STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
FAMILY DIVISION

CARLETTA THOMAS (Co-Guardian)
ROBERT THOMAS (Co-Guardian)

Plaintiffs

File No. 09-103028-DC
(WCPC File No. 2008-733108-GM)
Hon. Milton L. Mack, Jr.

V.

DARRELL BUSH

Defendant
_____/

OPINION DENYING MOTION FOR SUMMARY DISPOSITION

Jasmine D. Thomas ("Jasmine") was born on February 20, 2008, to Carla E. Thomas ("Carla"). Paternity was not established. A petition for limited guardianship was filed by Carla on July 14, 2008, seeking the appointment of Suronda F. Hall ("Hall") as limited guardian. At the hearing on July 17, 2008, Hall testified she was a friend of Carla and that some things happened at a party and Carla did not know who the father was. The court appointed a guardian ad litem who interviewed Carla. He commented that it was a "remarkable coincidence" that Hall was available and recommended that she be appointed as guardian. Carla consented to the appointment of Hall as "full" guardian instead of limited guardian.

Carla filed a petition to terminate the guardianship on July 29, 2008. On August 5, 2008, she then filed an emergency petition to terminate or modify the guardianship. Darrell Bush ("Bush") appeared at the hearing on August 13, 2008, and said he was "possibly the father." Carla then testified that she was "possibly the grandmother" and Bush was her son. Carla claimed their was a strong possibility that someone else was the father. The court removed Hall as the guardian and appointed Carla's parents as successor co-guardians. Carla's other petition was withdrawn. No action had been taken by Bush to establish paternity.

On December 22, 2008, Darrell Bush ("Bush") filed an emergency petition to terminate guardianship of the minor child and other relief. He argued that he was the father of Jasmine and that the guardianship was violating his constitutional right to raise his child without interference by the court. At the hearing on his motion on January 14, 2009, it was disclosed that he had not established paternity. Since he had not established parentage, he had no standing. His petition was dismissed.

On March 10, 2009, the co-guardians filed a complaint for custody of Jasmine in the Wayne County Circuit Court. They claimed that Bush had established paternity on February 24, 2009, but cited a variety of reasons why Bush was not suitable to be custodian of Jasmine. The filing of the custody action stayed all proceedings in the probate court.

On March 13, 2009, the order of filiation establishing paternity was entered by the Wayne County Circuit Court. On March 18, 2009, pursuant to statute[1], this court was assigned to hear the case.

On March 27, 2009, Bush filed his motion for summary disposition pursuant to MCR 2.116(C) (8) and (10) or alternatively for temporary custody and to terminate guardianship and request for attorney fees. The motion was not supported by a brief, affidavits, depositions, admissions or other documentary evidence as required by court rule.[2] The argument is that the assertions in the complaint do not rebut the presumption that the minor child's best interests are served by awarding custody to the father. While Bush may allege that he is seeking dismissal under MCR 2.116(C) (10), it is clear he is testing the legal sufficiency of the complaint. To the extent his motion is pursuant to MCR 2.116(C) (10), it is not properly supported and will be denied.

Bush's argument in support of his motion for summary disposition pursuant to MCR 2.116(C)(8) is based on his assertion that under Michigan law, once a parent no longer "permits" his child to reside with a guardian, the guardianship must be terminated. This is not the law in Michigan. If it were, why would the legislature have provided a process for termination of guardianships?[3] In any event, the court cannot terminate the guardianship because all proceedings in the probate court are automatically stayed by the custody action.[4] To address the remaining arguments the court will review the recent history of Michigan's guardianship laws as well as the standard to be used in the case of a child custody dispute between a parent and a guardian.

Michigan Minor Guardianship Law

Two recent decisions of the Court of Appeals have suggested that the Estates and Protected Individuals Code[5] ("EPIC") provides for "permanent" guardianship for children or that the law requires a parent to permit a child to "permanently" reside with someone else in order for the court to hear a petition for guardianship of the minor.[6] In

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[1] MCL 722.26b(5)
[2] MCR 2.116(G)(3)
[3] MCL 700.5208 and MCL 700.5209
[4] MCL 722.26b(4)
[5] MCL 700.1101 *et seq.*
[6] *Deschaine v St. Germain*, 256 Mich App 655; 671 NW2d 79 (2003); *Unthank v Wolfe*, 282 Mich App 40; 763 NW2d 287 (2008), vac'd in part 483 Mich 964; 763 NW2d 924 (2009). While both cases were correctly decided, some of the language in the opinion may create confusion. For example, it is suggested that the language in the statute regarding temporary guardianship somehow reflects the legislature's intent that a temporary guardianship may only be used in a "permanent" guardianship. This fails to recognize the fact that the word permanent does not appear anywhere in EPIC. It also fails to recognize that the statutory

fact, Michigan eliminated what might pass for a "permanent" guardianship in 1990. Not until 1994, did the legislature modify the law to give the probate court very limited authority to continue a guardianship over a parent's objection. In 1999, the legislature again amended the law to provide that the "permission" of the parent would be as of the date of the filing of the petition and not the date of the hearing.[7]

The 1990 guardianship legislation was in response to the murder of a child by his parents after his limited guardianship was terminated.[8] Prior to that time, the court could appoint a "regular" guardian where "the appointment is necessary for the immediate physical well-being of the minor." This authority was deleted by the amendment. Prior to this legislation, a parent had a right to terminate a limited guardianship but did not have the right to terminate a "regular" guardianship. As such, a "regular" guardianship had the potential to be "permanent". However, under the new law, if a parent petitioned to terminate a limited or regular guardianship, the court could not permanently continue the guardianship. The court would have three choices: 1) terminate the guardianship, 2) continue the guardianship for not more than one year or 3) refer the case for proceedings under the juvenile code. The effect of the legislation was that it was harder to create a "regular" guardianship and easier to terminate a "regular" guardianship.

