

**SENATE APPROPRIATIONS COMMITTEE
FISCAL NOTE**

BILL NO. Senate Bill 884

PRINTER NO. 1147

AMOUNT

No Fiscal Impact

FUND

General Fund

DATE INTRODUCED

September 11, 2017

PRIME SPONSOR

Senator Greenleaf

DESCRIPTION AND PURPOSE OF BILL

Senate Bill 884 amends Title 20 (Decedents, Estates and Fiduciaries) to address the venue for a guardianship proceeding, the petition and hearing for the appointment of a guardian, who may be appointed a guardian, the removal and discharge of a guardian, and health care decisions by a guardian.

The bill amends the General Provisions (Subchapter A) of Chapter 55 of Title 20 (relating to incapacitated persons) as follows:

- Establishes the venue for a guardianship proceeding for an incapacitated person or a proceeding regarding the guardianship itself in the judicial district of the Commonwealth in which the incapacitated person resides.
- Provides that confidentiality and disclosure of information shall be governed by court rules to be promulgated by the Supreme Court.

The bill permits the orphan's court division to appoint examiners of actions of guardians of the estate and mediators or arbitrators, in addition to the current authority to appoint masters, auditors, examiners of accounts, guardians and trustees ad litem, and representatives of parties.

The bill amends Section 5511, which contains the court's general authority to receive a petition and hold a hearing with regard to an incapacitated person, to provide as follows:

- Upon petition and hearing and the presentation of clear and convincing evidence, the court may find a person to be incapacitated and appoint a guardian of the person or a guardian of the estate for the person. The petitioner may be any person interested in the alleged incapacitated person's welfare. Guardian support agencies shall disclose the agency's financial information and a list of current guardianships.
- Permits the court to dismiss a proceeding if the proceeding was not instituted to aid or benefit the alleged incapacitated person or the petition contains insufficient facts. Requires the Supreme Court to establish a form to provide clear notice of the petition and hearing.

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- Requires personal service of the petition on the alleged incapacitated person not less than 20 days before the hearing. Requires that notice of the petition and hearing also be given to any person who would be entitled to share in the estate of the alleged incapacitated person and to the person or institution providing residential services to the alleged incapacitated person.
- Depending on the wishes of the alleged incapacitated person, specifies that the hearing may be closed to the public, with or without a jury, or may be held at the residence of the alleged incapacitated person. Requires the alleged incapacitated person to be present at the hearing unless the court is satisfied that being present would harm the person's physical or mental condition, or the person is outside the Commonwealth and cannot attend.
- In the absence of counsel for the alleged incapacitated person, requires the petitioner to notify the court at least 7 days before the hearing and requires the court to appoint counsel in appropriate cases as determined by the court, and in all cases where the alleged incapacitated person is not expected to attend the hearing.
- Permits the court to consider testimony about the person's alleged incapacity by teleconference or videoconference. Allows the petitioner, where incapacity is not contested, to establish incapacity by a sworn statement from the qualified individuals.

The bill permits the court to appoint any one or more of the following to be an alleged incapacitated person's guardian of the person, guardian of the estate, or both:

- Any qualified individual;
- A corporate fiduciary;
- A nonprofit corporation;
- A guardianship support agency;
- A county agency; and,
- If the person is a resident of a state facility, the guardian office at the facility.

SB 884 provides that the court may not appoint as guardian, unless no alternative exists, a person or entity providing residential services for a fee or any person whose interests conflict with those of the alleged incapacitated person. The legislation specifies that a family relationship to the alleged incapacitated person shall not by itself be considered a conflict of interest.

The bill provides that, if a nomination regarding guardian of the person or guardian of the estate has been made in a power of attorney, an adjudication of incapacity or the appointment of a guardian may not be necessary.

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The bill provides that, when making the appointment of a qualified person to be guardian of the person or estate, the court shall consider, in the following order: a guardian currently acting for the estate, the spouse of the person, an adult child of the person, a parent of the person, the nominee of a deceased or living parent of an unmarried alleged incapacitated person, and another suitable person.

The bill permits a court during a review hearing to order an independent evaluation.

The bill permits counsel for a person adjudicated to be incapacitated to act on the person's behalf at any proceeding regarding the interest of the person. The legislation permits the court to terminate the services of counsel and appoint new counsel or a guardian ad litem.

The bill permits the court, for an initial period of 30 days and for an extended period of up to 60 days, to appoint an emergency guardian when it appears that a person lacks capacity and the failure to make such an appointment will likely result in irreparable harm to the person or estate. The legislation provides that the emergency guardian will only have powers and duties as directed by the court.

