

HOUSE BILL REPORT

2SHB 1402

As Passed House:
March 3, 2017

Title: An act relating to the rights and obligations associated with incapacitated persons and other vulnerable adults.

Brief Description: Concerning the rights and obligations associated with incapacitated persons and other vulnerable adults.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Jinkins, Griffey, Rodne, Goodman, Muri, Kilduff, Orwall, Haler, Kirby, Hansen, Frame, Johnson, Appleton, Ortiz-Self and Cody).

Brief History:

Committee Activity:

Judiciary: 1/26/17, 2/2/17 [DPS];
Appropriations: 2/21/17 [DP2S(w/o sub JUDI)].

Floor Activity:

Passed House: 3/3/17, 97-0.

Brief Summary of Second Substitute Bill

- Provides that incapacitated persons retain certain associational rights.
- Prohibits guardians from restricting those associational rights, with some exceptions.
- Defines "isolate" or "isolation" in the laws regarding abuse of vulnerable adults.
- Adds certain notice requirements to the duties of a guardian.
- Requires the Office of Public Guardianship to work with the Office of the State Long-Term Care Ombuds to develop certain types of targeted training.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass.
Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking

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.

Minority Member; Muri, Assistant Ranking Minority Member; Frame, Goodman, Graves, Haler, Hansen, Kirby, Klippert, Orwall and Shea.

Staff: Audrey Frey (786-7289).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Judiciary. Signed by 33 members: Representatives Ormsby, Chair; Robinson, Vice Chair; Chandler, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Stokesbary, Assistant Ranking Minority Member; Bergquist, Buys, Caldier, Cody, Condotta, Fitzgibbon, Haler, Hansen, Harris, Hudgins, Jinkins, Kagi, Lytton, Manweller, Nealey, Pettigrew, Pollet, Sawyer, Schmick, Senn, Springer, Stanford, Sullivan, Taylor, Tharinger, Vick, Volz and Wilcox.

Staff: Meghan Morris (786-7119).

Background:

Guardianship.

A guardian is a person appointed and empowered by the court to make decisions for the person or the estate, or both, of an incapacitated person. A person may be deemed incapacitated as to person when the court determines that the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety. Incapacity as to the person's estate means the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs. If a person is incapacitated in some aspects, but not others, a limited guardian may be appointed over the person, the estate, or both, to make decisions regarding the areas in which the person is incapacitated.

Vulnerable Adults.

Certain persons are required to report suspected incidents of abandonment, abuse, financial exploitation, or neglect of a vulnerable adult to the Department of Social and Health Services, which is required to investigate those allegations.

"Vulnerable adult" means: (1) a person 60 years of age or older who has the functional, mental, or physical inability to care for himself or herself; (2) a person who is found incapacitated under the guardianship laws; (3) a person who has a developmental disability; (4) a person who is admitted to certain facilities; (5) a person who is receiving services from home health, hospice, or home care agencies licensed or required to be licensed; (6) a person who is receiving services from certain individual providers; or (7) a person who self-directs his or her own care and receives services from certain personal aides.

A vulnerable adult, or interested person on behalf of a vulnerable adult, may seek relief from abandonment, abuse, financial exploitation, or neglect, or the threat thereof, by filing a petition for a Vulnerable Adult Protection Order (VAPO) in superior court. Procedures for filing a VAPO are provided by statute.

Relevant Definitions. "Abuse" means willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. Abuse includes sexual abuse, mental abuse, physical abuse, personal exploitation of a vulnerable adult, and improper use of restraint against a vulnerable adult.

"Mental abuse" means a willful verbal or nonverbal action that threatens, humiliates, harasses, coerces, intimidates, isolates, unreasonably confines, or punishes a vulnerable adult.

"Improper use of restraint" means the inappropriate use of chemical, physical, or mechanical restraints for convenience or discipline in a manner that: (1) is inconsistent with federal or state requirements; (2) is not medically authorized; or (3) otherwise constitutes abuse.

Office of Public Guardianship.

The Office of Public Guardianship (OPG) is a judicial branch agency within the Administrative Office of the Courts that provides public guardianship services to incapacitated persons who need the services of a guardian and for whom adequate services may be otherwise unavailable. The OPG is authorized to provide guardianship training to individuals with whom the OPG contracts to provide public guardian services, as well as individuals who, in the judgment of the administrator of the OPG, are likely to provide public guardianship services in the future.

Office of the State Long-Term Care Ombuds.

All states are mandated by federal law to operate a long-term care ombudsman program. The Office of the State Long-Term Care Ombuds addresses complaints and advocates for improvements in the long-term care system. Long-term care facilities are defined to include: (1) facilities that maintain and operate 24-hour skilled nursing services for the care and treatment of chronically ill or convalescent patients; (2) facilities that provide supportive, restorative, and preventive health services in conjunction with a socially oriented program to its residents, and which maintain and operate 24-hour services; (3) any family home, group care facility, or similar facility for 24-hour nonmedical care of persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual; and (4) any swing bed in an acute care facility. One of the duties of a long-term care ombuds is to provide certain types of training.

