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## Judiciary Committee

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### ESSB 5740

**Title:** An act relating to preventing predatory guardianships of incapacitated adults.

**Brief Description:** Preventing predatory guardianships of incapacitated adults.

**Sponsors:** Senate Committee on Human Services & Corrections (originally sponsored by Senators Kastama, Chase and Roach).

#### Brief Summary of Engrossed Substitute Bill

- Requires guardians ad litem to disclose relationships that appear to be conflicts of interest in guardianship proceedings.
- Modifies the requirements for service of process relating to hearings on guardianship appointments.
- Requires courts to schedule hearings on any application to modify or terminate a guardianship unless an application is frivolous.
- Requires courts receiving petitions for guardianship, the Administrative Office of the Courts, and the Long-Term Care Ombudsman to distribute information regarding lay and professional guardians.

**Hearing Date:** 3/16/11

**Staff:** Kelly Pfundheller (786-7289).

#### Background:

Guardianship is a legal process through which a guardian is given the power to make decisions for a person who is determined to be "incapacitated" and therefore unable to take care of himself or herself. A person may be incapacitated if the individual is at a significant risk of financial harm because of an inability to manage his or her property or financial affairs or has a significant risk of personal harm because of an inability to provide for nutrition, health, housing, or physical safety.

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*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.*

The court may establish a guardianship or limited guardianship over the person, the person's estate, or both. A guardian of an incapacitated person's estate is responsible for managing the person's property and finances. Such person is responsible for assessing and meeting of the incapacitated person's physical, mental, and emotional needs. Any adult person residing in Washington may serve as a guardian unless the person is of unsound mind, has been convicted of a crime of moral turpitude, or is found unsuitable by the court. Professional guardians must be certified by the Certified Professional Guardian Board (Board) and must meet certain education, experience, and training requirements established by the Board.

#### Guardians Ad Litem in Guardianship Proceedings.

A guardian or limited guardian has a different role than a guardian ad litem (GAL). A GAL is a person appointed in a guardianship proceeding to represent the best interests of an alleged incapacitated person (AIP) and to investigate and report to the court on relevant matters. A GAL position is temporary and expires when the case is completed or dismissed.

When a court appoints a GAL in a guardianship proceeding, the GAL must file with the court and serve each party with a statement that includes:

- his or her training;
- his or her criminal history for the previous 10 years;
- his or her hourly rate;
- whether he or she has had any contact with a party to the proceeding prior to his or her appointment; and
- whether he or she has an apparent conflict of interest.

Any party may set a hearing and file and serve a motion for an order to show cause why the GAL should not be removed for lack of expertise, an unreasonable hourly rate, or a conflict of interest. An order to show cause requires one or more of the parties to a case to justify, explain, or prove something to the court.

#### Notice of a Petition for a Guardianship Appointment.

Any person may petition the court to appoint a guardian or limited guardian of an incapacitated person. Notice of a hearing on a petition must be served personally no less than 10 days prior to a hearing on the petition upon the AIP, if over the age of 14, and the GAL. Notice must be also be served personally or by registered mail to: the AIP, if under the age of 14; a parent of the minor AIP; and any other person who has been appointed as guardian or limited guardian or the person with whom the AIP resides.

#### Modifying or Terminating a Guardianship.

Any person, including the incapacitated person, may apply to the court for an order to modify or terminate a guardianship or to replace a guardian or limited guardian. If applicants are represented by counsel, counsel must move for an order to show cause why the relief requested should not be granted. If applicants are not represented by counsel, they may move for an order to show cause or deliver a written request to the clerk of the court.

After receipt of a person's request to modify or terminate a guardianship, or to replace a guardian or limited guardian, the court may:

- direct the clerk to schedule a hearing;
- appoint a GAL to investigate the issues raised by the application or take any emergency action the court deems necessary to protect the incapacitated person until a hearing can be held; or
- deny the application without scheduling a hearing, if it appears based on documents in the court file that the application is frivolous. Any denial of an application without a hearing must be in writing with the reasons for the denial explained.

If the court does not take action within 30 days of receiving the applicant's request from the clerk, the clerk must schedule a hearing. Upon a hearing, the court may grant such relief as it deems just and in the best interest of the incapacitated person.

### **Summary of Bill:**

The bill makes changes to guardianship laws relating to GALs, service of process of petitions for appointments, and the modification and termination of guardianships. A requirement regarding distribution of information on lay and professional guardians is also created.

#### *Guardians Ad Litem in Guardianship Proceedings.*

An appointed GAL must disclose in writing to the court any prior or existing relationship or other circumstances that would cause the appearance of a conflict of interest in the GAL's recommendation of the appointment of a particular person or persons to act as a guardian.

#### *Notice of a Petition for a Guardianship Appointment.*

The deadline to achieve notice of a hearing on a petition is extended to 15 days prior to the hearing with respect to service upon an AIP under the age of 14, a parent of an AIP who is a minor, and any other person who has been appointed as guardian or limited guardian or the person with whom the AIP resides. The notice served upon these individuals must include:

- the name of the person who the court or GAL proposes to be appointed as guardian or limited guardian;
- a copy of the petition for the appointment of guardian; and
- the statement of the legal rights of the AIP that could be restricted or transferred to a guardian by a guardianship order.

#### *Modifying or Terminating a Guardianship.*

A written request applying for modification or termination of a guardianship by an unrepresented person must be considered by the court as the equivalent of a motion for an order to show cause.

When the clerk delivers a request to modify or terminate a guardianship to the court, the court must direct the clerk to schedule a hearing on the request and mail notice to the guardian, the incapacitated person, the applicant, all counsel of record, and any other person entitled to receive notice. The court may deny the application without a hearing if it appears that the application is frivolous based on the documents in the court file.

If the applicant makes a prima facie showing that a professional guardian has breached a fiduciary, professional, or other ethical duty with respect to the guardianship as proscribed by the certified professional guardian board, the burden of proof shifts to the guardian to establish that his or her conduct was appropriate.

*Distribution of Information on Guardianships.*

When a person files a petition for an appointment of a guardian or limited guardian, the court must provide the person with information regarding professional and lay guardians. The bill states that the purpose of the information is to provide family members of incapacitated adults with information detailing:

- what a guardian is;
- the different types of guardianship in Washington;
- the powers granted to a guardian;
- an explanation of how professional guardian fees are approved by the court and how professional guardians may bill for their services;
- a description of the process to modify a guardianship or to remove a guardian; and
- information about the certified professional guardian board and program.

The Administrative Office of the Courts must publish information about professional and lay guardians on its web site. The Long-Term Care Ombudsman must also publish the information on a website or otherwise make the information available to the public and residents of long-term care facilities and their families.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.