

**DD GUARDIANSHIPS:
REMOVE TIME LIMIT**

**House Bill 4023 as passed by the House
Third Analysis (8-28-96)**

Sponsor: Rep. Kirk Profit
First Committee: Judiciary and Civil
Rights
Second Committee: Mental Health

THE APPARENT PROBLEM:

Under the Mental Health Code provisions for guardianships, a guardianship for a person with a developmental disability may be "plenary" (full) or partial. Plenary guardians have the legal rights and powers of a full guardian over the person with a developmental disability, his or her estate, or both, while the rights, powers, and duties of partial guardians are specifically enumerated by court order. And while full guardianships have no time limitations, partial guardianships are limited by law to a period of five years. Reportedly at the request of the Michigan Probate Judges' Association, in an attempt to reduce unnecessary use of court resources, legislation was introduced to eliminate the five-year time limit on partial guardianships. The House Judiciary and Civil Rights Committee reported a version of the bill that would have eliminated the five-year time limit and required the probate court to conduct "informal reviews" of all guardianships, whether full or partial, every five years. (See the House Legislative Analysis Section's analysis of House Bill 4023 dated 1-18-96.) Subsequently, the House referred the bill to the Mental Health Committee for consideration of the effect of such changes on the developmentally disabled population.

THE CONTENT OF THE BILL:

Until recently, "developmental disability" had been defined by the Mental Health Code as "an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:

- (i) It has continued since its origination or can be expected to continue indefinitely.
- (ii) It constitutes a substantial burden to the impaired person's ability to perform normally in society.
- (iii) It is attributable to 1 or more of the following:

(A) Mental retardation, cerebral palsy, epilepsy, or autism.

(B) Any other condition of a person found to be closely related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

(C) Dyslexia resulting from a condition described in subparagraph (A) or (B)".

The revised Mental Health Code, which took effect on March 28, 1996, redefines developmental disability as either of the following:

"(a) If applied to an individual older than 5 years, a severe, chronic condition that meets all of the following requirements:

- (i) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.
- (ii) Is manifested before the individual is 22 years old.
- (iii) Is likely to continue indefinitely.
- (iv) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

- (A) Self-care.
- (B) Receptive and expressive language.
- (C) Learning.
- (D) Mobility.
- (E) Self-direction.
- (F) Capacity for independent living.
- (G) Economic self-sufficiency.

(v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

(b) If applied to a minor from birth to age 5, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in

developmental disability as defined in subdivision (a) if services are not provided."

House Bill 4023 as passed by the House would amend the Mental Health Code to eliminate the five-year time limit on partial guardianships of people with developmental disabilities. Instead, the probate court would conduct a review of all guardianships under the code (whether full or partial) every three years (within three years after the guardian's appointment and at three-year intervals after the initial review). Further, a guardianship review would have to be conducted in accordance with the following:

- * A court would be required to appoint a guardian ad litem (GAL) to investigate the guardianship. The GAL would have to report back to the court within 28 days.

- * The guardian ad litem would be required to do the following:

- Personally visit the individual alleged to have a developmental disability.

- Explain to the individual the nature, purpose, and legal effect of the appointment of a guardian, and inform him or her of alternatives to a guardianship.

- Explain the hearing procedure to the individual, and explain the individual's right to contest the guardianship petition, to request limits on the guardian's powers, to object to a particular person's appointment as guardian, to be present at hearings, to be represented by legal counsel, and to have legal counsel appointed if he or she cannot afford it.

- Inform the individual of the name of the person who wants to continue as the guardian, and ask the individual if he or she wishes to place any limits on the guardianship.

- Include the individual's response or lack of a response to information or an explanation in the report to be submitted to the court.

- Personally explain to the guardian and other interested persons that they have the right to demand a hearing on the continuation or modification of the guardianship, and report to the court if an interested person demands a hearing.

- In a report to the court, recommend whether the guardianship should be terminated, continued, or modified. The recommendation would have to represent the best interests and desires of the individual. If the recommendation involved terminating or modifying the guardianship, the GAL would be required to recommend

alternatives, based upon the individual's self-reliance and independence, if necessary for the promotion and protection of the individual's well-being.

- Copies of the GAL's report would have to be sent to the court, the individual with developmental disabilities, the guardian, each interested person that the GAL had contact with during the investigation, and to any interested person who requested a copy.

- * A hearing would be scheduled if the individual or an interested person requested a hearing or objected to the guardianship in any manner. The court would be required to appoint legal counsel for a person with developmental disabilities who did not have an attorney. The state would pay for legal counsel for an individual determined to be indigent.

