

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 77

(Senator Lam)

Judicial Proceedings

Estates and Trusts - Protection of Minors and Disabled Persons - Guardianship

This bill makes numerous changes to statute governing the appointment of a guardian for a disabled person or a minor and establishes procedures for the retention and payment of fees to attorneys under specified circumstances. The bill also makes numerous stylistic, technical, clarifying, and conforming changes.

Fiscal Summary

State Effect: The bill is not anticipated to materially affect State operations or finances.

Local Effect: The bill is not anticipated to materially affect the circuit courts or local finances or operations.

Small Business Effect: None.

Analysis

Bill Summary/Current Law:

Jurisdiction

The bill specifies that the orphans' courts and the circuit courts have concurrent jurisdiction over guardians of the *property* of a minor, and that the circuit courts have exclusive jurisdiction over protective proceedings for guardianship of the *person* of a minor.

Under current law, the orphans' courts and the circuit courts have concurrent jurisdiction over both guardians of the person of a minor and over protective proceedings for a minor,

though on petition of an interested person, a matter initiated in the orphans' court may be transferred to the circuit court. An orphans' court may only exercise jurisdiction over guardianship of the person of a minor if the presiding judge of the orphans' court is a member of the bar. An orphans' court that exercises jurisdiction or is requested to exercise jurisdiction over a guardian of the property of a minor may (1) transfer the matter to the circuit court after finding that the best interests of the minor require use of the equitable powers of the circuit court and (2) waive any costs of a transfer. Generally, the circuit courts have exclusive jurisdiction over protective proceedings for disabled persons.

Appointment of a Guardian of Property

The bill newly establishes separate processes for the appointment of a guardian of the property of (1) a disabled person; (2) an adult "not under a disability" but who still meets the definition of a "disabled person"; and (3) a minor.

Current law authorizes the court, on petition and after notice or hearing as required by law or the Maryland Rules, to appoint a guardian of the property for a minor or a disabled person. For a minor, a guardian must be appointed if the court determines that (1) a minor owns or is entitled to property that requires management or protection, or (2) funds are needed for support, care, welfare, and education, and protection is necessary or desirable to obtain or provide funds. For a disabled person, a guardian must be appointed if the court determines that (1) the person is unable to manage the person's property and affairs because of physical or mental disability, disease, habitual drunkenness, drug addiction, imprisonment, compulsory hospitalization, detention by a foreign power, or disappearance and (2) the person has or may be entitled to property or benefits which require proper management.

The Property of a Disabled Person: Under the bill, a guardian of the property must be appointed if the court determines by a preponderance of the evidence that (1) the person is unable to effectively manage the person's property and affairs because of physical or mental disability or disease; (2) the person has or may be entitled to property or benefits which require proper management; and (3) no less restrictive form of intervention that is in the disabled person's best interest is available.

The bill newly establishes specific documentation and evidentiary requirements for a petition for guardianship of a disabled person and specifies rights held by the alleged disabled person. Specifically, the bill requires a petition for guardianship of a disabled person alleging that the person has a mental disability or disease to include signed and verified certificates of competency from either (1) two licensed physicians who have examined the alleged disabled person or (2) one licensed physician who has examined the alleged disabled person and one licensed psychologist or licensed certified social worker-clinical who has evaluated the alleged disabled person. An examination or

evaluation by at least one of the health care professionals must be conducted within 21 days before filing a petition for guardianship of a disabled person.

The bill specifies that the alleged disabled person is entitled to (1) be present at any hearing unless the person has knowingly and voluntarily waived the right to be present or cannot be present because of physical or mental incapacity and (2) present evidence and cross-examine witnesses. Failure of the person to appear may not be used as a basis to presume waiver or incapacity. Waiver or incapacity must be determined on the basis of factual information supplied to the court by counsel or a representative appointed by the court.

The bill specifies that determinations may be made at a closed hearing on the request of the alleged disabled person or the person's counsel. A closed hearing must be confidential and sealed unless otherwise ordered by a court of competent jurisdiction for good cause shown.

The Property of an Adult not under a Disability: On the filing of a petition, and after any notice and hearing as required by law or the Maryland Rules, the bill newly establishes that a court may appoint a guardian of the property of an adult not under a disability. A guardian of the property must be appointed with a court determination by a preponderance of the evidence: (1) if it appears from specific facts shown by affidavit or exhibit in compliance with the Maryland Rules, that the person is unable to manage effectively the person's property and affairs because of habitual drunkenness, drug addiction, imprisonment, compulsory hospitalization, detention by a foreign power, or disappearance; (2) that the person has or may be entitled to property or benefits that require proper management; and (3) that no less restrictive form of intervention that is in the person's best interest is available.

The Property of a Minor: The bill newly establishes that on the filing of a petition, and after any notice and hearing as prescribed by law or the Maryland Rules, the court may appoint a guardian of the property of a minor. A guardian of the property must be appointed if the court determines by a preponderance of the evidence that (1) a minor owns or is entitled to property that requires management or protection or (2) funds are needed for the minor's support, care, welfare, and education, and protection is necessary or desirable to obtain or provide funds.

Access to Funds/Attorney's Fees

The bill specifies that the court may ensure that a disabled person has access to funds considered appropriate by the guardian or ordered by the court.

