

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

Senate Bill 90

(Senator Kelley, *et al.*)

Judicial Proceedings

Guardianship, Advance Directives, and Surrogates - Disabled Persons and
Mental Health Services

This bill authorizes a court to appoint a guardian for a disabled person for a limited period of time if it appears probable that the disability will end within one year of the appointment of the guardian. The bill allows the court to require guardians to submit biannual reports. The bill also implements a 72-hour waiting period after a declarant revokes an advance directive for mental health services before the revocation may become effective, when the declarant revoking the advance directive has been certified incapable of making an informed decision. Finally, the bill repeals a prohibition against surrogates authorizing treatments for mental health disorders.

Fiscal Summary

State Effect: None. The bill does not materially affect State finances.

Local Effect: None. The bill's provisions authorizing a court to appoint a guardian for limited period of time and to require guardians to submit biannual reports can be implemented with existing resources.

Small Business Effect: None.

Analysis

Current Law:

Appointment of a Guardian

The circuit court may appoint a guardian for a disabled person for the limited purpose of making one or more decisions related to the health care of that person.

Powers of a Guardian of the Person

The court may grant to a guardian only those powers necessary to provide for the demonstrated need of the disabled person. Subject to this limitation, the court order may include specified rights, duties, and powers.

Accordingly, the court may grant the guardian the same rights, powers, and duties that a parent has with respect to a child, except that the guardian is not liable solely by reason of the guardianship to third persons for any act of the disabled person. The court may give the guardian of the person the right to custody of the disabled person and the right to determine where he or she may live, whether inside or outside the State, provided there is court authorization for a change in living quarters and with the exception that no one may be committed to a mental facility without an involuntary commitment proceeding. The court may also delegate to the guardian the duty to provide for care, comfort, and maintenance (including social, recreational, and friendship requirements); provide, as appropriate, for training and educating the disabled person; and take reasonable care of the personal effects of the disabled person.

If a guardian of the estate has not already been appointed for the disabled person, the court may authorize the guardian of the disabled person to go to court to compel a person to perform the duty to support the disabled person and to use money from the estate to support, care for, and educate the disabled person. However, the guardian of the person may not take money from the estate for room and board that the guardian, his/her spouse, parent, or child provides without court approval, and there is a duty to exercise care to conserve any excess estate for the needs of the disabled person.

If a guardian of the estate has been appointed, however, the court may delegate to the guardian of the disabled person the duty to control the custody and care of the disabled person, the duty to receive a reasonable amount of money for the room and board for the disabled person, the duty to account to the guardian of the estate for expended funds, and the right to ask the guardian of the estate to sell assets to pay for the care of the disabled person.

The court may also give the guardian the power to give consent for medical or other professional care, including admission to a hospital or nursing home or transfer from one medical facility to another, and the power to withhold or withdraw medical care.

Reporting Requirement

A guardian of the disabled person must file an annual report with the court that includes the disabled person's residence, health status, the guardian's plan for disabled person's future well-being, and the need to continue or end the guardianship or for any alteration in the powers of the guardian. The court must renew the appointment of the guardian if it is satisfied that the reason for the original appointment continues to exist. If the court determines that the reason no longer exists, it must hold a hearing and the guardian must prove that there is reason to continue the guardianship. If the court does not agree, it must order termination of the guardianship. If the guardian declines to participate in the hearing, the court may appoint another guardian to replace him or her.

Revocation of an Advance Directive for Mental Health Services

An advance directive may be revoked at any time by a declarant by (1) a signed and dated written or electronic document; (2) physical destruction of the advance directive; (3) an oral statement to a health care provider; or (4) the execution of another directive. If an individual revokes an advance directive by an oral statement to a health care practitioner, the practitioner and a witness must note the revocation in the medical record of the individual. The individual revoking the advance directive then has the responsibility to reasonably attempt to notify any person that has a copy of the directive.

Surrogate Authorization of Treatment

A surrogate may not authorize sterilization or treatment for a mental disorder.

Background: At the direction of Governor O'Malley, the Department of Health and Mental Hygiene (DHMH) convened the Continuity of Care Advisory Panel to explore ways to enhance continuity of care for individuals with serious mental illness. The advisory panel was charged with examining barriers to continuity of care – economic, social, legal, and clinical – and making recommendations to strengthen the public behavioral health service delivery system, improve health outcomes, and address deficiencies that lead to interruptions of care.