Because the 1990 amendments failed to recognize that there were circumstances where the parent-child relationship was non-existent and the best interests of the child clearly called for continuing the guardianship, the Michigan Probate Judges Association advocated for changes in the law to permit the court to continue guardianships under limited circumstances.[9] The legislature agreed and adopted 1994 PA 159. This amendment permitted the court to continue the guardianship if the minor had resided with the guardian or limited guardian for not less than 1 year and if the court found that the parent had failed to provide the minor with parental care, love, guidance, and attention appropriate to the child's age and individual needs resulting in a substantial disruption of the parent-child relationship. The guardian would have to prove by clear and convincing evidence that the continuation would serve the best interests of the minor. MCL 700.5209(2)(c)

In 1998, the legislature again amended the law at the request of the Michigan Probate Judges Association and the Lieutenant Governor's Children's Commission.[10] The Family Independence Agency reported that after petitions for guardianships were filed, parents were retrieving their children before the hearing date. Courts interpreted the

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scheme in EPIC is designed to make it difficult to continue a guardianship over a parent's objection. No guardianship is permanent. It is acknowledged that a court rule, MCR 5.403(A) uses the word permanent.

[7] The legislature did not require that the permission be explicit or in writing. If a person leaves their child with a third party and does not provide them with the authority to enroll the child in school or secure medical care the permission could be said to be implicit. Particularly in those cases where the parent is on drugs and nowhere to be found.

[8] See attached report from the House Legislative Analysis Section dated November 14, 1990 and HB 6018

[9] See attached resolution from the Michigan Probate Judges Association dated January 14, 1994, a memorandum from Anne M. Boomer to Senators Geake and Welborn as well as a letter from all of the judges of the Wayne County Probate Court dated December 7, 1993, to Senator Welborn.

[10] See attached report from the House Legislative Analysis Section dated December 9, 1998.

statute to mean that the parent had to be permitting the child to be living with the third party as of the hearing date. The statute provided that the court could appoint a guardian if the parent or parents have permitted the minor to reside with another person and have not provided the other person with legal authority for the care and maintenance of the minor." The legislature amended the law to add "and the minor is not residing with his or her parent or parents when the petition is filed." MCL 700.5204(2)(b) The legislature clearly provided that the test for whether a parent had permitted their child to reside with another without providing legal authority to care for the child was to be measured at the time of the filing of the petition. The legislative history reports that the bill would provide that a court could appoint a guardian where the minor had been permitted to reside with another person, even if the parents had taken the child back after the petition was filed. The statute does not require that the permission be "permanent". It would be odd for the statute to require "permanent" permission since the statutory scheme does not provide for "permanent" guardians. The court in *Unthank*, citing *Deschaine*, stated that MCL 700.5402(b) requires that "a parent have given a *current* permission for the child to reside with another person before that person may seek a guardianship order."

The statute is really quite simple. If a parent leaves their child with a third person, without giving the third person the legal authority to care for the child, the third person may file a petition for guardianship, provided the child had not been retrieved by the parent prior to the filing of the petition. Neither EPIC nor case law provides that the guardianship will be terminated by the later withdrawal of consent.

In this case, Bush had not acknowledged paternity at the time the guardianship was established. As such, he did not have standing to participate in those guardianship proceedings.[11] Bush simply misreads *Unthank*.

The only remaining question is whether the complaint should be dismissed pursuant to MCL 2.116(C)(8) because the complaint fails to state a cause of action. This requires an analysis of the current law as it relates to third party custody actions by guardians.

Third Party Custody Action by Guardians

Following the decision of the United States Supreme Court in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000), the Michigan Court of Appeals decided *Heltzel v Heltzel*, 248 Mich App 1; 638 NW2d 123 (2001). *Heltzel* defined the standard to be applied in a child custody dispute between a natural parent and a third person.

Recently, the Michigan Supreme Court decided *Hunter v Hunter,* 484 Mich 247; ___ NW2d ___ (2009) which clarifies the standard to be used in deciding child custody cases between parents and third parties.

[11] MCR 5.125(B)(4). By statute and case law, putative fathers receive notice in adoption and juvenile matters. Adoption and juvenile proceedings may result in the termination of parental rights while the appointment of a guardian under EPIC merely results in the temporary suspension of parental rights.

Hunter, prohibits the trial court from granting custody to a third party unless it is demonstrated by clear and convincing evidence that custody with the parent does not serve the child's best interests.

The burden is on the third party to prove that "all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns [within MCL 722.231], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person." *Hunter,* at 279.

In their complaint, the co-guardians make numerous assertions relative to the fitness of Bush. If they prove their allegations, they might prove by clear and convincing evidence that placement of Jasmine with Bush is not in Jasmine's best interests. As such, the Court cannot conclude that the complaint is so legally deficient that prevailing would be impossible assuming all well-pleaded facts are true and construed in a light most favorable to the co-guardians. Therefore, the motion for summary disposition pursuant to MCR 2.116(C) (8) is denied.[12]

An order pursuant to MCR 2.602 consistent with this Opinion may be presented.

