

SENATE BILL REPORT

SB 5604

As of February 6, 2019

Title: An act relating to the uniform guardianship, conservatorship, and other protective arrangements act.

Brief Description: Concerning the uniform guardianship, conservatorship, and other protective arrangements act.

Sponsors: Senators Pedersen, Padden, Conway, Kuderer, Keiser, Salomon, Bailey and Dhingra; by request of Uniform Law Commission.

Brief History:

Committee Activity: Law & Justice: 2/04/19.

Brief Summary of Bill

- Adopts the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.
- Repeals laws governing guardianships, and nonparental actions for child custody.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Tim Ford (786-7423)

Background: Guardianships of Incapacitated Persons. Any person or entity may petition the court for a guardian or limited guardian appointment for an allegedly incapacitated person who may be either an adult or minor. A person may be incapacitated, either in their person or estate, when the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety; or a significant risk of financial harm. An incapacity determination is a legal decision, not a medical decision. However, prior to an incapacity determination a medical report must be filed with the court by a licensed doctor or psychologist detailing the health history and specific needs of the alleged incapacitated person.

Following a court hearing determining incapacity, the court appoints a guardian who exercises the legal rights of the incapacitated person. The court may establish the extent and

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duration of the guardian's power as a decision-maker for the incapacitated person. A full guardianship transfers authority for all major decisions to the appointed legal guardian. A standby or limited guardianship may assume some or all of the duties, responsibilities, and powers of a full guardianship. Standby or limited guardianships may be limited to one area—such as estate or property matters, or may have full powers for a limited duration in the absence of the guardian.

When a guardianship has been established, incapacitated persons may lose the right to:

- marry, divorce, or enter into a domestic partnership;
- vote;
- enter into a contract, make or revoke a will;
- have a driver's license and drive;
- buy, sell, own, or lease property;
- consent to or refuse medical treatment;
- decide who will provide care; and
- to make decisions regarding social aspects of life

In Washington, there are professional guardians, public guardians and lay guardians. A lay guardian may be a member of the incapacitated person's family. Lay guardians are required to complete a no cost training video. A professional guardian is not a member of the incapacitated person's family and charges fees for carrying out the duties of a court-appointed guardian of three or more incapacitated persons. Professional guardians may be a person, a professional agency or a corporate fiduciary such as a nonprofit corporation or bank trust department. A public guardian is a professional guardian that provides guardianship services under a contract with the Office of Public Guardianship for incapacitated persons:

- who are age 18 or older;
- whose income level does not exceed 200 percent of the federal poverty level; or
- who are receiving long-term care services through the Washington State Department of Social and Health Services (DSHS).

A person who is convicted of a felony or misdemeanor involving moral turpitude is not qualified to serve as a guardian. A dictionary definition of a crime involving "moral turpitude" means a criminal act considered base or vile which gravely violates accepted standards of a community. There are no crimes in state law that are listed as being crimes of moral turpitude.

Professional guardians are certified and regulated by the Certified Professional Guardianship Board (CPGB) established by court rule. The CPGB establishes standards of practice for professional guardians, and may investigate grievances and sanction professional guardians for violations of those standards. The court has supervisory power over all types of guardianships, and may modify a guardianship or remove a guardian upon petition and showing of good cause. A court may receive complaints regarding an incapacitated person under a guardianship, and the court has authority to investigate or issue emergency orders to protect the incapacitated person. Guardianship monitoring programs are not required by state law, nor are there any statewide monitoring standards applied by courts. A few county courts use volunteers to review reports required to be filed by guardians.

Nonparent Custody in Washington. A nonparent seeking court-ordered custody of a minor child must file a petition with sworn statements alleging either the child is not in a parent's physical custody; or no parent is a suitable custodian for the child.

The parents may file responsive pleadings and the court may permit interveners to join the case as additional parties.

The court reviews the filings, and determines whether the filings show adequate cause for a hearing on the merits of the custody request. If so, the court sets the matter for an expedited evidentiary hearing. The court may exclude the public from the hearing and seal the record if circumstances warrant. The court also appoints an attorney or guardian ad litem for the child. The court may also order an investigation and report, enter temporary orders, seek the written advice of professionals, and interview the child in chambers.

The court will deny the nonparent's custody request unless the nonparent proves the parent is unfit, or placement with the parent would result in actual detriment to the child's growth and development.

Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act. The Uniform Law Commission develops and proposes laws in areas where it believes uniformity between states is desirable. The ULC approved the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (Act) in 2017, and it has been enacted in Maine and introduced in New Mexico.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Proposed Substitute): The Act, as adapted for Washington, repeals existing state guardianship laws and replaces them with the Act. The Act repeals existing law on nonparental actions for child custody. The Act covers guardianships, conservatorships, and protective arrangements for both minors and adults.

