



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2005 Senate Bill 391

**Senate Substitute
Amendment 1, as Amended by
Senate Amendments 1 and 2**

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2005 Senate Bill 391 rewrites ch. 880, Stats., the state's guardianship law, and places it in a new chapter of the statutes, ch. 54. Senate Substitute Amendment 1 to the bill contains the following major provisions:

Senate Substitute Amendment 1 to 2005 Senate Bill 391

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Jurisdiction and venue; county of residence

- Permits a petition for guardianship to be directed to the county in which the petitioner proposes that the proposed ward reside.
- Provides that a determination of county of residence, which determines responsibility for funding services, may be made for adults with various types of disabilities.
- Clarifies that a court that issues a commitment or protective placement or services order may make a specific finding of county of residence. The finding may be reviewed by the Department of Health and Family Services (DHFS) upon objection of any party.
- Modifies criteria for determining county of residence, and authorized a guardian to declare guardian of residence in certain circumstances.
- Requires filing of a petition for protective placement or services or guardianship to be in the county of residence or, under certain circumstances, where the subject of the petition is physically present.

Petition for guardianship

- Requires certain additional information be included in a petition for guardianship.

Examination of proposed ward

- Expands the requirement for furnishing a report, rather than a statement, of the proposed ward's mental condition, and provides for distribution of the report to a greater number of people than under current law. Also, authorizes submittal of a petition to the court to order the proposed ward to submit to an examination.

Notice

- Reconciles the notice requirements for appointment of a guardian based on incompetence or spendthriftiness and requires service of notice upon an expanded group of people and entities. Provides special notice for guardianship of a minor and temporary guardianships.

Guardian ad litem appointment

- Expands the circumstances under which a court must appoint a guardian ad litem; expands the prohibition on appointment of certain people as guardian ad litem who might have a conflict of interest; and expands the duties of the guardian ad litem.

Rights of the proposed ward

- Expands the rights of a proposed ward in a guardianship proceeding.

Appointment of guardian; determination of incompetence

- Changes the standard for a finding of incompetence and appointment of a guardian of the person or a guardian of the estate, or both, for an individual, and provides that the individual's need for assistance in decision-making or communication must be unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.
- Requires that, in appointing a guardian for an individual who is found to be incompetent or in appointing a guardian of the estate for an individual who is found to be a spendthrift, various sources of information must be considered before making that determination.
- Provides that the court must authorize a guardian of an individual found to be incompetent or, for a spendthrift, a guardian of the estate to exercise only necessary powers and to exercise them in a manner that is appropriate and that constitutes the least restrictive form of intervention.

Nomination of guardian

- Establishes priority for certain types of individuals, such as existing powers of attorney for finances or health care, to be appointed as guardian.

- Sets limits on the number of wards a guardian may have.

Hearing

- Requires that each hearing under the guardianship laws be closed unless the proposed ward or his or her counsel moves that it be open.
- Requires that petitions for guardianship, except for temporary guardianship and petitions for protectively placed individuals in certain facilities, be heard within 90 days after they are filed.
- Provides that court determinations of incompetency or spendthriftiness be made by clear and convincing evidence.
- Requires the proposed guardian and any proposed standby guardian be physically present at the hearing unless excused by the court or unless the court permits their attendance by telephone.
- Requires that an adult proposed ward attend the hearing unless the guardian ad litem, under certain standards, waives attendance.

Disposition of petition

- Requires that a health care power of attorney remain in effect, if the proposed ward has one, and permits a court to revoke it or limit the power of the agent only for good cause shown.
- Eliminates payment, from the ward's income and assets, of the costs of a protective placement and changes a finding that the ward had engaged in advance planning for financial health care decision-making to be a factor in awarding payment of the petitioner's reasonable attorney fees and costs, rather than a prohibition on that payment.

Involuntary administration of psychotropic medication

- Clarifies that a guardian may consent to the involuntary administration of psychotropic medication only under a court order under the laws relating to protective placement and protective services. Under these laws, the substitute amendment establishes an exclusive procedure for involuntary administration of psychotropic medication as a protective service to an individual who has been protectively placed.