The bill provides in a new Section 5515.3 that every guardian of the estate shall execute and file a bond in the name of the Commonwealth with sufficient surety as determined by the court.

The bill provides for the following powers of the guardian of the person or estate, unless limited by the court:

- Insure the assets of the estate against damage or loss and protect the incapacitated person from liability to a third person arising from administration of the estate;
- Take any legal action against a co-guardian of the estate to protect the estate;
- Employ a custodian for property or securities;
- Take for the estate the deed of a property encumbered by a mortgage in lieu of foreclosure;
- Take possession of tangible and intangible personal property and dispose of personal property through sale or exchange;
- Accept and retain investments;
- Advance money for the protection of the estate and for all expenses, losses, and liability sustained in the administration of the estate;
- Renounce any fiduciary position to which the incapacitated person has been appointed;
- Vote a security; and,
- Manage, repair, and maintain real property; collect rent; pay taxes; grant or obtain easements.

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The bill allows the guardian to have the following powers only with court approval:

- Continue any business in which the incapacitated person has an ownership interest, but any party in interest may petition the court to revoke or modify the order;
- After notice to all parties in interest, organize a corporation, partnership, or limited liability company to carry on the business of the incapacitated person; and,
- Sell or buy real property, subject to the court's terms and security.

The bill provides that when a guardian dies or becomes incapacitated, the guardian's personal representative does not succeed as the guardian of the estate or person, but the court may direct the fiduciary of the guardian to make appropriate distributions and transfers.

SB 884 provides that, when a dispute arises among guardians of the estate, the decision of the majority shall control unless otherwise provided by the court.

The bill provides for the substitution of guardians as parties to pending actions, the consummation of agreements for the sale of property when a guardian is appointed, and the abandonment by the guardian of property in the estate that is so burdensome or encumbered as to be of no value.

The bill permits a guardian of the estate to settle claims by or against the estate without court approval. It also permits the guardian to settle claims with approval under certain circumstances.

The bill requires a guardian to maintain records regarding the guardianship and the incapacitated person.

The bill provides that a guardian of the person is not personally liable on a contract properly entered into by the guardian in a fiduciary capacity. SB 884 provides that a guardian of the estate is not personally liable on a contract properly entered into in a fiduciary capacity unless the guardian fails to reveal the representative capacity in the contract. The guardian of the estate may be personally liable to the estate if the guardian fails to exercise reasonable care, skill, and caution for obligations or for other acts or omissions during the administration of the estate.

The bill allows the guardian of the estate to delegate powers and duties and requires skill and care in selecting an agent to carry out certain powers and duties.

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The bill requires the guardian to file within 90 days after appointment an inventory of the incapacitated person's real and personal property, other assets (including life insurance, annuities, and retirement plans), and all income received by the guardian on behalf of the incapacitated person (including government benefits).

SB 884 permits the court, in an uncontested matter concerning the termination of a guardianship, to terminate the guardianship based on an affidavit of the incapacitated person's attending physician stating that the guardianship is no longer necessary.

The bill authorizes the court to remove a guardian if the guardian is wasting or mismanaging the estate, is likely to become insolvent, has failed to perform a duty imposed by law, has become incapacitated, is no longer in the Commonwealth or has a known place of residence, or for any other reason in which the interests of the estate or incapacitated person are likely to be jeopardized by the guardian.

The bill requires the court, on its own motion or on the petition of an interested party alleging grounds for removal, to order the guardian to appear and show cause why the guardian should not be removed or to summarily order the removal of the guardian when necessary to protect the rights of creditors or parties in interest. Upon removal of the guardian, the bill requires the court to appoint a successor guardian and provide for the security and delivery of the assets and records of the estate. Any guardian summarily removed may petition for reinstatement.

The bill provides in new Sections 5515.1 and 5515.2 for the discharge of liability of a surety, insurance company, or financial services company when certain conditions are satisfied.

SB 884 requires a petition to be filed for the appointment of a guardian of the person to state whether it is proposed that the guardian shall have the power to make health care decisions and whether the guardian will have all powers of a health care representative.

The bill requires the guardian, to the extent practicable, to consult with close family members of the incapacitated person when making a health care decision, particularly one involving end-of-life decision making.

This act shall take effect in 60 days.

FISCAL IMPACT:

Senate Bill 884 will have no fiscal impact to the Commonwealth. Additional responsibilities prescribed in this legislation are assumed to be accommodated within existing staffing and funding levels for the Judiciary.