The bill also newly specifies that, on the filing of a petition for attorney's fees by specified individuals, the court may order reasonable attorney's fees incurred in bringing a petition for appointment of a guardian of the property of an alleged disabled person to be paid from the estate of the alleged disabled person, by the alleged disabled person, or by a fiduciary for the alleged disabled person. Before ordering the payment of attorney's fees, the court must consider (1) the financial resources and needs of the alleged disabled person and (2) whether there was substantial justification for the filing of the petition for guardianship. Fees must be denied if a court finds that there was not a substantial justification for bringing the petition for guardianship, and a court may not award attorney's fees if the petition for guardianship is brought by (1) a government agency paying benefits to the alleged disabled person; (2) a local department of social services; or (3) an agency eligible to serve as the guardian of the disabled person.

Finally, the bill specifies that if the appointed guardian of the property is an attorney, the court may require the deposit of an appropriate sum into the court registry or the appointed guardian's escrow account within 30 days after the order of appointment has been entered, subject to further order of the court.

Preservation and Application of Property/Attorney's Fees

The bill specifies that if the appointed guardian *of the property* is an attorney, the court may require that the guardian deposit an appropriate amount into the court registry or the appointed guardian's escrow account within 30 days after the order of appointment has been entered, subject to further order of the court.

Petition for Orders Granting Relief/Attorney's Fees

The bill newly specifies that if the appointed guardian *of the person* is an attorney, and on petition by the appointed guardian *of the property*, the court may require the deposit of an appropriate sum into the court registry or the appointed guardian's escrow account within 30 days after the order of appointment has been entered, subject to further order of the court.

Procedure in Protective Hearings/Attorney's Fees

The bill specifies that unless the alleged disabled person has chosen counsel, the court, after appointing an attorney to represent the person in the proceeding, may require the deposit of an appropriate sum into the court registry or the appointed attorney's escrow account within 30 days after the order of appointment has been entered, subject to further order of the court.

Compensation and Expenses

Under the bill, if the appointed guardian is an attorney, the attorney may file a fee petition to be compensated at the attorney's customary hourly rate if the guardian (1) is providing legal services and (2) would otherwise need to hire an attorney to provide the legal services. The court may then order reasonable and necessary attorney's fees to be paid from the estate of the disabled person, after considering the financial resources and needs of the disabled person.

Under current law, except in unusual circumstances, a guardian is entitled to the same compensation and reimbursement for actual and necessary expenses as the trustee of a trust. No petition or hearing is required before distribution of compensation and expenses to the guardian. The court may increase or decrease compensation following the petition of any interested person and a finding that unusual circumstances exist. If the guardian is appointed as the guardian of a disabled person who is a recipient of long-term care services and supports under the Maryland Medical Assistance Program, and whose income is subject to specified provisions of the Health-General Article, the guardian is not entitled to receive more than \$50 per month in compensation unless the court makes a finding that unusual circumstances exist.

Immunity

The bill specifies that a person filing a petition for the protection of property, participating in the making of a good faith report, or participating in an investigation or judicial proceeding resulting from an investigation has the immunity from civil liability or criminal penalty described under § 5-618(a) of the Courts and Judicial Proceedings Article, which generally relates to adult protective services.

Under § 5-618(a) of the Courts and Judicial Proceedings Article, any person who participates in the making of a good faith report or participates in an investigation or judicial proceeding relating to adult protective services, as specified, is immune from civil or criminal liability.

Rights of a Guardian of the Person of a Minor

The bill establishes that the court may grant the guardian of the person of a minor the right to (1) take custody of and designate the primary residence of the minor; (2) consent to medical, dental, and surgical treatment involving invasive procedures, and to consent to psychiatric and psychological treatment; (3) receive and give receipt for periodic payments for the support of the minor and to hold or disburse these funds for the benefit of the minor; (4) represent the minor in legal action and make other decisions of substantial legal

significance concerning the minor; (5) make decisions concerning the minor's education; and (6) exercise any other power considered appropriate by the court.

Emergency Protective Services

The bill repeals the exception to the general prohibition against medical care being provided in a State mental hospital which allows care to be provided at the Walter P. Carter Community Mental Health and Retardation Center or the Highland Health Facility.

The bill also clarifies that the medical director *of the medical facility* to which a person has been transported by a law enforcement officer must file a specified petition with the court within 24 hours after the transfer of the person has taken place.

Guardianship of Department of Veterans Affairs Beneficiary/Evidence of Necessity of Appointment

The bill defines "beneficiary" as a person receiving a monetary benefit, but further specifies that "benefit" means a monetary payment, but does not include a pension plan or health care.

The bill authorizes the court, in accordance with the Maryland Rules, to order the examination of an alleged disabled person who receives medical treatment at a Department of Veterans Affairs facility if the petition for appointment of a guardian for the person does not include the required two certificates of competency because the facility where the alleged disabled person is receiving care is prohibited from disclosing medical records by federal law.

Under current law, if a petition is filed for the appointment of a guardian for a minor who is a Department of Veterans Affairs beneficiary, a certificate of the Administrator or the Administrator's authorized representative, including the age of the minor and the fact that appointment of a guardian is a condition precedent to the payment of any money due the minor from the Veterans Administration must be *prima facie* evidence of the necessity for the appointment.

Background: According to the Administrative Office of the Courts (AOC), the authorization of an orphans' court to exercise jurisdiction over guardianships of the person of minors if the presiding judge is a member of the bar under current law is relevant to Baltimore City, as well as Baltimore, Carroll, Prince George's, and Queen Anne's counties where orphans' court judges are members of the bar. AOC further advises that the circuit courts in Harford and Montgomery counties sit as the orphans' court in those jurisdictions.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Caroline and Montgomery counties; City of Bowie; Judiciary (Administrative Office of the Courts); Register of Wills; Maryland Department of Disabilities; Maryland Department of Health; Department of Human Services; Department of State Police; Department of Veterans Affairs; Legal Information Institute; Department of Legislative Services

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