Milton L. Mack, Jr.
Judge of Probate

Dated: NOV 3 2009

[12] Bush also requests attorney fees pursuant to MCR 3.206(C) claiming he is unable to bear the expense of this litigation because the mother and her parents have unnecessarily delayed this litigation. The court rule requires that the party seeking attorney fees "allege facts" to show the party is unable to bear the expense of litigation and the other party is able to pay. The court has been presented with no facts. The request is denied due to the failure of Bush to comply with the court rules.

House Legislative Analysis Section

Manufacturer's Bank Building, 12th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

GUARDIANSHIPS FOR MINORS

House Bill 6018 (Substitute H-2)
Sponsor: Rep. David M. Gubow

House Bill 6019 (Substitute H-1)
Sponsor: Rep. Nick Ciaramitaro

First Analysis (11-14-90)
Committee: Judiciary

THE APPARENT PROBLEM:

Reports are that the numbers of children living with their parents' relatives or friends, rather than with their parents, have been increasing dramatically in recent years, and this rise has highlighted a number of deficiencies in the law on guardianships and child custody. In one of the saddest and most publicized examples, an aunt and uncle were granted limited guardianship of an infant upon his mother's request. Five years later, the child's mother petitioned the probate court to end the guardianship, the state supreme court held that a limited guardianship must be terminated upon petition of the parent at whose request the limited guardianship was created, and the child, Antwon Dumas, was returned to his mother. Although the supreme court also held that the probate court could issue various orders to assist the child in the transition from the home of the guardian to the home of the parent, no transition plan was devised for Antwon Dumas. Less than a year after the supreme court issued its decision (In re Rankin, In Re Dumas, 433 Mich. 592 [1989]), Antwon Dumas was beaten to death; his mother and her boyfriend plead guilty to a reduced charge of manslaughter on October 25, 1990. (The plea bargain evidently was offered to avoid having another child in the home testify against her mother.)

The Dumas case illustrates a trend in the use of limited guardianships. It appears that such guardianships originally functioned to enable a child to receive medical care and be enrolled in school while a parent was away for a fixed period of time — say away at school or receiving military training. However, more recently it appears that limited guardianships are being used to place unwanted children with family members, or to forestall action by the authorities investigating allegations of abuse or neglect in the parent's home. Such children are perceived to be at risk, but the probate code offers little to ensure adequate monitoring of the creation or termination of limited guardianships.

Problems with the law on guardianships are not confined to those of limited guardianships, however. A regular guardianship for a minor can be created only when parental rights have been terminated or suspended or when necessary for the immediate physical well-being of the minor. Thus, when a grandmother who has long been caring for a child abandoned by its mother must enroll the child in school or obtain medical treatment or health insurance for the child, she discovers that she cannot because she lacks the status of a guardian, and the court cannot appoint her guardian if parental rights have not been terminated.

Amendments have been proposed to remedy these and other problems associated with the law on guardianships.

THE CONTENT OF THE BILLS:

House Bill 6018 would amend the Revised Probate Code (MCL 700.424 et al.) to require placement plans for children placed under limited guardianships, require annual court review of guardianship placements for children under six years of age, specify procedures for termination of both limited and regular guardianships for children, and authorize the court to order various investigations and evaluations in child guardianship situations. Provisions for termination of guardianships would apply to all guardianships established prior to the effective date of the bill, as well as those established after. The bill could not take effect unless House Bill 6019 and Senate Bill 1039 were enacted. A more detailed explanation follows.

Creation of regular guardianships. The probate court could appoint a guardian when the parent(s) had allowed a minor to reside with another person and had not provided the other person with legal authority for the minor's care. A limited guardian could petition the court to be appointed guardian, except that the petition could not be based on the suspension of parental rights created by the order that established the limited guardianship. The court could continue to appoint a guardian when parental rights had been terminated or suspended. However, the bill would remove authority to appoint a guardian when the appointment was necessary for the immediate physical well being of the minor. The court could order the DSS to conduct an investigation of a proposed guardianship, or it could undertake an investigation itself. The court could at any time, for the welfare of the minor ward, order reasonable visitation and contact between the child and his or her parent(s).

Creation of limited guardianships. A limited guardianship could continue to be created upon request from a parent, but any created after the bill took effect would have to first have a placement plan developed by the parent(s) and guardian and approved by the court. The plan would have to include the parent's reason for seeking a limited guardianship, and provisions on visitation, guardianship duration, and financial support for the minor. A plan could be modified later if approved by both parties and the court. Plans would be developed using a court form that notified the parent that substantial failure to comply with the plan without good cause could result in the termination of parental rights.

Court review. The court would have to annually review a guardianship for a child under six years of age, and could review other minors' guardianships as it deemed necessary. A review would have to consider parties' compliance with the guardianship plan, whether the guardian had adequately provided for the welfare of the minor, the necessity of continuing the guardianship, the willingness and ability of the guardian to

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continue to provide for the welfare of the minor, and the effect on the minor's welfare if the guardianship was continued. Following review, the court could continue the guardianship, order institution or modification of a guardianship plan (the court could structure a plan for regular guardianships), terminate the guardianship and order the reintegration of the minor into the parent's home (the DSS could be ordered to supervise and help in the transition), continue the guardianship for one year, appoint an attorney to represent the minor, or refer the matter to the DSS.