Terminology Changes. The Act uses person centered terminology. For example, "alleged incapacitated person" is replaced "respondent," and "incapacitated person" is replaced with "person" under a guardianship or conservatorship. The Act uses "guardian" to refer to just a guardianship over the person, and a guardianship over the estate is now called a "conservatorship." A GAL is not eliminated in the Act, but the appointment of a GAL is optional. In adult proceedings, the investigator appointed by the court is called a visitor and that appointment is mandatory.

Qualifications of a Guardian. The disqualification to serve as a guardian based on a conviction of a felony or of a misdemeanor involving moral turpitude is eliminated. The disqualification is now based on a conviction of a crime involving dishonesty, neglect, or use of physical force or other crime relevant to the functions the individual would assume as guardian. However, an exception is provided and a court may, upon consideration of the facts, find that a relative convicted of a crime is qualified to serve as a guardian or conservator.

Legal Standard for a Guardian Appointment. The functional standard in existing law does not apply.

Minors. A court may appoint a guardian for a minor if the court finds the appointment is in the minor's best interest, and:

- the parents consent, after being fully informed of the nature and consequences of guardianship;
- all parental rights have been terminated; or
- the court finds by clear and convincing evidence the parents are unwilling or unable to exercise their parental rights.

Adults. A court may appoint a guardian for an adult who lacks the ability to meet essential requirements for physical health, safety, or self-care because:

- the adult is unable to receive and evaluate information or make or communicate decisions even with the use of supportive services, technological assistance, and supported decision-making, and
- the adult's identified needs cannot be met by a less restrictive alternative.

The requirement that a qualified health care professional provide a report to the court is eliminated.

Priority of Appointment. The Act prioritizes a guardian appointment that generally emphasizes family over professionals.

For a minor the priority is:

- a person nominated by a parent in a will;
- the nominee in the best interest of the child if multiple parents have nominated different persons;
- a person nominated by the minor who is 12 years or older; or
- a person whose appointment is in the best interest of the minor if a person with a higher priority is not in the best interest of the minor.

An order appointing a guardian for a minor must state rights retained by any parent of the minor, which may include contact or visitation with the minor; decision making regarding the minor's health care, education, or other matter; or access to a record regarding the minor.

For an adult the priority is:

- a guardian currently acting for the respondent in another jurisdiction;
- a person most recently nominated by the respondent in a power of attorney;
- an agent appointed by the respondent in a power of attorney for health care;
- a spouse or domestic partner;
- a relative or other individual who has shown special care and concern for the respondent;
- a certified professional guardian or conservator; or
- a person in the best interest of the adult if a person with a higher priority is not in the best interest of the adult.

An owner, operator, or employee of a long-term care facility at which the respondent is receiving care may not be appointed as guardian unless the owner, operator, or employee is related to the respondent by blood, marriage, or adoption.

Duties of a Guardian. The Act codifies standards set forth in case law.

Minors. Custody over the minor is conferred to the guardian. The guardian has the duties and responsibilities of a parent regarding the minor's support, care, education, health, safety, and welfare. Among other listed duties, a guardian must act in the minor's best interest and exercise reasonable care, diligence, and prudence. When determining what is in the minor's best interest, the guardian must take into account the minor's preferences to the extent actually known or reasonably ascertainable by the guardian.

Adults. The guardian must make decisions regarding the support, care, education, health, and welfare of the adult subject to guardianship to the extent necessitated by the adult's limitations. A guardian's duty includes promoting the self-determination of the adult and, encouraging the adult to participate in decisions, act on the adult's own behalf, and regain the capacity to manage the adult's personal affairs.

Emergency Guardian. The court may appoint an emergency guardian for a minor to prevent substantial harm to the minor's health, safety, or welfare where no other person has the authority or willingness to act in the circumstances.

Appointment of Counsel. Appointment of legal counsel is not required, but a court may appoint an attorney for a person subject to a proceeding for guardianship or conservatorship.

Placement in a Facility for Mental Health Treatment. A guardian may not place a person in a facility against their will except by following civil commitment laws. A guardian may move an adult to a nursing home, mental health facility, or other facility that places restrictions on the adult's ability to leave or have visitors only if the potential move is established in the guardian's plan, and either (1) the court authorizes the establishment or move; or (2) the guardian gives notice of the move at least 14 days before the move to the adult and all persons entitled to notice and no objection is filed.

