

HOUSE BILL REPORT

2SSB 5604

As Passed House - Amended:
April 12, 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: Senate Committee on Ways & Means (originally sponsored by Senators Pedersen, Padden, Conway, Kuderer, Keiser, Salomon, Bailey and Dhingra; by request of Uniform Law Commission).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 3/22/19, 3/28/19 [DPA];
Appropriations: 4/6/19, 4/8/19 [DPA(CRJ/APP)].

Floor Activity:

Passed House - Amended: 4/12/19, 85-10.

**Brief Summary of Second Substitute Bill
(As Amended by House)**

- Adopts the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act which governs guardianships, conservatorships, and protective arrangements for both minors and adults.
- Repeals current law provisions regarding guardianships and third-party custody.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass as amended. Signed by 10 members: Representatives Jinkins, Chair; Thai, Vice Chair; Irwin, Ranking Minority Member; Goodman, Hansen, Kilduff, Kirby, Orwall, Valdez and Walen.

Minority Report: Do not pass. Signed by 2 members: Representatives Klippert and Shea.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Ingrid Lewis (786-7289).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Civil Rights & Judiciary as such amendment is amended by Committee on Appropriations. Signed by 26 members: Representatives Ormsby, Chair; Bergquist, 2nd Vice Chair; Robinson, 1st Vice Chair; Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Caldier, Cody, Dolan, Fitzgibbon, Hansen, Hoff, Hudgins, Jinkins, Macri, Pettigrew, Pollet, Ryu, Senn, Springer, Stanford, Steele, Sullivan, Tarleton, Tharinger and Ybarra.

Minority Report: Do not pass. Signed by 6 members: Representatives Chandler, Dye, Kraft, Mosbrucker, Schmick and Sutherland.

Staff: Meghan Morris (786-7119).

Background:

Guardianship.

A guardian is an individual or entity appointed and empowered by the court to make decisions for either the person or the estate, or both, of an incapacitated person or minor. The court may also establish a limited guardianship for persons who need protection or assistance because of an incapacity, but who are capable of managing some of their affairs.

A guardian of an incapacitated person's estate is responsible for managing the person's property and finances. A guardian of the person is responsible for assessing and meeting the person's physical, mental, and emotional needs. Legislative intent emphasizes that guardianships are utilized only when clearly warranted and are to be fashioned such that a person's liberty and autonomy are restricted to the minimum extent necessary.

In Washington there are professional guardians, public guardians, and lay guardians. A professional guardian is an individual appointed by the court who is not a member of the incapacitated person's family and who charges fees for carrying out duties. In addition to court supervision, professional guardians are certified and regulated by the Certified Professional Guardianship Board. A public guardian is a certified professional guardian who contracts with the Office of Public Guardianship (OPG) to provide services to low-income individuals. A lay guardian is generally a family member or friend of the person subject to guardianship. They are usually a volunteer who is not paid to perform guardianship services.

A person who is convicted of a felony or misdemeanor involving moral turpitude is not qualified to serve as a guardian.

Guardian ad Litem. A guardian ad litem (GAL) is a person appointed in a court proceeding to represent the best interests of a party or to investigate and report to the court on relevant matters. A GAL position is temporary and expires when the case is completed or dismissed. A court must appoint a GAL in an adult guardianship proceeding and may use its discretion whether to appoint a GAL in minor guardianship proceedings.

Evidence, Standard of Proof, and Findings. A person may be deemed incapacitated when the court determines that there is a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety. Incapacity as to the person's estate means the person is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

A written report from one of a variety of professionals with expertise is required. The report must include information on the alleged incapacitated person's medical history, including a psychological or psychiatric report; the physician's or psychologist's findings as to the conditions of the alleged incapacitated person; and opinions on the specific assistance the alleged incapacitated person needs.

The standard of proof to be used in a contested guardianship hearing is clear, cogent, and convincing evidence.

Duties of a Guardian. Guardians and limited guardians have specific statutory duties. Among those duties are requirements to file with the court an initial personal care plan or inventory for the incapacitated person and annual reports regarding the status of the incapacitated person.