Termination of guardianships. A parent could ask the court to terminate a guardianship, but if it was a limited guardianship, the parent would have to have a right to custody of the minor. After a petition was filed, the court could order the DSS or a court employee to conduct an investigation into the best interests of the minor, seek expert advice in what constituted the best interests of the minor, appoint a guardian ad litem or attorney to represent the minor, or take any other action considered necessary in a particular case.

For a limited guardianship, if the parent(s) had substantially complied with the placement plan, the court would have to terminate the limited guardianship. The court could issue orders to ease the reintegration of the child into the parent's home; the transition period could last up to six months prior to termination.

For regular guardianships and for limited guardianships where the parent(s) had not complied with the placement plan, the court could terminate the guardianship if termination was in the best interests of the minor. With termination, the court could arrange for a DSS-supervised and -aided transition period. The court could instead continue the guardianship for up to one year, if in the best interests of the minor, and order compliance with a placement plan (for a limited guardianship that preceded enactment of the bill, and for a regular guardianship, the court would develop a plan that would enable the child to return to the parent's home). If a guardianship was temporarily continued, the court would have to hold a hearing during the continuation period and decide whether to terminate the guardianship, appoint an attorney to represent the child, or refer the matter to the DSS. The attorney or the DSS could petition the juvenile court to take jurisdiction over the child.

The bill would define "best interests of the minor" much as it is in the Child Custody Act. The definition would encompass the child's emotional ties, the disposition of each party involved, the parties' abilities to meet the child's material needs, the permanence of the family units involved, the moral fitness of the parties involved, and other matters.

The above provisions on termination of guardianships would apply to all guardianships established before, on, or after the bill's effective date.

Custody actions. The probate court would have to terminate a guardianship, whether regular or limited, when notified that the circuit court has issued a custody order under House Bill 6019.

House Bill 6019 would amend the Child Custody Act (MCL 722.26 and 722.26b) to specify that a guardian or limited guardian of a child would have standing to bring an action in the circuit court seeking custody of the child. However, a limited guardian would not be allowed to bring the action if the parent(s) had substantially complied with the limited guardianship placement plan that the parties had developed under House Bill 6018. Upon the filing of the child custody action, all guardianship proceedings in the probate court would be suspended until the custody issue was settled. The guardianship would remain in effect during that time. In actions under the bill, the circuit court could request the supreme court to assign the probate judge involved to serve as a judge of the circuit court and decide the child custody matter. The bill could not take effect unless House Bill 6018 and Senate Bill 1039 were enacted.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The bills would go far toward improving protections for children placed in guardianship situations. They would demand guardianship placement plans, mandate regular and thorough court review of situations involving young children, suggest to the probate court that it issue orders to ease a child's transition back into his or her parent's home, and require the best interests of the child to be considered in most guardianship disputes. That "best interests of the child" standard would make reuniting parent and child secondary to a consideration of where the child would be happiest and best cared for. They would allow someone with a custodial role to be appointed regular guardian, and they would explicitly provide for a guardian or limited guardian to petition for custody in the circuit court, where the custody decision would be made applying the same considerations used in all custody disputes.

Against:

House Bill 6019 would encourage the assignment of a probate judge to decide a custody action brought by a guardian. Such assignments should not be encouraged, as it is circuit judges who are experienced in deciding custody disputes and are accustomed to determining what is in the best interests of the child; a presumption in favor of continuity for the child guides the Child Custody Act. Probate judges, on the other hand, operate under the probate code, which has a presumption for reuniting parents and children. In addition, by granting guardians standing to seek custody, the bill could be construed to prevent other third parties in custodial roles from seeking custody. Those situations could be very good places for the children involved, and the law should do all it can to ensure the child's best interest, not some legal status, rules.

Against:

With their inroads on parental authority, the bills could discourage the use of limited guardianships, even where such guardianships would be beneficial for the child.

Response: A parent who complied with the limited guardianship placement plan, in which he or she played a role in devising, would be able to have the guardianship terminated when he or she requested it, and the limited guardian would not be able to seek custody of the youngster in circuit court.

Against:

The bills could prove expensive for the probate court and the state, occupying court time and increasing funding needs.

POSITIONS:

The Department of Social Services supports the bills. (11-13-90)

The Michigan Probate Judges Association supports the concept of the bills. (11-13-90)

MORE

STATE OF MICHIGAN
85TH LEGISLATURE
REGULAR SESSION OF 1990

Introduced by Reps. Gubow, Ciaramitaro, Stabenow, Berman, Kosteva, Trim and Fitzgerald
Rep. Kulchitsky named co-sponsor

ENROLLED HOUSE BILL No. 6018

AN ACT to amend sections 424, 424a, 426, 427, 435, and 437 of Act No. 642 of the Public Acts of 1978, entitled as amended "An act to revise and consolidate the laws relative to the probate of decedents' estates, guardianships, conservatorships, protective proceedings, trusts, and powers of attorney; to prescribe penalties and liabilities; and to repeal certain acts and parts of acts," sections 424, 427, and 435 as amended and section 424a as added by Act No. 396 of the Public Acts of 1980, being sections 700.424, 700.424a, 700.426, 700.427, 700.435, and 700.437 of the Michigan Compiled Laws; and to add sections 424b, 424c, and 424d.