Monitoring a Guardianship. The Act requires the court to establish procedures for monitoring guardians' reports. The requirement is subject to appropriation. The Act also expands the list of persons who may be notified of a petition for appointment of a guardian or conservator. It requires the court, when appointing a guardian, specify the persons who must receive notice of key events or conditions that could affect the well-being of the person under guardianship or conservatorship, and who can help monitor the guardian and protect the interests of the person subject to guardianship or conservatorship.

Delegation of a Parent's Powers. A parent of a minor, by a power of attorney, may delegate to another person any of the parent's powers regarding care, custody, or property of the minor, other than power to consent to marriage or adoption. The period of delegation may not exceed 24 months.

Model Training Program. The Department of Social & Health Services must convene an advisory group to develop a model guardian ad litem and visitor training program and must update the program every two years. The court must use the model training program to ensure minimum qualifications are met for persons applying for the role of a guardian ad litem or visitor.

Miscellaneous Changes. The validity of guardianship orders issued under repealed laws are retained by the Act.

The right to associate for adults under guardianships retains the statutory language from the old law being repealed.

Grievances filed with the CPGB must be resolved within a reasonable time.

“Relative” means any person related by blood or law to the person subject to a guardianship, conservatorship, or other protective arrangement. "Family member" is replaced with "relative."

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill takes effect on January 1, 2020.

Staff Summary of Public Testimony: PRO: The Washington Defenders Association supports the original provisions relating to care giving of minor children. The Act will allow more diverse options for care giving for minors when parents are either unwilling or unavailable. Due process protections are better than in the repealed law like for the appointment of counsel. Without the appointment of counsel provisions, petitions for guardianship over minors should be dismissed without the consent of the parents.

Washington is in the minority of states that do not confer custody when a guardianship is appointed over a minor. The Act changes the role of a guardian ad litem to a visitor. A visitor will just be a neutral investigator. The GAL will still have some decision making authority. The Act places better due process protections for a person subject to an emergency or temporary guardianship by requiring a follow up hearing. The Act codifies the substituted judgment standard which is in case law of the duties for a guardian or conservator. Under current law emergent relief is not uniformly applied. You should follow the injunction process. A GAL is usually appointed and makes decisions to manage money or make health care decisions. There is no follow up hearing as required law. The language of current law is not person friendly. Article 5 creates an alternative to guardianships and provides uniformity and certainty statewide for how alternatives to guardianship should be used.

The Act is important because it requires DSHS to develop a model training program for GALs and Visitors. Uniform practices would be helpful statewide. There is confusion about the role of the GAL. The GAL is often confused with a temporary guardian but there is no

current law to provide any authority for a temporary guardian. The Act provides this authority. Yet some GALs run amok and act outside of the scope of the authority of the statute or court order. It creates conflict, tension, and confusion. The Act reduces that by delineating roles and defining standards and duties for GALs. GALs are accountable to the court and there is a grievance process in the court rules.

The Washington Professional Guardians Association has 120 members and is in favor of the act but would like to see changes to the grievance process before the Washington Certified Professional Guardianship Board. The CPGB has 165 grievances going back to 2012. California has a similar program but their longest time for grievances is 276 days. California triages their grievances where the CPGB treats anonymous complaints against guardians as a full complaint. The CPGB has grievances going back seven years. The process for the CPGB review needs to speed up and use a triage process. The CPGB does not just look at the complaint but it looks back five years to a history of practice. The CPGB gets overzealous and the culture is of intimidation and not resolving issues.

The CPGB claims it has the sole authority to rule on standards of practice. In California the standards of practice are in statute and judges may rule on them. We should put the WA standards of practice into statute. The California model is under the Department of Licensing and they contract out to provide investigations. The executive director will receive the investigation report and decide on a sanction. Ultimately a dispute will go into the court system. The complaint process before the CPGB is different and goes through an administrative process and ultimately ends up before the Washington Supreme Court. The GALs often expand their role, making placement decisions and freezing bank accounts. GALs only have to take a two-week class and do not have the background, experience, or bonding of a guardian.

CON: The superior court judges have numerous concerns with Act. Current law has more robust protections that are not in the Act. The Act does not distinguish between lay and professional guardians. Current law requires professional guardians to allow the incapacitated person to reside in the least restrictive environment and that the guardian take reasonable measures to effectuate those preferences. Our law provides more protections in this area. Guardianship monitoring is important.

Persons Testifying: PRO: Senator Jamie Pedersen, Prime Sponsor; Alex Hur, Washington Defender Association and Washington Association of Criminal Defense Lawyers; Robert Nettleton, citizen; Colby Parks, citizen; Gary Beagle, President, Washington Association of Professional Guardians.

CON: Tom Parker, Superior Court Judges Association.

Persons Signed In To Testify But Not Testifying: No one.