- * The burden of proof at a review hearing would be on the person seeking to continue the guardianship. The court would have discretion to order a continuation or modification of a guardianship without a hearing if the individual and all interested persons were in agreement.

- * A Community Mental Health Services Program (CMHSP) would have to supply a GAL with the most recent clinical update or assessment available on an individual if requested by the GAL. The GAL would be required to send copies of the CMHSP update or assessment to the individual, the court, and the guardian.

The bill would take effect 180 days after being enacted.

MCL 330.1626 and 330.1748

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have indeterminate costs to the state due to the bill's provision to supply indigent individuals with developmental disabilities with court appointed attorneys when a hearing is requested. Indeterminate local costs would be incurred when guardians ad litem were appointed by the court to conduct the guardianship reviews. Minimal local costs would also be incurred by a Community Mental Health Services Program when providing an individual's clinical assessment to the court. (5-1-96)

ARGUMENTS:

For:

Establishing a guardianship under the Mental Health Code is a fairly involved process that involves submitting a petition, reports, appointing attorneys, holding a court hearing, taking testimony from the treatment team and so

on. When a guardianship is established, moreover, the developmental disability upon which it is based must legally be expected to continue indefinitely. So when a partial guardianship is established, in order to continue it after the initial five years, the entire process (involving a court hearing, etc.) must be repeated every five years. This can be hard on the ward and his or her family, and uses valuable court time for what usually is a purely routine process. Additionally, some probate judges have been concerned that although the Mental Health Code specifies that partial guardianship is the preferred form of guardianship for a person with a developmental disability, that due to heavy case loads, many judges are assigning full guardianships in an attempt to avoid seeing the same cases back in court in five years. By requiring all guardianships to go through a review process every three years, there would be no "advantage" for a judge to choose plenary over partial guardianship, and would therefore encourage judges to decide on a case by case basis what is in the best interest of the person with a developmental disability. Further, provisions in the bill requiring guardianship reviews every three years and the appointment of a guardian ad litem for the review process are very similar to provisions in the Revised Probate Code regarding the appointment of guardians ad litem when establishing guardianships for people determined to be legally incapacitated (MCL 700.443a). (The Revised Probate Code, MCL 700.8, defines a legally incapacitated person as a "person, other than a minor, who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, to the extent that the person lacks sufficient understanding or capacity to make or communicate informed decisions concerning his or her person".) Finally, the bill would implement new protections for people with developmental disabilities that currently don't exist: full guardianships under the Mental Health Code have no set expiration date nor are there any requirements that they be periodically reviewed. The bill would require that all guardianships, whether full or partial, be periodically reviewed.

Against:

As reported from the Mental Health Committee, the bill would have required that guardians ad litem receive instruction about developmental disabilities, individuals with such disabilities, and skills for communicating with the DD population. According to advocates for the developmentally disabled, this provision would have gone a long way in recognizing and protecting the basic rights of individuals with developmental disabilities. Since many people with developmental disabilities communicate through non-verbal means such as word boards or a system of eye blinks, it is essential that a guardian ad litem have some knowledge and ability to communicate effectively with an individual, especially since the GAL

would be required to represent the individual's best interests and desires. Secondly, advocates report that often family members and individuals with developmental disabilities are told, erroneously, that a guardian must be appointed even though less demeaning or restrictive alternatives exist that may accomplish the same end. This problem would have been greatly alleviated by a requirement that had been contained in the Mental Health Committee version of the bill that GALs receive instruction in guardianship law and less personally intrusive alternatives to guardianship. Thirdly, with the recent change in the definition of developmental disability to match the federal definition, it is all the more important that GALs be thoroughly knowledgeable about what constitutes a developmental disability and the various needs of persons with developmental disabilities. For instance, the broader definition could now include a person who sustained an injury before the age of 22 that resulted in a closed head injury or paralysis. Therefore, language should be reinserted into the bill to protect the rights of a segment of the population who too often cannot "speak" for themselves.

Response:

The initial goal of the bill as introduced was to provide for more flexibility in structuring guardianships for persons with developmental disabilities, and to provide families with greater ease in terminating or modifying DD guardianships. Reportedly, many wards, guardians, and family members find the process of having to re-petition the court every five years to continue a partial guardianship to be not only expensive and time consuming, but emotionally difficult as well. The bill as passed by the House more closely parallels language in the Revised Probate Code regarding the role of guardians ad litem in the guardianship process for legally incapacitated persons and would do a better job of addressing the concerns of wards, family members, guardians, and the courts than the Mental Health Committee version would do.

