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H.26

Introduced by Representatives Donahue of Northfield and Howard of Rutland

City

Referred to Committee on

Date:

Subject: Guardianship proceedings; adult guardianship

Statement of purpose of bill as introduced: This bill proposes to combine jurisdiction over adult guardianship proceedings into a single division of the Superior Court, the Probate Division, which would establish rules for the proceedings with a more unified set of procedural protections and options.

An act relating to guardianship proceedings

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. APPLICATION AND CONSTRUCTION

In applying and construing this act, consideration shall be given to the following:

(1) Prior to 1978, Vermont statute provided for adult guardianship only through its probate court with minimal procedural protections. See Linda O. Smiddy, "Guardianship for the Adult: A Need for Due Process Protections in Vermont," 4 Vt. L. Rev. 95 (Spring 1979).

1 (2)(A) The Vermont General Assembly passed Act 192 in 1978, which
2 provided the district court with jurisdiction to appoint the Commissioner of
3 Mental Health as guardian for adults who were not institutionalized yet were
4 determined by the court to be “mentally retarded” and in need of protection
5 and supervision. That act provided for significant improvements in
6 guardianship procedural protections not available in the probate court system
7 at the time, including:

8 (i) a formal definition of the disabling condition upon which
9 guardianship jurisdiction could be founded and the requirement that there be a
10 comprehensive evaluation by a qualified mental retardation professional;

11 (ii) the right to representation by an attorney, at public expense if
12 needed; and

13 (iii) the necessity of a hearing, along with the opportunity to
14 present evidence and the right to subpoena and to cross-examine witnesses.

15 (B) Act 192 guardianship jurisdiction was subsequently assigned to
16 the Family Division of the Superior Court, with the Commissioner of
17 Disabilities, Aging, and Independent Living as appointed guardian. The
18 probate court is now the Probate Division of the Superior Court, and the
19 archaic and offensive term “mentally retarded” is no longer in use.

20 (3) In 1979, the General Assembly added subchapter 12 to the probate
21 court guardianship provisions in 14 V.S.A. chapter 111. Subchapter 12

1 increased the procedural protections in the probate court so significantly that
2 they outstripped the protections available in what is now the Family Division.
3 In 2010 the differences between the two systems increased even further when
4 the General Assembly provided for voluntary guardianship in the Probate
5 Division without regard to an individual’s disability type. Voluntary
6 guardianship has never been an option in the Family Division.

7 (4) With regard to the Common Benefits Clause of the Vermont
8 Constitution, the General Assembly observed a generation ago that Vermont’s
9 history as an independent republic and as a State is one of equal treatment and
10 respect for all Vermonters. Presently, however, there are approximately 600
11 adults with disabilities for whom the State has been made guardian in the
12 Family Division despite deficiencies in how they are treated under the law
13 compared to how they would be treated in the Probate Division. These
14 differences include:

15 (A) In the Probate Division, under 14 V.S.A. § 3066, the court “may
16 appoint a guardian ad litem if it finds the respondent or person under
17 guardianship is unable to communicate with or advise counsel.” In the Family
18 Division, there is no provision for the appointment of a guardian ad litem.

19 (B) Appeals from the Probate Division to the Civil Division are de
20 novo, and under 12 V.S.A. § 2553 and Rule 72 of the Vermont Rules of Civil
21 Procedure, there is an available retrial in the Civil Division of disputed factual

1 determinations such as mental incapacity. In the Family Division, only a
2 standard appeal with deference to the factual findings below is available.

3 (C) In the Probate Division, under 14 V.S.A. § 3076(a) and (b), the
4 guardian must file an annual report with the court “on the progress and
5 condition of the person under guardianship ... [and] the manner in which the
6 guardian carried out [their duties].” In the Family Division, no annual report is
7 required.

8 (D) In the Probate Division, under 14 V.S.A. § 3073, the residential
9 placement of the person under guardianship may only be changed upon an
10 order of the court made after a motion and hearing. In the Family Division, no
11 court permission is required for a change in residential placement of the person
12 under guardianship.

13 (E) In the Probate Division, under 14 V.S.A. § 3078, the court must
14 mail to the person under guardianship and other persons a copy of the annual
15 report and a statement of the person’s right to seek modification or revocation
16 of the guardianship. In the Family Division, there is no such requirement.

17 (F) In the Probate Division, under 14 V.S.A. § 3076(c), the guardian
18 must file a final accounting with the court at the termination of the
19 guardianship. In the Family Division, no final accounting is required.

1 (G) In the Probate Division, under 14 V.S.A. § 3067(a), a court order
2 is required for a guardianship evaluation to be conducted. No such order is
3 required in the Family Division.

4 (H) In the Probate Division, under 14 V.S.A. § 3061(1)(B), it must be
5 shown that an alleged incapacity is caused by the purported disability. This is
6 not required in the Family Division.