Duties and powers of a guardian; limitations

- Specifies in detail numerous powers and duties of a guardian (either a guardian of the person or a guardian of the estate) and clarifies that a guardian's powers are limited to those authorized by statute or court order, that a ward retains all rights that are not assigned to the guardian or otherwise limited by statute, and that a guardian's powers are limited to those necessary to provide for the personal needs or property management of the ward in a manner that is appropriate to the ward and that constitutes the least restrictive form of intervention.

Duties and powers of guardian of the estate

- Specifies numerous duties of the guardian of the estate, and requires that the guardian of the estate, after following any applicable requirements concerning petitioning the court for the authority to sell, mortgage, pledge, lease, or exchange the ward's property, perform these duties so as to provide the ward with the greatest amount of independence and self-determination with respect to property management in light of the ward's functional level, understanding, and appreciation of his or her functional limitations and in light of the ward's personal wishes and preferences.

Duties and powers of guardian of the person

- Requires that a guardian of the person endeavor to secure care or services that are in the ward's best interests by, among other things, regular in-person inspection, of the ward's condition, surroundings, and treatment; examination of the ward's patient health care records; and inquiry into alternatives to treatment for the ward if drastic or restrictive treatment is proposed.
- Specifies that a guardian of the person has only those rights and powers that he or she is specifically authorized to exercise by statute, rule, or court order; any other right is retained by the ward, unless the ward has been declared by a court incompetent to exercise a right or the guardian of the person has been authorized by a court to exercise certain rights usually retained by the ward.

Temporary guardianships

- Establishes a standard for the appointment of a temporary guardian; establishes procedures for appointment of a temporary guardian, including appointment of a guardian ad litem; provides for a rehearing on the issue of appointment of the temporary guardian, if requested; clarifies the duration of the temporary guardianship and the authority of the temporary guardian; and prohibits the temporary guardian from selling real estate or expending more than \$2,000 unless authorized by the court.

Standby guardianships

- Clarifies when a standby guardian may be appointed, to assume the duty and authority of guardianship on the death, incapacity, or resignation of the guardian.

Out-of-state guardians

- Establishes a procedure, based on requirements specified by the Wisconsin Supreme Court in *Matter of the Guardianship of Jane E. P.*, 275 Wis. 2d 680 (2005), for the receipt and acceptance by Wisconsin of an out-of-state (foreign) guardianship of a ward who resides in or intends to move to Wisconsin.

Post-appointment matters

- Establishes requirements relating to contents, filing, and distribution of the inventory of the ward's property.

- Modifies provisions in current law relating to keeping and filing accounts of the ward's property.
- Creates a procedure by which a guardian or other person may submit to a court a request for removal of rights from a ward and transfer of powers to the guardian in addition to those specified in the order of appointment.
- Specifies time limits and procedures for reviewing a ward's incompetency, and expands grounds for termination of a guardianship of the person or estate.
- Specifies that the court that appointed a guardian has continuing jurisdiction over the guardian, establishes numerous causes for court action against a guardian, establishes procedures and notice requirements for a hearing to review the guardian's conduct, and establishes remedies of the court.

Conservatorship

- Authorizes an individual who is unwilling to manage his or her assets or income to apply for conservatorship and clarifies that a conservatee may make gifts of his or her assets, subject to the conservator's approval. Provides that if the individual has executed a financial power of attorney before conservatorship, that power of attorney remains in effect, unless revoked or limited by the court. Authorizes appointment of a standby conservator, and clarifies when a conservatorship may be terminated, and sets standards for the termination.

Senate Amendment 1

Senate Amendment 1 clarifies that the right of a proposed ward to retain legal counsel is not subject to court approval.

Senate Amendment 2

Senate Amendment 2 deletes a provision in current law that prohibits a ward from incurring or assuming debt for the purchase of real estate.

Legislative History

On February 8, 2006, the Senate Committee on Health, Children, Families, Aging and Long Term Care recommended introduction and adoption of Senate Amendments 1 and 2 to Senate Substitute Amendment 1 by a vote of Ayes, 5; Noes, 0; recommended adoption of Senate Substitute Amendment 1, as amended, by a vote of Ayes, 5; Noes, 0; and recommended passage of the bill, as amended, by a vote of Ayes, 4; Noes, 1.

LR:jal