The People of the State of Michigan enact:

Section 1. Sections 424, 424a, 426, 427, 435, and 437 of Act No. 642 of the Public Acts of 1978, sections 424, 427, and 435 as amended and section 424a as added by Act No. 396 of the Public Acts of 1980, being sections 700.424, 700.424a, 700.426, 700.427, 700.435, and 700.437 of the Michigan Compiled Laws, are amended and sections 424b, 424c, and 424d are added to read as follows:

Sec. 424. (1) A person interested in the welfare of a minor, or a minor if 14 years of age or older, may petition for the appointment of a guardian of the minor.

(2) The court may order the department of social services or an employee or agent of the court to conduct an investigation of the proposed guardianship and file a written report of the investigation.

(3) The court may appoint a guardian for an unmarried minor if either of the following circumstances exists:

(a) The parental rights of both parents or of the surviving parent have been terminated or suspended by prior court order, by judgment of divorce or separate maintenance, by death, by judicial determination of mental incompetency, by disappearance, or by confinement in a place of detention.

(b) The parent or parents have permitted the minor to reside with another person and have not provided the other person with legal authority for the care and maintenance of the minor.

(4) A limited guardian of a minor may petition to be appointed a guardian for that minor, except that the petition shall not be based upon suspension of parental rights by the order which appointed that person the limited guardian of that minor.

(5) A guardian appointed by will as provided in section 422 whose appointment is not prevented or nullified under section 423 has priority over a guardian who may be appointed by the court. The court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within 30 days after notice of the guardianship proceeding.

(6) The court may at any time, for the welfare of a minor ward, order reasonable visitation and contact of the minor ward by his or her parents.

Sec. 424a. (1) Beginning on the effective date of the amendatory act that added section 424b, the court may appoint a limited guardian for an unmarried minor under this section upon the petition of the parent or parents if all of the following requirements are met:

(a) The parents with custody of the minor consent or, in the case of only 1 parent having custody of the minor, the sole parent consents to the appointment of a limited guardian.

(b) The parent or parents voluntarily consent to the suspension of their parental rights.

(c) The court approves a limited guardianship placement plan agreed to by both of the following parties:

(*i*) The parents with custody of the minor or, in the case of only 1 parent having custody of the minor, the sole parent who has custody of the minor.

(*ii*) The person or persons who the court will appoint as limited guardian of the minor.

(2) The parent or parents of a minor who desire to have the court appoint a limited guardian for that minor and the person or persons who desire to be appointed limited guardian for that minor shall develop a limited guardianship placement plan. The parties shall use a limited guardianship placement plan form prescribed by the state court administrator. A limited guardianship placement plan form shall include a notice that informs a parent who is a party to the plan that substantial failure to comply with the plan without good cause may result in the termination of the parent's parental rights pursuant to chapter XIIA of Act No. 288 of the Public Acts of 1939, being sections 712A.1 to 712A.28 of the Michigan Compiled Laws. The proposed limited guardianship placement plan shall be attached to the petition requesting the court to appoint a limited guardian. The limited guardianship placement plan shall include provisions concerning all of the following:

(a) The reason why the parent or parents are requesting the court to appoint a limited guardian for the minor.

(b) Visitation and contact with the minor by his or her parent or parents sufficient to maintain a parent and child relationship.

(c) The duration of the limited guardianship.

(d) Financial support for the minor.

(e) Any other provisions that the parties agree to include in the plan.

(3) The court shall review a proposed limited guardianship placement plan filed with the court pursuant to this section and shall do 1 of the following:

(a) Approve the proposed plan.

(b) Disapprove the proposed plan.

(c) On its own motion, modify a proposed plan and approve it as modified, if the parties agree to the modification. The modified plan shall be filed with the court.

(4) A limited guardianship placement plan that has been approved by the court may be modified upon agreement of the parties and approval of the court. A modified limited guardianship placement plan shall be filed with the court.

(5) The suspension of parental rights under this section does not prevent the parent or parents from filing a petition to terminate the limited guardianship at any time pursuant to section 424c. Appointment of a limited guardian under this section shall be a continuing appointment.

(6) A limited guardian appointed under this section shall have all of the powers and duties enumerated in section 431, except that a limited guardian may not consent to the adoption of the minor or release of the minor for adoption nor may a limited guardian consent to the marriage of a minor ward.

Sec. 424b. (1) The court may review a guardianship for a minor as it deems necessary and shall review a guardianship annually if the minor is under 6 years of age. In conducting the review, the court shall consider all of the following factors:

(a) The parent's and guardian's compliance with either of the following, as applicable:

(*i*) A limited guardianship placement plan.

(*ii*) A court-structured plan under subsection (3)(b)(*ii*)(B) or section 424c(4)(b)(*ii*).

(b) Whether the guardian has adequately provided for the welfare of the minor.

(c) The necessity of continuing the guardianship.

(d) The willingness and ability of the guardian to continue to provide for the welfare of the minor.

(e) The effect upon the welfare of the minor if the guardianship is continued.

(f) Any other factor that the court considers relevant to the welfare of the minor.

(2) The court may order the department of social services or an employee or agent of the court to conduct an investigation and file a written report of the investigation regarding factors described in subsection (1)(a) to (f).

(3) Upon completion of a review of a guardianship, the court may do either of the following:

(a) Continue the guardianship.

(b) Schedule and conduct a hearing on the status of the guardianship and do any of the following:

(*i*) If the guardianship is a limited guardianship, do either of the following:

(A) Continue the limited guardianship.

(B) Order the parties to modify the limited guardianship placement plan as a condition to continuing the limited guardianship.

(*ii*) If the guardianship was established under section 424, do either of the following:

(A) Continue the guardianship.