7 (I) In the Probate Division, under 14 V.S.A. § 3061(2) and (3), the
8 determination that a person is in need of a guardianship must be based upon
9 evidence of recent behavior. This is not required in the Family Division.

10 (J) In the Probate Division, under 14 V.S.A. § 3067(c)(2)(A), the
11 evaluation in connection with whether a person is in need of guardianship must
12 specify aspects of the person’s personal care and financial affairs that the
13 person can manage without supervision or assistance. In the Family Division,
14 this is not required.

15 (K) In the Probate Division, under 14 V.S.A. § 3067(c)(2)(B), the
16 evaluation in connection with whether a person is in need of guardianship must
17 specify aspects of the person’s personal care and financial affairs that the
18 person could manage with the supervision or assistance of support services and
19 benefits. In the Family Division, this is not required.

20 (L) In the Probate Division, under 14 V.S.A. § 3067(c)(2)(D), the
21 evaluation in connection with whether a person is in need of guardianship must

1 contain a statement of the programs and services that the guardian should
2 provide. In the Family Division, this is not required.

3 (M) In the Probate Division, under 14 V.S.A. § 3071(c), there is a
4 statutory requirement that “the guardian shall always serve the interests of the
5 person under guardianship and shall bring any potential conflicts of interest to
6 the attention of the court.” In the Family Division, there are no such
7 requirements.

8 (N) The option of voluntary guardianship is available in the Probate
9 Division when an individual is able to understand the nature, extent, and
10 consequences of the proposed guardianship even if the person may otherwise
11 have a disability. This option provides for adult guardianship without the
12 stigma of the person being under a judicial finding of mental incapacity.
13 Voluntary guardianship is not an available option in the Family Division.

14 (O) Because the Probate Division is the court in which individuals
15 without disabilities may have guardianships granted for themselves, the current
16 requirement that guardianship proceedings for certain individuals with
17 developmental disabilities must be held in the Family Division instead of the
18 Probate Division may be at odds with the Common Benefits Clause of the
19 Vermont Constitution.

1 Sec. 2. SHORT TITLE

2 This act shall be referred to as “the Adult Guardianship Equity Act” or as
3 “the AGE Act.”

4 Sec. 3. 14 V.S.A. § 3060 is amended to read:

5 § 3060. POLICY

6 (a) Guardianship shall be utilized only as necessary to promote the well-
7 being of the individual and to protect the individual from violations of ~~his or~~
8 ~~her~~ the individual’s human and civil rights. It shall be designed to encourage
9 the development and maintenance of maximum self-reliance and independence
10 in the individual and only the least restrictive form of guardianship shall be
11 ordered to the extent required by the individual’s actual mental and adaptive
12 limitations. The State of Vermont recognizes the fundamental right of an adult
13 with capacity to determine the extent of health care the individual will receive.

14 (b) A person shall not be subjected to a determination of mental
15 incompetency regarding guardianship if the person would qualify for and agree
16 to the creation of an appropriate voluntary guardianship.

17 (c) Regardless of the form of guardianship applied for, if the proposed
18 person under guardianship qualifies for a voluntary guardianship under section
19 2671 of this title and agrees to the creation of an appropriate voluntary
20 guardianship, then voluntary guardianship shall be deemed the least restrictive
21 form of guardianship under subsection (a) of this section.

1 Sec. 4. 14 V.S.A. § 3061 is amended to read:

2 § 3061. DEFINITIONS

3 ~~The words and phrases used in this subchapter shall be defined as follows~~

4 As used in this subchapter:

5 (1)(A) “Person in need of guardianship” means a person who:

6 (A)(i) is at least 18 years of age; and

7 (B)(ii) is unable to manage, without the supervision of a guardian,
8 some or all aspects of ~~his or her~~ the person’s personal or financial affairs as a
9 result of:

10 (i)(I) significantly subaverage intellectual functioning ~~which~~
11 that exists concurrently with deficits in adaptive behavior; or

12 (ii)(II) a physical or mental condition that results in
13 significantly impaired cognitive functioning ~~which~~ that grossly impairs
14 judgment, behavior, or the capacity to recognize reality.

15 (B) A person who qualifies for a voluntary guardianship under
16 section 2671 of this title and agrees to the creation of an appropriate voluntary
17 guardianship shall not be deemed a person in need of guardianship under this
18 subchapter.

19 * * *

20 Sec. 5. REPEAL

1 18 V.S.A. chapter 215 (guardianship services for people with
2 developmental disabilities) is repealed.

3 Sec. 6. 14 V.S.A. § 3062a is added to read:

4 § 3062a. GUARDIANSHIP SERVICES FOR CERTAIN PERSONS WITH A
5 DEVELOPMENTAL DISABILITY

6 (a) The terms in this section shall have the same meanings as in 18 V.S.A.
7 chapter 204A (Developmental Disabilities Act).