Summary of Second Substitute Bill:

The associational rights of incapacitated persons and the related duties of guardians are set forth.

Associational Rights of an Incapacitated Person.

Incapacitated persons retain the right to associate with persons of their choosing, including, but not limited to, the right to freely communicate and interact with other persons, whether through in-person visits, telephone calls, electronic communications, personal mail, or other means.

Duties of a Guardian with Respect to an Incapacitated Person's Associational Rights.

A guardian of an incapacitated person who is unable to express consent or make a decision regarding association with another person must: (1) personally inform the incapacitated person of the decision under consideration using plain language; (2) maximize the incapacitated person's participation in the decision-making process; and (3) give substantial weight to the incapacitated person's expressed and historical preferences.

A guardian may not restrict an incapacitated person's associational rights unless: (1) the restriction is specifically authorized by the guardianship court in the court order establishing or modifying the guardianship; (2) the restriction is pursuant to a protective order; or (3) the guardian has good cause to believe that there is an immediate need for the restriction in order to protect the incapacitated person from abuse, neglect, abandonment, or financial exploitation, and within 14 days of imposing the restriction, the guardian files a petition for a vulnerable adult protection order (VAPO). In the 14-day period before the guardian is required to file a VAPO, a guardian or limited guardian is allowed to restrict an incapacitated person's associational rights to protect the incapacitated person from activities that unnecessarily impose significant distress.

A VAPO sought to protect a person under guardianship must: (1) include written findings of fact and conclusions of law; (2) may not be more restrictive than necessary to protect the incapacitated person from abuse, neglect, abandonment, or financial exploitation; and (3) may not completely deny association between the incapacitated person and another person unless the court finds that placing reasonable time, place, or manner restrictions is unlikely to sufficiently protect the incapacitated person.

Isolation.

"Isolate" or "isolation" means "to restrict a vulnerable adult's ability to communicate, visit, interact, or otherwise associate with persons of his or her choosing." Isolation may be evidenced by acts including, but not limited to: (1) acts that prevent a vulnerable adult from communicating with others; and (2) acts that prevent or obstruct a vulnerable adult from meeting with others.

"Isolate" or "isolation" may not be construed in a manner that prevents a guardian or limited guardian from performing his or her fiduciary obligations under the guardianship laws or prevents a hospital or facility from providing treatment consistent with the standard of care for delivery of health services.

Additional Duties of a Guardian.

Guardians are given additional duties.

Mental Health Reports. Guardians must include reports from mental health professionals on the status of the incapacitated person, if any exist, along with the required annual reporting.

Notice Requirements. Guardians must inform any person entitled to special notice of proceedings, and any other person designated by the incapacitated person, as soon as possible, but in no case more than five days after the incapacitated person: (1) makes a change in residence that is likely to last more than 14 calendar days; (2) is admitted to a medical facility for acute care that requires inpatient treatment; (3) has been treated in an

emergency room setting or kept for hospital observation for more than 24 hours; or (4) dies, in which case the notification must be made in person, by telephone, or by certified mail.

Training.

The Office of Public Guardianship is required to work in partnership with the Office of the State Long-Term Care Ombuds to develop and offer training targeted to the legal community and persons working in long-term care facilities regarding the different types of decision-making authority that guardians, persons with powers of attorney, and persons with surrogate health care decision-making authority have, including their various roles, duties, and responsibilities.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony (Judiciary):

(In support) This bill addresses the issue of isolation and abuse of vulnerable persons. The point of this bill is to put some structure around what professional guardians have to do if they want to limit contact with someone like a family member. It will help create some balance in the relationship. Also, certain family members and others will receive notification when big things happen, such as when the person in the guardianship is hospitalized or moved. There is a training component for long-term care facilities to help them know what to do. Our society should take care of our most vulnerable.

The bill strikes a good balance of all the various stakeholder perspectives in the workgroup, especially the robust definition of isolation. This is a very important issue. The notice requirements, robust associational rights, definition of isolation, and all of the provisions are ready to go primetime.

Adult protective services does not enforce the vulnerable adult law against mental abuse, which includes isolation. The certified professional guardian rules are also not enforced. There are many people out there who need help and deserve justice. This bill will help, but only if it is enforced by the courts.

Isolation for seniors is a growing problem, both for elders in and out of facilities. This bill is a really good first step. It sets out a process where a guardian can protect, yet not isolate, a vulnerable adult from friends, family, and loved ones.

The placement of isolation in the definition of improper use of restraint is probably not necessary. The examples in the definition of isolation are helpful, but the intent language in the definition of isolation narrows the definition a lot.

This bill will be really beneficial. People under guardianship do get isolated sometimes by their guardian, and if they feel like they are being isolated, there should be proper procedures

in place so they can speak out and talk about how they are being isolated. People under guardianship should have the right to appear before the court and talk about how their life is going and how the isolation might look.

