

Department of Legislative Services  
Maryland General Assembly  
2019 Session

FISCAL AND POLICY NOTE  
First Reader

House Bill 436 (Delegate Hill, *et al.*)  
Health and Government Operations

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

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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.

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**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.

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**Analysis**

**Bill Summary/Current Law:**

*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. Generally, the bill prohibits the court from appointing as guardian (1) an attorney who is representing a party in the petition for guardianship or (2) a person who is a partner or business associate of an attorney representing a party in the petition for guardianship.

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. The health care professionals must be appropriately credentialed to give an opinion as to the competency of the 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 clarifies that the court is not required to give notice of its actions related to the preservation and application of property to other persons, including the alleged disabled person, if the court finds that giving notice would (1) cause harm or increase the potential of harm to the alleged disabled person; (2) unacceptably delay the execution or implementation of the action; or (3) in any other way not serve the best interest of the alleged disabled person.

The bill also 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.

### *Appointment of a Guardian of a Disabled Person*

Under current law, a petition for guardianship of a disabled person alleging that the person has a mental disability or disease must 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.

The bill specifies that the health care professions submitting the certificates of competency must be appropriately credentialed to give an opinion as to the competency of the disabled person. The bill also prohibits the court from appointing as guardian of a disabled person (1) an attorney who is representing a party in the petition for guardianship or (2) a person who is a partner or business associate of an attorney representing a party in the petition for guardianship.

#### *Emergency Protective Services*

The bill repeals the exception to the general prohibition against medical care being provided in a State mental facility 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 U.S. 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 U.S. 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 U.S. Department of Veterans Affairs (formerly the Veterans Administration) beneficiary, a certificate of the U.S. Secretary of Veteran’s Affairs or the Secretary’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

U.S. Department of Veterans Affairs, must be *prima facie* evidence of the necessity for the appointment.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Judiciary (Administrative Office of the Courts); Register of Wills; Department of Human Services; Department of State Police; Department of Juvenile Services; Maryland Department of Veterans Affairs; Montgomery and Prince George's counties; cities of Baltimore and Bowie; Town of Thurmont; Department of Legislative Services

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