8 (b) After the effective date of this act, guardianships administered,
9 modified, and revoked in the Family Division under former 18 V.S.A. chapter
10 215 (guardianship services for people with developmental disabilities) shall be
11 administered, modified, and revoked in the Probate Division under the
12 procedures of this chapter. The Supreme Court is authorized to promulgate
13 rules to supplement the procedures in this chapter to accommodate
14 circumstances particular to guardianships established under former 18 V.S.A.
15 chapter 215, provided that the rules shall not lessen the procedural protections
16 or reduce the options available under this chapter.

17 (c)(1) Any person with knowledge of the facts may request that the State's
18 Attorney in the county where the person resides file a petition with the court
19 alleging that:

20 (A) the person has a developmental disability;

1 (B) the person desires the assistance of a guardian or is in need of
2 guardianship; and

3 (C) there is no suitable private person to serve as guardian.

4 (2) The State's Attorney shall file a petition requested under subdivision
5 (1) of this subsection with the court unless it clearly appears to the State's
6 Attorney that the petition will be legally or factually insufficient to support an
7 action under this chapter.

8 (3) A petition filed under subdivision (2) of this subsection shall propose
9 that the Office of Public Guardian be appointed as the person's guardian. If
10 appropriate, the court shall proceed in the same manner as for all petitions for
11 guardianship under this chapter.

12 (4) If the court after hearing determines that it is appropriate for a
13 guardianship to be established, and the court makes specific findings that there
14 is no suitable private person to serve as guardian, the court may appoint the
15 Office of Public Guardian as the person's guardian. If the court makes an
16 appointment of the Office of Public Guardian under this subdivision, the
17 provisions of subchapter 13 of this chapter (public guardian) shall apply.

18 (d) A person who is receiving guardianship services under this chapter
19 from the Office of the Public Guardian or the Commissioner of Disabilities,
20 Aging, and Independent Living may appeal a decision of the guardian in
21 accordance with 3 V.S.A. § 3091 or by petition to the court, but an appeal or

1 petition pursuant to this subsection shall not be required for a petition to the
2 court by an interested person to modify or terminate a guardianship under this
3 chapter.

4 Sec. 7. 14 V.S.A. § 3067 is amended to read:

5 § 3067. EVALUATION AND REPORT; BACKGROUND CHECK;

6 RELEASE OF EVALUATION

7 (a)(1) When a petition is filed pursuant to section 3063 of this title and
8 there is probable cause to believe that the respondent is a person in need of
9 guardianship under subdivision 3061(1) of this title, or when a motion for
10 modification or termination is filed pursuant to subdivision 3077(a)(4) of this
11 title, the court shall order an evaluation of the respondent. If a motion to
12 terminate an involuntary guardianship is made for the purpose of establishing a
13 voluntary guardianship, the evaluation limitations in subsection 2671(e) of this
14 title shall apply. Except as otherwise provided in this subsection, the cost of
15 the evaluation shall be paid for out of the respondent's estate or as ordered by
16 the court. If the respondent is unable to afford some or all of the cost of the
17 evaluation without expending income or liquid resources necessary for living
18 expenses, the court shall order that the Department of Mental Health or the
19 Department of Disabilities, Aging, and Independent Living provide the
20 evaluation through qualified evaluators.

1 (e) If the Commissioner of Disabilities, Aging, and Independent Living or
2 the Office of Public Guardian has been appointed guardian, the Commissioner
3 or Office shall annually assess whether the person under guardianship would
4 qualify for a voluntary guardianship under section 2671 of this title and agree
5 to a voluntary guardianship being established. The assessment shall be
6 included in the annual report to the court required by this section.

7 Sec. 10. 14 V.S.A. § 3080 is amended to read:

8 § 3080. APPEALS

9 ~~Orders of the court issued pursuant to the provisions of this subchapter may~~
10 ~~be appealed in such manner as provided in 12 V.S.A. § 2551 et seq. and Rule~~
11 ~~72, Vermont Rules of Civil Procedure, provided, however, that any order~~
12 ~~issued pursuant to this subchapter shall not be stayed during the pendency of~~
13 ~~an appeal except by order of a court of competent jurisdiction.~~

14 (a) 12 V.S.A. §§ 2551 and 2553 shall govern whether an appeal under this
15 chapter shall be to the Civil Division or the Supreme Court. Appeals to the
16 Civil Division on questions of fact shall be tried de novo under Vermont Rule
17 of Civil Procedure 72.

18 (b) In an appeal to the Civil Division where the question is whether the
19 respondent is a person in need of guardianship, the respondent shall be entitled
20 to a jury trial. The right to a jury trial under this subsection may only be
21 waived with approval of the court.

1 Sec. 11. EFFECTIVE DATE

2 This act shall take effect on July 1, 2026.