Incapacitated persons retain the right to associate with persons of their choosing, including, but not limited to, the right to freely communicate and interact with other persons, whether through in-person visits, telephone calls, electronic communications, personal mail, or other means.

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 of a Guardianship. Courts retain ultimate responsibility for protecting an incapacitated person and are responsible for monitoring guardianships. These monitoring practices vary widely by jurisdiction.

Standby Guardians. A standby guardian is designated by a guardian at the time of appointment. The standby guardian may serve as the guardian during a planned absence of the guardian. If the guardian dies or becomes incapacitated, the standby guardian has the all the powers, duties, and obligations of the guardian. Within 30 days of the death or adjudication of the guardian, the standby guardian must file a petition for appointment of a substitute guardian in the court where the guardianship is being administered.

Third-Party Custody.

Washington's third-party, or nonparental, custody statute sets forth procedures for persons who are not parents to seek custody of a child. A person filing a third-party custody action must submit a declaration stating that the child is either not in either parent's physical custody

or neither parent is a suitable custodian. A court may hold a hearing on the petition only if the court finds that adequate cause for hearing the motion is established by the declarations.

The third-party custody statute requires a petitioner to prove that custody by a nonparent is in the best interests of the child. However, Washington courts determined the standard inadequate to protect a parent's constitutional right to the care, custody, and control of his or her children. In order to protect a parent's constitutional rights, a court may not grant custody to a nonparent unless there is proof that the parent is unfit or proof that placement of the child with an otherwise fit parent would negatively affect the child's growth and development.

The court may appoint an attorney to represent the interests of the child. The court also may appoint a GAL for the minor. Generally, the GAL represents the best interests of the minor. A GAL may also function as an investigator and may be ordered to make a formal report to the court.

A custody decree must make provision for the custody, visitation, and support of any child entitled to support, and any necessary continuing restraining orders. A parent who is not granted custody is entitled to reasonable visitation rights except in specified situations involving abuse, sexual offenses, domestic violence, or abandonment. Statutorily defined relatives are permitted to petition for visitation with the child if the relative has an ongoing and substantial relationship with the child and the child is likely to suffer harm or a substantial risk of harm if visitation is denied.

A court may modify a third-party custody order if it can be proved upon the basis of new or previously unknown facts that a substantial change has occurred in the circumstances of the child or the nonmoving party, and that the modification is the best interest of the child and is necessary to serve the best interest of the child.

Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.

The National Conference of Commissioners on Uniform State Laws develops and proposes laws in subject matters where it believes uniformity between states is desirable. The Commissioners approved the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act in 2017, and it has been enacted in Maine and introduced in Utah and Montana.

Summary of Amended Bill:

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (Act), as adapted for Washington, is enacted, and existing statutory provisions related to guardianship and third-party custody are repealed. The Act covers guardianships, conservatorships, and protective arrangements for both minors and adults.

Throughout the Act, the term "guardian" refers to a person appointed by a court to make decisions about the care and well-being of another person. The term "conservator" refers to a person appointed by a court to manage the property of another person.

The Act eliminates the term incapacitated person and replaces it with "adult subject to guardianship," "minor subject to guardianship," and "individual subject to conservatorship" instead.

Guardian ad Litem.

The Act makes the appointment of a guardian ad litem (GAL) optional, changing the mandatory requirement that a GAL be appointed in an adult guardianship proceeding. The court may appoint a GAL at any time if it determines that the individual's interests would not be adequately represented otherwise. The role of the visitor is established; a court must appoint a visitor to investigate and report to the court on relevant matters.

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.

Evidence, Standard of Proof, and Findings.

Adults. Rather than utilize the functional impairment standard for considering whether a person is in need of a guardian and/or conservator, the Act instead requires that the following three elements be established: (1) the adult cannot meet essential requirements for physical health, safety, or self-care; (2) guardianship is the least restrictive approach to meeting the adult's identified need; and (3) the adult cannot receive and evaluate information or make or communicate decisions even with appropriate supportive services, technological assistance, or supported decision making. The requirement that a qualified health care professional provide a report to the court is eliminated, except in certain circumstances. The standard of clear, cogent, and convincing remains.

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

- each parent consents 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 that no parent is willing or able to exercise their parental rights.