The advisory panel held six public meetings between August and November of 2013. DHMH also established four stakeholder workgroups to help support the broader advisory panel. Each workgroup examined and researched data and reports related to one of four barriers to continuity of care – economic, social, legal, or clinical. The workgroups

provided recommendations to the advisory panel about ways to better address barriers to care, prevent interruptions in treatment, and improve health outcomes

The advisory panel issued its final report on January 21, 2014. The report contained 25 recommendations that addressed areas both inside and outside of DHMH's regulatory authority. Of those recommendations, 3 are reflected in the bill.

Advisory Panel Recommendation 14: Amend the Health Care Decisions Act to allow a surrogate to authorize the treatment of a mental disorder.

The advisory panel identified numerous barriers to continuity of care for individuals with serious mental illness that it believed could be resolved through changes to Maryland's Health Care Decisions Act. When an individual is incapacitated due to illness, disease, mental illness, or a developmental disability, other individuals may need to make medical decisions for that person. The Health Care Decisions Act permits family and friends to make medical decisions for an individual who is unable to make decisions for himself or herself.

Medical decision making can occur through several avenues. After two doctors certify that a patient is unable to make decisions about his or her health care, the doctors ask whether the patient has named a health care agent in a health care advance directive. If there is no appointed agent, the doctors look to the closest relative or friend to make health care decisions. Any person subject to such designation is a surrogate. Surrogates may act in the following order of priority: (1) a legally appointed guardian; (2) a spouse; (3) an adult child; (4) a parent; (5) an adult sibling; and (6) a close relative or friend.

A surrogate is expressly prohibited from authorizing treatment for a mental disorder. A surrogate may however, authorize treatment for somatic health issues even when the symptoms resemble those associated with mental illness. This disparate treatment of somatic health and mental health issues was cited by the advisory panel as a significant barrier to continuity of care for individuals with a serious mental illness.

Advisory Panel Recommendation 15: Statute should be amended to allow for short-term or temporary guardianship. Guardianship would be reevaluated after six months (in comparison to the annual evaluation) to account for instances when individuals are experiencing brief instances of psychosis.

As noted above, a legal guardian receives the highest order of priority as a surrogate. A legal guardian may be appointed by the court if the court determines that a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person – including provisions for health care, food, clothing, or shelter – because of any mental disability, disease, habitual drunkenness, or drug addiction. A

guardian of the person may only be appointed if the court finds that no less restrictive form of intervention is available which is consistent with a person's welfare or safety. Once appointed, a guardian is obligated to file an annual report with the court. The report is meant to supervise the guardian's actions and to determine whether the guardianship should be modified or terminated.

The advisory panel raised concerns that the existing process for supervising and annually reviewing a guardian's actions fails to meet the unique needs of individuals with serious mental illness who experience brief periods of incompetency. The advisory panel noted that, in these cases, short-term or temporary guardianship may be more appropriate as that necessitates court review in shorter intervals. As an individual regains competency, the guardianship may be terminated by the court.

Advisory Panel Recommendation 17: Amend statute to create a delay in terms of revoking an Advance Directive for Mental Health Treatment so that revocation does not take effect until 72 hours after the request to revoke is made.

Individuals who need mental health services, who may become incapacitated in the future, or who have intermittent competency may choose to designate a health care agent to ensure that they receive specified mental health services even when they are no longer able to consent to the provision of services themselves. This can be achieved through the execution of an advance directive for mental health services.

An advance directive for mental health services may include (1) the designation of an agent to make mental health services decisions for an individual; (2) the identification of preferred mental health professionals and facilities from which the individual prefers to receive mental health services; (3) a statement of medications preferred by the individual for psychiatric treatment; and (4) instruction regarding the notification of third parties and the release of information to third parties about mental health services provided to the individual.

The advisory panel raised concerns that there are instances when advance directives are not implemented due to statements an individual may make when he or she is incompetent. The advisory panel noted that, despite the execution of an advance directive for mental health treatment, an individual has the right to revoke his or her advance directive at any time, even when he or she is incapacitated and in need of treatment. Under these circumstances, an advance directive for mental health services that is developed when an individual is competent may never be honored if that individual chooses to revoke an advance directive when he or she is incompetent.

Additional Information

Prior Introductions: None.

Cross File: HB 239 (Delegate Morhaim) – Health and Government Operations.

Information Source(s): Department of Disabilities, Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Department of Legislative Services

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