(B) Order the parties to follow a court-structured plan designed to resolve the conditions identified at the review hearing.

(*iii*) Take any of the actions described in section 424c(4) (a), (b), or (c).

Sec. 424c. (1) The parent or parents of a minor may petition the court to terminate a guardianship for the minor, as follows:

(a) If the guardianship is a limited guardianship, the parents or the sole parent with a right to custody of the minor.

(b) If the guardianship was established under section 424, the parent or parents of the minor.

(2) If a petition has been filed to terminate a guardianship pursuant to this section, the court may do 1 or more of the following:

(a) Order the department of social services or an employee or agent of the court to conduct an investigation and file a written report of the investigation regarding the best interests of the minor or give testimony concerning the investigation.

(b) Utilize the community resources in behavioral sciences and other professions in the investigation and study of the best interests of the minor and consider their recommendations for the disposition of the petition.

(c) Appoint a guardian ad litem or attorney to represent the minor.

(d) Take any other action considered necessary in a particular case.

(3) After notice and hearing on a petition to terminate a limited guardianship, the court shall terminate the limited guardianship if it determines that the parent or parents of the minor have substantially complied with the limited guardianship placement plan. The court may enter orders to facilitate the reintegration of the minor into the home of the parent or parents for a period of up to 6 months prior to the termination.

(4) For all petitions to terminate a guardianship in which subsection (3) does not apply, the court, after notice and hearing, may do any of the following:

(a) Terminate the guardianship if the court determines that it is in the best interests of the minor, and may do any of the following:

(*i*) Enter orders to facilitate the reintegration of the minor into the home of the parent for a period of up to 6 months prior to the termination.

(*ii*) Order the department of social services to supervise the transition period when the minor is being reintegrated into the home of his or her parent.

(*iii*) Order the department of social services to provide services to facilitate the reintegration of the minor into the home of his or her parent.

(b) Continue the guardianship for not more than 1 year from the date of the hearing if the court determines that it is in the best interests of the minor, and do any of the following:

(*i*) If the guardianship is a limited guardianship, order the parent or parents to comply with 1 of the following:

(A) The limited guardianship placement plan.

(B) A court-modified limited guardianship placement plan.

(C) If the limited guardianship was established before the effective date of this section, a court-structured plan that will enable the child to return to the home of his or her parent or parents.

(*ii*) If the guardianship was ordered pursuant to section 424, order the parent or parents to follow a court-structured plan that will enable the child to return to the home of his or her parent or parents.

(*iii*) If a guardianship is continued pursuant to subparagraph (*i*) or (*ii*), schedule and conduct a hearing to review the guardianship before the expiration of the period of time that the guardianship is continued and do either of the following:

(A) Terminate the guardianship or limited guardianship.

(B) Proceed pursuant to subdivision (c).

(c) Appoint an attorney to represent the minor or refer the matter to the department of social services. The attorney or the department of social services may file a complaint on behalf of the minor requesting the juvenile division of the probate court to take jurisdiction of the minor under section 2(b) of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.2 of the Michigan Compiled Laws.

(5) As used in this section and section 424b, "best interests of the minor" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) The willingness and ability of the guardian to facilitate and encourage a close and continuing parent-child relationship between the child and his or her parent or parents.

(k) Any other factor considered by the court to be relevant to a particular dispute regarding termination of a guardianship, removal of a guardian, or visitation.

(6) This section applies to all guardianships established before, on, or after the effective date of this section.

Sec. 424d. Upon receipt of a copy of a judgment or an order of disposition in a child custody action regarding a minor that is sent to the court pursuant to section 6b(4) of the child custody act of 1970, Act No. 91 of the Public Acts of 1970, being section 722.26b of the Michigan Compiled Laws, the court shall terminate the guardianship or limited guardianship for that minor.

Sec. 426. The court may appoint as guardian a person whose appointment would serve the welfare of the minor. The court shall appoint a person nominated by the minor, if the minor is 14 years of age or older, unless the court finds the appointment contrary to the welfare of the minor.

Sec. 427. (1) Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor shall be given by the petitioner to each of the following:

(a) The minor, if 14 years of age or older.

(b) The person who had the principal care and custody of the minor during the 60 days preceding the date of the petition.

(c) Each living parent of the minor or, if neither of them is living, the adult nearest of kin to the minor.

(2) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 424 or 424a are satisfied, and the welfare of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings or make any other disposition of the matter that will serve the welfare of the minor.

(3) If necessary, the court may appoint a temporary guardian with the status of an ordinary guardian of a minor, but the authority of a temporary guardian shall not exceed 6 months.

(4) If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, the court may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 years of age or older.

Sec. 435. (1) The court in the county where the ward resides has concurrent jurisdiction with the court which appointed the guardian or in which acceptance of a testamentary appointment was filed over resignation, removal, accounting, and other proceedings relating to the guardianship.

(2) If the court in the county where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced, in all appropriate cases, shall notify the other court, in this or another state, and after consultation with that court, shall determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever will serve the welfare of the ward. After this determination has been made, the court accepting a resignation or removing a guardian shall direct this fiduciary to prepare and submit a final report to both courts. A copy of an order accepting a resignation or removing a guardian and a copy of the final report shall be sent to the court in which acceptance of appointment is filed. The court entering this order may permit closing of the guardianship in the court in which acceptance of appointment is filed, without notice to interested persons.

