

# Legislative Analysis

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## VULNERABLE OR INCAPACITATED PERSON

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**Senate Bill 461 (Substitute H-2)**

**Sponsor: Sen. Tonya Schuitmaker**

**House Committee: Families, Children, and Seniors**

**Senate Committee: Families, Seniors, and Human Services**

**Complete to 5-21-12**

## A SUMMARY OF SENATE BILL 461 AS REPORTED BY HOUSE COMMITTEE

The bill would amend the Estates and Protected Individuals Code to do all of the following:

- Prevent a person from benefiting from the estate of a decedent if the person is convicted of abuse, neglect, or exploitation with respect to the decedent. (In general, a conviction for these offenses under the bill would be treated the way a conviction for feloniously and intentionally killing the decedent is currently treated under the act. This amends Section 2803.)
- However, the provision above would not apply if the decedent executed a governing instrument after the date of the conviction for abuse, neglect, or exploitation expressing a specific intent to allow the felon to inherit or otherwise receive the estate or property of the decedent.
- Make complementary amendments to Section 2804 which deals with the liability of a payor and other third parties who make payments or transfer property to a beneficiary who has forfeited benefits under Section 2803.
- List the rights of an incapacitated individual for whom a guardian is sought or appointed (described in detail later).
- Require an incapacitated individual to be informed of the rights in writing. The State Court Administrative Office and the Office of Services to the Aging would have to promulgate a form to be used to give the written notice.
- Provide that the guardian of an incapacitated person would have the specified powers and duties to the extent granted by court order.
- Allow an incapacitated person to handle his or her property or money without the supervision or consent of his or her guardian or conservator, except to the extent a court granted power to the guardian or conservator.

- Specify that if the court determines that financial protection is required for the ward, it could order the guardian to petition for the appointment of a conservator or for another protective order under the code in relation to the ward's estate. If a conservator has not been appointed for the ward's estate and a guardian determines that there is more cash or property that is readily convertible into cash than was estimated by the guardian ad litem and reported to the court, the guardian would be required to report the amount of the additional cash or property to the court.
- Provide that a court would have to require a conservator to furnish a bond if the cash and property readily convertible into cash in an individual's estate exceeded the limit for distribution of a small estate, subject to certain exceptions.
- Prohibit a conservator from mortgaging, pledging, or causing a lien to be placed on an individual's real property without court approval.

The bill would take effect on December 1, 2012.

#### Definition of Abuse, Neglect, Exploitation

Under the bill, "abuse, neglect, or exploitation" would mean any of the following:

- An act that constitutes child abuse under Section 136b of the Michigan Penal Code.
- A criminal act that is an offense under Chapter XXA of the Penal Code (offenses against vulnerable adults).
- A violation of Section 174a (embezzlement of a vulnerable adult's money or property) of the Penal Code.
- A criminal act that is an offense involving domestic violence as that term is defined in a section of the Code of Criminal Procedure (MCL 768.27b).
- A criminal act that constitutes abuse, neglect, or exploitation of as defined in Section 11 of the Social Welfare Act (regarding vulnerable adults).

#### Rights of those for whom guardian is sought or appointed

The bill would add Section 5306a to state that an individual for whom a guardian is sought or appointed under Section 5306 would have the following rights:

- To object to the appointment of a successor guardian by will or other writing.
- To have the guardianship proceeding begun and conducted in the place where the individual resided or was present or, if he or she were admitted to an institution by a court, in the county where the court was located.
- To petition on his or her own behalf for the appointment of a guardian.
- To have legal counsel of his or her own choice represent him or her on the petition to appoint a guardian.
- To have a guardian ad litem appointed to represent the individual on the petition to appoint a guardian, if the individual were not represented by legal counsel.
- To have an independent evaluation of his or her capacity by a physician or mental health professional, at public expense if the individual were indigent.

- To be present at the hearing on the petition to appoint a guardian and to have all practical steps taken to ensure this, including moving the hearing site if necessary.
- To see and hear the evidence presented in the hearing.
- To present evidence and cross-examine witnesses at the hearing.
- To have a trial by jury on the petition to appoint a guardian.
- To have a closed hearing on the petition.
- To be informed of the name of each person known to be seeking appointment as guardian.
- To require that proof of incapacity and the need for a guardian be proven by clear and convincing evidence.
- To have the powers and period of time of a guardianship limited to only the amount and time that were necessary.
- To have a guardianship designed to encourage the development of maximum self-reliance and independence.
- To prevent the grant of powers to a guardian if those powers were already held by a valid patient advocate.
- To have periodic review of the guardianship by the court, including the right to a hearing and the appointment of an attorney if issues arose upon the review.
- To seek modification or termination of the guardianship by informal letter to the judge at any time.
- To have a hearing within 28 days of requesting a review, modification, or termination of the guardianship.
- To have the same rights on a petition for modification or termination of the guardianship with respect to the appointment of a visitor, as apply to a petition for appointment of a guardian.
- To receive personal notice of a petition for appointment or removal of a guardian.
- To receive written notice of the nature, purpose, and legal effects of the appointment of a guardian.
- To choose the person who would serve as guardian, if the chosen person were suitable and willing to serve.
- To consult with the guardian about major decisions affecting the individual, if meaningful conversation were possible.
- To have quarterly visits by the guardian.
- To have the guardian notify the court within 14 days of a change in the individual's residence.
- To have the guardian secure services to restore the individual to the best possible state of mental and physical well-being, so he or she could return to self-management at the earliest possible time.
- To have the guardian take reasonable care of the individual's clothing, furniture, vehicles, and other personal effects.
- To partially self-manage his or her property to encourage self-reliance and independence.

If a guardian ad litem were appointed, the individual also would have the following rights:

- To be personally visited by the guardian ad litem.
- To have an explanation by the guardian ad litem of the nature, purpose, and legal effects of a guardian's appointment.
- To have an explanation by the guardian ad litem of the individual's rights in the hearing procedure.

**FISCAL IMPACT:**

The bill would have an indeterminate fiscal impact on state and local government. Local courts may incur additional costs due to an increased administrative workload. The cost of this workload is not known, but is likely negligible.

**POSITIONS:**

Department of Human Services supports the bill. (3-20-12)

Elder Law of Michigan supports the bill. (3-20-12)

Elder Law and Disability Rights Section of State Bar of Michigan supports the bill. (3-20-12)

Michigan Bankers Association supports the bill. (3-20-12)

Michigan Catholic Conference supports the bill. (3-20-12)

Michigan County Social Services Association supports the bill. (3-20-12)

Michigan Probate Judges Association supports the bill. (3-20-12)

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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.