A visitor must ascertain whether a parent consents to the appointment of a guardian for a minor. The court may not appoint a guardian for a minor without consent of the parents unless parental rights have been terminated.

Priority of Appointment.

For a minor the priority of appointment for a guardian 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; or
- a person nominated by the minor if the minor is 12 years or older.

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 matters; or access to records regarding the minor.

For an adult the priority of appointment for a guardian 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; or
- a certified professional guardian or conservator.

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.

The court may appoint as guardian a person in a lower priority position if the court finds that the appointment of a person with a higher priority is not in the best interest of the minor.

Duties of a 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.

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.

Standby Guardians.

In addition to standby guardians, the court is authorized to appoint the following:

- a successor guardian or conservator, effective either upon appointment of the original guardian or conservator or upon a future contingency;
- a temporary guardian who would fill in for a regular guardian, whose powers are suspended for the duration of the appointment; or
- an emergency guardian or conservator who is appointed in an urgent situation in which there is no guardian or conservator but the needs of the individual are emergent.

Appointment of Counsel.

A court may appoint an attorney for a person subject to a proceeding for guardianship or conservatorship. A court may also appoint an attorney to represent a parent of minor who is

the subject of a proceeding in certain circumstances, and must appoint an attorney to represent a parent of a minor if: the parent has appeared in the proceeding; the parent is indigent; and any of the following is true: (a) the parent objects to the guardianship; or (b) counsel is needed to ensure consent; or (c) the court determines the parent needs representation. An attorney appointed for a minor who is unable to ascertain the wishes of the minor must advocate for the minor's legal rights.

Monitoring a Guardianship.

The Act requires the court to establish procedures for monitoring guardians' reports, subject to appropriations. The Act also expands the list of persons who may be notified of a petition for appointment of a guardian or conservator. It requires that 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 to monitor the guardian and protect the interests of the person subject to guardianship or conservatorship.

Delegation of a Parent's Powers.

The Act allows for temporary delegation of powers by a parent; it does not create a guardianship, nor does it allow a parent to grant powers the parent does not possess. The period of delegation may not exceed 24 months.

Model Training Program.

The Department of Social and Health Services must convene an advisory group to develop a model lay guardian, 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.

Certified Professional Guardianship Board.

Grievances filed against a professional guardian or conservator for violations of the Certified Professional Guardianship Board (CPGB) standards of practice must be resolved by the CPGB within a reasonable time as outlined in the Act.

Grievances.

When a grievance is filed against a guardian/conservator, the court must promptly review the grievance and act to protect the autonomy, independence, values, and preferences of the individual subject to guardianship/conservatorship. Dismissal of a grievance is not an appropriate remedy if the resolution cannot occur in a timely manner.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available. New fiscal note requested on April 12, 2019.

Effective Date of Amended Bill: The bill takes effect on January 1, 2021.

Staff Summary of Public Testimony (Civil Rights & Judiciary):

(In support) The effective date is delayed to give the Legislature time to work through concerns and issues while letting Washington residents know that there is work being done to help our vulnerable populations.

The cost of obtaining guardianship is cost-prohibitive. There is a wealth gap with the rising cost of housing and student loans. There are invisible expenses associated with caring for a special needs family member. The bill would help families navigate a complex process. Changes need to be made—more education and more monitoring needs to be provided to guardians. As soon as a child becomes an adult, the Health Insurance Portability and Accountability Act laws prohibit a parent from being informed about a child's medical needs. Family members need more education on the process, as well as a monitoring system to protect citizens. Parents have to go through a non-user friendly process when their minor turns 18. For-profit guardians and guardians ad litem need to be more accountable.

Kinship care providers make up an estimated 50,000 grandparents raising grandchildren who save the state money because the children are not in foster care. Kinship care providers are disproportionately people of color and low income. Children who are raised by relatives have better outcomes. Children come into care when parents are gone for short period of time or longer periods of time. The legal system must be able to respond to various lengths of stay and different situations. The bill provides a variety of options. The current third-party custody system is rigid and inflexible and does not serve Washington residents.

The bill incorporates the annual and biannual reporting that the court reviews, which is consistent with current law.

