SENATE FISCAL AGENCY

GUARDIANSHIP AND CONSERVATORSHIP REFORM
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In the fall of 2000, the Michigan Legislature passed a series of bills that, among other things, will require consideration of alternatives before a probate court appoints a guardian or conservator. The legislation also will subject guardians and conservators to certain new standards of practice and apply some new limitations on their actions. This article examines some recent developments in the oversight of Michigan's system of guardianship and conservatorship and reviews the 2000 legislation.

Background

The probate court appointment of guardians and conservators in Michigan is governed by 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.

According to a recent *Michigan Bar Journal* article, beginning in the 1970s: "Guardianship, at one time seen as a benign way to 'protect' people with disabilities, began to be seen more often as an intrusion into a person's basic civil and human rights and to be avoided if at all possible" (Kathleen Harris, "Guardianship Reform", December 2000). Despite a series of legislative and administrative "efforts to ensure that no one had a guardianship imposed unnecessarily, Michigan's guardianship numbers increased steadily". The article cites a 1990 study of 22 states in which "Michigan far exceeded the other states in numbers of guardianship petitions filed" (National Center for State Courts Statistic Project, 1990).

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.

In response to these developments, and at the urging of the State Bar and the State Court Administrative Office, the Michigan Supreme Court created the Task Force on Guardianships and Conservatorships in November 1996. 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).

Task Force Recommendations

The Supreme Court appointed 25 people to the task force, with Judge Phillip E. Harter, Chief Judge of the Calhoun County Probate Court, serving as chairperson. 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 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.

Meeting as a whole and through its committees during 10 months in 1997, the task force considered information from a variety of sources, including the results of two surveys conducted by the task force. One survey was completed by county probate registers "to discern the status of court operations and procedures concerning guardianship and conservatorship", while the other was aimed at petitioners for appointment of a guardian "to gauge what motivated petitioners to file and whether alternatives to guardianship had been considered" (Final Report of the task force).

At its November 1997 meeting, the task force reviewed the committees' recommendations and reached consensus on 11 recommendations to forward 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 (appointed on behalf of an individual in a judicial proceeding) 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.

The task force noted that many of the recommendations could increase costs both to local units and to State agencies, and that implementation of many of the recommendations could be done only with a corresponding increase in appropriations.

2000 Legislation

Following the 1998 Final Report of the Task Force on Guardianships and Conservatorships, problems in Michigan's guardianship and conservatorship system came to light once again through the news media. A series of articles and editorials in the *Detroit Free Press* in the spring and summer of 2000 detailed some 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 *Free Press* series suggested that the system had limited court oversight and little opportunity for families to provide input. At about the same time, Senator Bev Hammerstrom, the chairperson of the Senate Committee on Families, Mental Health and Human Services, asked a working group of legislative and judicial staff, together with probate law practitioners and representatives of advocacy groups, to formulate recommendations for action in the fall legislative session. That informal group helped to develop the bills that were passed by the Legislature.

Public Acts 312 and 313 of 2000 (House Bills 5919 and 5921) were signed into law on October 17, 2000, and took effect on January 1, 2001. Public Acts 463 through 469 of 2000 (Senate Bills 863 and 1385 through 1390) were signed into law on January 10, 2001, and will take effect on June 1, 2001.

Public Acts 312 and 313 amended EPIC to limit a guardian's authority to act as a patient advocate under certain circumstances in which a patient advocate has been designated before the appointment of a guardian; 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 that the inventory be provided to interested persons as specified in court rules (in addition to being provided to the court and the protected individual); require a conservator to give a copy of an annual account of the administration of a trust to the protected individual and to interested persons as specified in court rules; and require that a guardian's scheduled report to the court also be given to each interested person.

Public Acts 463 through 469 will do the following:

- Require that a guardian ad litem appointed for an allegedly incapacitated individual consider 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" (rather than a "nonprofit corporation") 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 professional guardian to visit the ward at least every three months.
- Require that, when a guardianship petition is filed, the court give the petitioner information regarding alternatives to guardianship.
- Prohibit a conservator from selling real property without court approval and require the court to consider evidence of the property's value and determine that the sale is in the protected individual's best interest.
- Allow a guardian to sell a ward's real property or interest in it only if the court appoints the guardian as a special conservator and authorizes the special conservator to proceed with the sale.

Conclusion

Proponents of the 2000 legislation have characterized the measures as a good first step toward reforming Michigan's guardianship and conservatorship system. Emphasizing alternatives and requiring reporting to a ward's or protected individual's heirs and family members should increase the amount and quality of oversight in the system as well as help to limit the number of guardianship appointments. Also, requiring court approval for the sale of real property may alleviate some of the problems associated with selling property.

Some people believe that reforms still need to go further in the area of regulating guardians and conservators. Professionally certifying guardians and conservators, with strict standards for certification, is an area that many believe should be included in future reforms. Also, court enforcement of requirements placed upon guardians and conservators could be more consistent and uniform throughout the State. Some also advocate standards for relationships between judges and guardians that would prohibit campaign contributions to judicial campaigns. While the recent reforms address some of the deficiencies in Michigan's guardianship and conservatorship system, more accomplishments may be needed before the system runs smoothly and as intended.