Sec. 437. (1) A person interested in the welfare of a ward or the ward, if 14 or more years of age, may petition for removal of a guardian on the ground that removal would serve the welfare of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may include a request for appointment of a successor guardian.

(2) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

(3) If, at any time in the proceeding, the court determines that the interests of the ward are, or may be, inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 or more years of age.

Section 2. This amendatory act shall not take effect unless all of the following bills of the 85th Legislature are enacted into law:

(a) Senate Bill No. 1039.

(b) House Bill No. 6019.

This act is ordered to take immediate effect.

Clerk of the House of Representatives.

Secretary of the Senate.

Approved .....

Governor.

RESOLUTION BY MICHIGAN PROBATE JUDGES ASSOCIATION
REGARDING
TERMINATION OF MINOR GUARDIANSHIPS
FAVORING ADOPTION OF HB 4859

WHEREAS, the Michigan House of Representatives has approved HB 4859 and sent same to the Michigan State Senate for further action; and

WHEREAS, if approved, HB 4859 would give the Probate Court the authority to continue limited or regular minor guardianships for a period longer than one year after the filing of a petition to terminate under limited circumstances; and

WHEREAS, this authority is necessary to protect this best interests of children.

NOW, THEREFORE, BE IT RESOLVED, that the Michigan Probate Judges Association hereby endorses HB 4859, and urges the Michigan Legislature to adopt same as soon as possible.

RESOLUTION NO. 1
ADOPTED UNANIMOUSLY
MPJA WINTER CONFERENCE
JANUARY 19, 1994

SENATE MAJORITY POLICY OFFICE
OLDS PLAZA 11TH FLOOR
P.O. BOX 30036
LANSING, MICHIGAN 48909-7536

THE SENATE
LANSING, MICHIGAN

PHONE: (517) 373-3330
FAX: (517) 373-0550

MEMORANDUM

TO: Senator R. Robert Geake
Senator Jack Welborn

FROM: Anne M. Boomer, Policy Advisor AMB

RE: HB 4859 (Gubow)

DATE: April 14, 1994

HB 4859 (Gubow) amends the Revised Probate Code as it relates to guardianships. This bill makes three major changes:

* It allows the court to appoint a relative as a guardian when the parent with custody of the minor dies or is missing and the other parent has not been granted legal custody by a court order. This provision would not apply in situations where the parents are still married.

* It reinforces the push toward reunification of the biological family by explicitly stating that there is a presumption that it is in the child's best interest to have a strong relationship with his or her parents. Further, this presumption requiring appropriate visitation shall be adhered to unless it is shown by clear and convincing evidence that visitation will not be in the best interest of the child. The current statute states that a court may order reasonable visitation between the parent and child while the child is living with the guardian.

* It would allow guardianships that have existed for more than one year to be continued if a parent has petitioned for termination of the guardianship. Under current law, guardianships where the parent <u>has not petitioned for termination of the guardianship</u> may be continued for more than a year. However, where a parent has petitioned for termination of the guardianship, the court must either return the child to the parent or continue the guardianship for up to one year. If the guardianship is continued, at the end of that year the court must either return the child to the parent or petition for termination of parental rights. As approved by the House, this bill would allow the court, after a hearing where it was determined that the parent or parents have failed to provide the minor with an appropriate parent-child relationship, to continue the guardianship if it is in the child's best interest to do so.

While neither the State Court Administrative Office nor the House staff people who dealt with this bill were able to tell me how many cases annually

are affected by this section of the probate code, it is clear that this is a fairly significant issue for probate judges. That being the case, I believe it is good policy to take the bill up.

However, I would recommend a slight change. It is my opinion that the language dealing with parental visitation and the stated presumption requiring visitation should be stricken. That language was added at the request of the State Bar Family Law Section and is not vital to the sponsor of the bill. Further, its tone conflicts somewhat with SB 725, which was passed by the Senate as part of the adoption package, which evidenced a legislative intent of moving away from a "reunification at any cost" mentality. The existing statute already allows a probate judge to order visitation; that language should be sufficient as is.

If you have further questions or comments, please let me know.

AB:ng
H:GUARDIAN

THE PROBATE COURT
FOR
COUNTY OF WAYNE STATE OF MICHIGAN
DETROIT

December 7, 1993

State Senator Jack A. Welborn
Senate Chamber
State Capitol
Lansing, Michigan 48909

Re: HB 4859

Dear Senator Welborn,

We, the undersigned, as members of the Probate and Mental division of the Wayne County Probate Court, write in support of HB 4859.

You may recall that in 1990 the legislature amended Michigan's guardianship laws as they relate to minors. This was done largely in response to the tragic beating death of Antwon Dumas. In the Dumas case the Wayne County Probate Court was required by law to terminate the limited guardianship. Unfortunately, the new law made material changes in the statute as it related to regular guardianships of minors. Two significant changes which may have been overlooked at the time were; first, taking away the jurisdiction of the probate court to appoint a guardian if it was in the best interest of the child, and, second, requiring the probate court to proceed to termination of regular minor guardianships within 1 year of the filing of a petition to terminate by the parent(s).

In terminating a regular minor guardianship the probate court is given three options, none of which include continuing the guardianship for over 1 year, even if the evidence clearly establishes the lack of a parent-child relationship and that it is in the child's best interests to remain with the guardian. We are convinced that this was not the legislature's intention. Not only does this change in the law cause serious disruption in the lives of children who have only known their guardian as their parent for all of their lives, but it creates the danger of more tragedies like Antwon Dumas.

