close a loophole in the law that enables a conservator to obtain a mortgage or home equity loan on the home of a protected individual (the person found to be legally incapacitated). Reportedly, there have been cases of conservators stripping homes of equity through various loan products and then either embezzling those funds or mismanaging them. Regardless, the result is that when the protected individual needs that equity to provide for his or her needs, or to pass on to an heir, it is gone. Requiring court approval should add an extra layer of protection. This is particularly important in light of the numerous mortgage products offered today and the problems that have arisen from subprime loans.

For:

House Bill 5192 would address another concern raised by the Michigan Supreme Court and Governor Granholm's task forces to end elder abuse. Under the bill, a conservator

would have to furnish a bond if the estate exceeded the small estate threshold. If the conservator mismanaged or pilfered the assets, the bond would cover the loss to the protected individual. Basically, requiring a bond would provide another layer of oversight which should discourage fraud. Insurance companies providing the bonds also have the resources to aggressively go after "bad apples" and collect from those conservators the money paid out by the bond. An insurer is also apt to deny a bond to a person who has a sketchy credit history, a criminal history, or otherwise appears to be a bad risk; thus, without a bond, the person could not be appointed conservator.

So that the bond requirement would not provide hardship or be ordered unnecessarily, there would be several exceptions. For instance, if the conservator were the spouse or child of the individual, and it appeared the relative would provide proper care and management of the assets, a court would not have to require a bond, though the court would have to record the reasons why it determined the bond was unnecessary.

For:

As a package, the bills would provide a few more layers of oversight and protection for those for whom a guardian and/or conservator is appointed and would do so with minimal to no cost to the state. The measures won't cure all that ails the system, but will screen out some bad actors from being appointed guardians or conservators, will identify upfront some estates that should go into conservatorship that would be missed under the present process, and will provide a financial mechanism for protected individuals cheated by a conservator to recoup some or all of their losses.

Against:

The bills are an excellent first step in implementing some quick, low-cost fixes. However, according to an article published in *AARP The Magazine* entitled "Stolen Lives" in February, 2004, even professional guardians receive little training and are not required in most jurisdictions to be certified. By comparison, those certified by the National Guardianship Foundation, the certification arm of the National Guardianship Association, must adhere to a code of ethics and undergo continuing education. According to the article, "the vast majority of the (then) estimated 600,000 Americans under guardianship are receiving care from people without certification." Requiring certification of professional guardians, or even providing some minimal training and refresher courses for friends or family members appointed as guardians, could also help to protect the assets of wards from mismanagement or out and out fraud.

POSITIONS:

A representative of Elder Law of Michigan testified in support of House Bill 4619. (6-10-10)

A representative of the Michigan Advocacy Project indicated support for House Bill 4619. (6-10-10)

A representative of the Office of Services to the Aging testified in support of House Bills 5192 and 6272. (7-21-10)

The Prosecuting Attorneys Association of Michigan (PAAM) indicated support for House Bills 5192 and 6272. (7-21-10)

A representative of the Long Term Care Ombudsman indicated support for House Bills 5192 and 6272. (7-21-10)

The Michigan Bankers Association indicated a position of neutrality on House Bill 5192.

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■ 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.