The Mental Health Committee version raises many problematic issues regarding the requirement that guardians ad litem receive basic information on various topics relating to guardianships for people with developmental disabilities. For instance, the committee version does not specify if the instruction would be a course lasting days or months in duration or a pamphlet explaining guardianship alternatives and ways to communicate with people with developmental disabilities. Who would develop, conduct, or pay for such training? This raises possible Headlee implications. In addition, rural counties may have difficulty finding sufficient qualified people to appoint as guardians ad litem. Further, the language in the committee version that would require that a GAL use communication skills that he or she "has or can make available" when giving explanations

or information to a developmentally disabled person raises questions about the practicality of attempting to legislate the use of a GAL's communication skills. The issue of GAL training or educational requirements is properly within the purview of the judicial branch of government, and would be better addressed through court rules. Or, if the legislature wishes to address this issue, it would be more appropriate to do that in subsequent legislation, as this bill has a more narrow purpose.

For:

Reportedly, mental health professionals have been concerned with the lack of due process protection for persons with developmental disabilities. Under the bill, a person with developmental disabilities who was indigent would be provided legal counsel if he or she, or an interested person, requested a hearing or had objections to any part of the guardianship. This is very similar to the guarantee of legal counsel afforded to legally incapacitated persons during guardianship hearings. It simply isn't right to grant protections to one group and not to extend them to another, especially in light of the fact that many persons with developmental disabilities do have the understanding and capacity to make informed choices about many, if not all, areas of their lives.

Response:

Though the bill's provision for legal counsel for an individual with developmental disabilities is commendable, legal representation by an attorney only comes into play if a hearing is requested or the individual or interested party objects to the guardianship in some matter. Some advocates would argue that appointment of an attorney in every case (as opposed to utilizing guardians ad litem for the review process) would provide the cognitive accommodation, as required under the Americans with Disabilities Act, that every person with a developmental disability needs in order to participate on a level playing field with everyone else connected with the review process. In addition, where an attorney represents the wishes and desires of his or her client, a guardian ad litem operates as the eyes and ears of the court and makes recommendations as to what he or she thinks is in the best interest of the individual. It is imperative that people with developmental disabilities receive whatever accommodation is necessary to identify both their needs and desires and to have those needs and desires zealously advocated on their behalf.

Further, at the heart of the new Mental Health Code, which took effect on March 28, 1996, is a "person-centered" orientation, both in person-centered language and in an emphasis on providing services in the least restrictive setting. The appointment of a guardian ad litem who was trained in guardianship law and alternatives to guardianships as required in the Mental Health Committee version would have assured that a

person with a developmental disability would have received the level of assistance that was needed, without having had to sacrifice various rights through a guardianship appointment that went far beyond what was needed.

Against:

Partial guardianships recognize that people under such guardianships are competent to make decisions about some aspects of their lives. While guardianships for people with developmental disabilities are established because the wards' disabilities are expected to continue indefinitely, the law under which such guardianships are established also directs that they "be designed to encourage the development of maximum self reliance and independence." With proper support, developmentally disabled people's skills can develop and change to such an extent that they become able to make competent decisions in areas of their lives that they formerly were unable to do. The current five-year limitation on partial guardianships ensures that there is an adequate periodic review of these guardianships. Reportedly, many families, guardians, and individuals with developmental disabilities opt to let the guardianship quietly expire at the end of the five years because it is no longer necessary to continue it. Under the bill, however, people would be forced to undergo yet another hearing in order to request a termination of the guardianship, and would possibly be subject to the recommendation of the guardian ad litem regarding termination. Eliminating the five-year mandatory expiration of partial guardianships, and replacing it with three-year periodic reviews, would remove important existing protections for people with developmental disabilities. This is not the group whose day in court should be taken away to ease the courts' workload problems. If anything, there should be more protections of the due process rights of developmentally disabled people, not less, since guardianships remove significant rights.

Response:

The bill does not specify the length of a partial guardianship. If requested in the original petition, or at the discretion of the court, a partial guardianship could be set at less than three years. Then, at the end of the time frame in the court order, the guardianship could be allowed to expire if no longer needed. Should the guardian or the individual wish to continue the guardianship, either would be free to petition the court to reestablish the guardianship, as is the current practice.

POSITIONS:

The Michigan Probate Judges Association supports the bill. (8-23-96)

The Department of Community Health neither supports nor opposes the bill. (8-26-96)

The ARC Michigan (formerly the Association of Retarded Citizens of Michigan) opposes the bill. (8-22-96)

The Association for Community Advocacy feels that the bill is still grossly deficient in due process protection for persons with developmental disabilities in not appointing an attorney in every case (instead of a guardian ad litem) or ensuring that GALs have the needed knowledge/expertise about the DD population, among other concerns, (8-27-96)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.