At this time, their are over 20,000 active minor guardianships in Wayne County. 17,000 are regular guardianships while only 3,000 are limited guardianships. We believe that Wayne County has over 30% of the total minor guardianships in Michigan.

For the 17,000 regular minor guardianships in Wayne County, if a parent files a petition for termination, the probate court may either; (1) terminate the guardianship and order DSS to supervise the transition period, or (2) continue the guardianship for not more than 1 year under a court-structured plan, or (3) refer the matter to juvenile court to commence proceedings to terminate parental rights. Virtually no resources are available to enable DSS to carry out its statutory responsibility.

The 1990 amendments fail to recognize that there are circumstances where a minor wants to stay with the guardian and the parent-child relationship is virtually non-existent. We see many cases where the evidence is overwhelming that it is in the best interests of the child to continue the guardianship for more than 1 year. Unfortunately, this option is not available.

HB 4859 will give the probate court the flexibility to do what is in the best interests of the child. The bill creates a high standard of evidence in order to address any concern that parental rights will be impaired.

We urge your support of HB 4859 and would be willing to give detailed testimony regarding its necessity.

Sincerely,

Freddie G. Burton, Jr.
Chief Judge

Martin T. Maher
Chief Judge Pro Tempore

Milton L. Mack, Jr.
Judge of Probate

David J. Szymanski
Judge of Probate

June E. Blackwell-Hatcher
Judge of Probate

cc: Senator Virgil Smith
Senator Christopher Dingell
Senator Robert Geake
Senator Joel Gougeon
County Executive Edward H. McNamara

House
Legislative
Analysis
Section

Romney Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

APPOINTMENT OF GUARDIAN

Senate Bill 1210 (Substitute H-1)
First Analysis (12-9-98)

Sponsor: Sen. Glenn Steil
House Committee: Judiciary
Senate Committee: Families, Mental Health and Human Services

THE APPARENT PROBLEM:

The Lieutenant Governor's Children's Commission was established under Executive Order Number 1995-12 in May, 1995. The commission's explicit charge was to "review current laws, programs, procedures, policies, and training procedures that affect children, and create recommendations to help improve the quality of life for Michigan's children," and its conclusions were issued in July, 1996, in the report, "In Our Hands." As described in the report, the commission created five subcommittees to address early intervention, placement, permanency planning, post-termination, and confidentiality issues.

Legislation has been introduced based upon the recommendations of the Commission on Children report. Specifically, one recommendation addresses a problem with the law regarding when a court may appoint a guardian for a minor. Many courts have interpreted a provision of the law allowing for appointment of a guardian when a child has been left with a third party without that person having been given legal authority over the child as only applying while the child is in the custody of the third party. In some cases, this results in the court refusing to consider appointment of a guardian if the parent or parents retrieved the child before the hearing on the petition could be held, even if the same situation has occurred previously. It has been suggested that the law should be changed to make it clear that a court may continue a proceeding to appoint a guardian even after the parents have retrieved the child.

THE CONTENT OF THE BILL:

The bill would amend the Revised Probate Code to allow a court to appoint a guardian for an unmarried minor if the appointment were necessary for the minor's immediate physical, mental, or emotional well-being. If a guardian were appointed under these circumstances, the court would have to refer the child to the state department responsible for children's protective services.

Under the code, a person who is interested in the welfare of a minor, or a minor who is at least 14 years old, may petition for the appointment of a guardian for the minor. The court may order the Family Independence Agency or an employee or agent of the court to conduct an investigation of the proposed guardianship. The court may appoint a guardian for an unmarried minor if one or more of the following circumstances exist:

-- The parental rights of both parents or of the surviving parent have been terminated or suspended by prior court order, judgment of divorce or separate maintenance, death, judicial determination of mental incompetency, disappearance, or confinement in a place of detention.

-- The parent or parents have permitted the minor to reside with another person and have not provided that person with legal authority for the care and maintenance of the minor.

-- The minor's biological parents have never been married to each other; the minor's custodial parent dies or is missing and the other parent has not been granted legal custody under court order; and the proposed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

MCL 700.424

HOUSE COMMITTEE ACTION:

Current law provides three circumstances under which a court may appoint a guardian for a minor: when the parental rights of the parents have been terminated, by death or court order; when the parents have permitted

the minor to reside with another person without providing the other person with legal authority for the care and maintenance of the minor; or when the minor's parents were never married and a relative petitions the court for guardianship upon the death of the minor's custodial parent.

The H-1 substitute for the bill proposed by the House Judiciary Committee would amend the Revised Probate Code to expand when a court could appoint a guardian for a minor child. Specifically, the bill would provide that a court could appoint a guardian where the parent or parents had permitted the minor to reside with another party without providing that person with legal authority for the care and maintenance of the minor, even if the parents had taken the child back after the petition had been filed.

The bill would have an effective date of March 1, 1999.

MCL 700.424

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

According to the FIA, there have been a number of cases where the child spends a great deal of time with a third party, but because the parent retrieves the child before a petition can be heard, the courts have refused to appoint a guardian for the child. Sometimes this situation can occur over and over again, while the court is unable to appoint a guardian as long as the parent or parents retrieve the child. This is clearly not the law's intent, and the current situation limits the law's effectiveness in protecting children. In fact, the law has the opposite effect, because it encourages instability in the lives of certain children by encouraging the parents to abandon, retrieve and the abandon the child repeatedly.

POSITIONS:

There are no positions on the bill.

Analyst: W. Flory

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.