(Opposed) There are some concerns about how quickly this bill is moving forward. There is a decision package by the Office of Public Guardianship which will help address the grievance process.

This bill is not what would have come out of the WINGS Project. There are some limitations to the act. Most of the current law protections are still in place, but others are not. The provision stating that a monitoring program is subject to appropriations may take away the requirement of the courts to monitor guardianships. The intent language in current law should remain. The bill should build on the definition of supported decision-making.

The bill incorporates the annual and biannual reporting that the court reviews which is consistent with current law.

(Other) Guardianship violates provisions of the Universal Declaration of Human Rights of the United Nations. The process strips a person of their right to vote; a person is deprived of control of any aspect of their life.

Staff Summary of Public Testimony (Appropriations):

(In support) Section 701 of the bill, despite the separation of powers issue, gives a legislative nudge to the Administrative Office of the Courts to resolve grievance problems. There is a huge backlog of six or seven years; this is troublesome to the eventual client and vulnerable people who are wards of the state. This is a complicated bill, but it has been worked on very

diligently. The effective date is set out another year so the Legislature can adjust any discrepancies, if they arise. There is value in using a national model, especially for border counties so people working across state lines do not need to be recertified. The good things from Washington's law are being mixed with the national model to prevent future problems and preserve the value of the good things done over the years. This bill may save money in the long run, even though it has a fiscal impact upfront.

(Opposed) There is strong opposition to this bill among judges as it is currently constituted. The right to counsel is a good idea, but it is never funded, and it is extremely expensive. The bill outlines where the court must appoint an attorney, which will drive significant costs. Changes to current law should only be made if they are improving protections for those whom the laws are intended to benefit. These changes are a wholesale repeal and replace, which will cost millions of dollars to Washington's already woefully underfunded program. The fiscal note reports estimated costs of \$6 million in the next biennium and up to an additional \$10 million each biennia thereafter. These dollars would be far better spent to improve the current system, which is outstanding. There needs to be funding increases with regard to adding staff to investigate grievances and address the backlog. There have only been two staff members for the past six years, but a third was just added. There is no need to wholesale, repeal, and replace these laws. The focus should be on using the funds to expand the Office of Public Guardianship (OPG). Those guardians represent people who cannot find guardians any other way. Currently there are only 75 people being represented by the OPG. These people are mentally ill, abused, neglected, and homeless.

For minor guardianship, there are dangers of adopting the "complex" uniform act, which has only been adopted by Maine. Washington has several times before been an early adopter of some wholesale act, which is often not uniform and could have many pitfalls. The public, Legislature, and courts will end up spending millions of dollars and many years to fix what is not carefully looked at in the first place.

There is support to address problems in the nonparental custody statute, but this bill creates a new set of problems. The people affected are vulnerable family members who are doing their best to keep children out of the overtaxed foster care system. These people will be left without resources while this new unproven regime is built. Additionally, there are a number of concerns about involving children and being present for hearings.

(Other) There is real motivation to pass this bill this year. The two-year waiting period before implementation is essential because there are still changes that need to be made. It will be wonderful for all grievances to be resolved within a reasonable time, but no grievances should be dismissed simply because there is not adequate staffing. This could be a real problem for people with disabilities and seniors who have grievances that need resolving. Additionally, the repeal section removes an intent which is a great statement of the legislative intent around guardianship. This should not be discarded since there is not a similar statement in current law. The statement highlights the importance of alternatives to guardianship and least restrictive uses.

Persons Testifying (Civil Rights & Judiciary): (In support) Senator Pedersen, prime sponsor; Demas Nesterenko, Service Employees International Union 775; Anna Stusser; Teresa Otto; Mary Van Cleve, Columbia Legal Services; and Robert Nettleton.

(Other) Tom Parker, Superior Court Judges Association; and David Lord, Disability Rights Washington.

(Opposed) Michael Brunson.

Persons Testifying (Appropriations): (In support) Steve Lindstrom, Washington Association of Professional Guardians.

(Opposed) Tom Parker, Janet Helson, and Rachelle Anderson, Superior Court Judges Association.

(Other) David Lord, Disability Rights Washington.

Persons Signed In To Testify But Not Testifying (Civil Rights & Judiciary): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.