Bringing the procedures under the Vulnerable Adult Protection Act (VAPA) into play here deserves strong support. That act was established in the mid-1980s, and its purpose is to protect vulnerable adults from abuse, including mental abuse. Procedures under that act are well-established by court rules and case law. Both the vulnerable adult and the accused person are afforded a hearing and due process. People are excluded from contact with a person under guardianship without any due process or opportunity to be heard. Bringing in the VAPA procedures will hopefully help address those problems. In response to other concerns raised, mediation is always available under a guardianship proceeding—it should always be the first step.

There may be very good guardians out there, but there are a lot of very corrupt guardians and magistrates out there as well. There are people being isolated by guardians right now. Loved ones are kept from their friends and families. Many complaints, phone calls, and emails are sent and received describing situations where guardians have isolated people. If this bill had been in place, there is a mother that would not have been isolated and kept from her children and grandchildren.

There are cases where guardians place people in nursing homes with the intent of taking their savings and retirement nest eggs. This bill will protect people in their retirement years.

The bill says the guardian's duty is to involve the person under guardianship in decision-making as much as possible. That's really what a guardian is supposed to do anyway, but this bill does a good job of setting this out. It makes sure guardians have the authority to act. The training provision is important. It will cost money, but training is really what will make sure the law will be enforced.

(Opposed) There's an awful lot to support about this bill, but there are also some serious concerns. Someone under a guardianship is, by definition, the most vulnerable of the vulnerable. There are circumstances in which it is to the benefit of the person under the guardianship to have the guardian restrict or control contact that doesn't rise to the circumstances required to seek a vulnerable adult protection order. Ultimately that standard is not going to be good for some vulnerable adults. The second, and biggest concern, is that this bill puts the onus on the guardian to come to court every time they want to restrict someone's access. What that does is put the cost of access on the guardianship estate; that doesn't seem a good way to handle this. Before a guardian has been appointed they've been vetted by a guardian ad litem and approved by the court. They are trusted to make more serious decisions than what we're talking about here; they make decisions about healthcare, housing, and spending—decisions that are subject to review in a report that has to be filed with the court every one to three years. It doesn't seem like the level of trust should change for this one specific issue, especially with the costs that are going to be borne by the guardianship.

Staff Summary of Public Testimony (Appropriations):

(In support) This is an important step in making sure seniors and vulnerable persons are not accidentally or intentionally isolated from their friends or loved ones. The Washington Office of the Long-Term Care Ombudsman training will ensure all care facilities have a clear process and understanding of what their obligations are under the law. Long-term care facilities must know the steps for vulnerable adult protection orders. Facilities cannot arbitrarily isolate someone and must follow the proper steps before legal guardians and others restrict contact with an incapacitated person. The bill is a good investment to keep our seniors safe while maintaining their ability to have outside relationships.

There are many stories about guardians who are isolating individuals and doing something fiscally irresponsible with their life savings. This bill gives the court guidance if somebody is isolated and there are cases of fiscal irresponsibility.

The substitute bill balances stakeholder interests. The cost to the incapacitated persons when work is done on their behalf by either professional guardians or lay guardians is not mentioned in the total costs. The cost of complying with the five-day requirement for notice to be made to interested parties if something changes in the status of an incapacitated could be expensive. This is something that will be billed to the incapacitated person. Five days is very restrictive. Ten days or 15 days is a better number. Some people want 21 or 30 days, but that is too much. This bill is important, but the five-day limit could be costly.

Currently there are three gentlemen who cannot testify because they are being isolated by their professional guardians. There is a mother who was isolated from family and friends who also cannot testify. Family members and relatives of incapacitated persons need this bill. The state has laws on this issue that are not enforced. The Department of Social and Health Services (DSHS) is supposed to enforce the laws regarding abuse of vulnerable adults, which says isolation is a form of mental abuse, but the DSHS is not enforcing the law. The Certified Professional Guardian Board's standard of practice says a professional guardian cannot isolate an incapacitated person, but they do not enforce that rule.

(Opposed) None.

Persons Testifying (Judiciary): (In support) Representative Jenkins, prime sponsor; Representative Griffey; Dan Smerken, Washington Association of Professional Guardians; Larry Shannon, Washington State Association for Justice; Claudia Donnelly; Melanie Smith, Washington State Long-Term Care Ombudsman Program; Bill Moss, Department of Social and Health Services; Noah Seidel, Self Advocates in Leadership; Teresa Maxwell; Douglas Schafer; Lucky Miller; Cathy Maccaull, American Association of Retired Persons; David Lord, Disability Rights Washington; and Jennifer Roach.

(Opposed) Steve Warning, Superior Court Judges Association.

Persons Testifying (Appropriations): Melanie Smith, Washington State Long-Term Care Ombudsman Program; Noah Seidel, Self Advocates in Leadership; Steve Lindstrom, Washington Association of Professional Guardians; and Claudia Donnelly.

Persons Signed In To Testify But Not Testifying (Judiciary): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.