

Report on Public Policy Position**Name of section:**

Judicial Conference

Contact person:

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Bill Number:

[HB 5499](#) (Jones) Probate; guardians and conservators; rights of the incapacitated; define. Amends [1998 PA 386](#) (MCL [700.1101](#) - [700.8102](#)) by adding sec. 5306a.

Date position was adopted:

March 7, 2008

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

27

Number who voted in favor and opposed to the position:

21 Voted for position

0 Voted against position

6 Did not vote

Position:

Oppose

Explanation of the position, including any recommended amendments:

HB 5499 is based on a false premise. This bill is not necessary. The rights which are set forth in EPIC make it very easy for a ward to make his or her complaints known and to remove a guardian the ward feels is not satisfactory.

The bill purports to implement a recommendation of the Governor's Task Force on Elder Abuse. The Task Force found that Michigan's Estate and Protected Individuals Code(EPIC), which is the current law, did not clearly define what rights are retained by individuals who are deemed incapacitated, or what rights may be removed from those individuals. The Task Force recommended that the legislature define, identify and limit the rights that can be removed from persons who are deemed incapacitated.

As is apparent from the attachment, EPIC provides a broad array of rights which are clearly described in EPIC. As drafted, this bill would not only interfere with the statutory duty of the guardian to provide for the “care, custody and control” of the ward, but, the bill would prevent the guardian from taking steps to protect the ward from abuse, danger and exploitation.

For example, the guardian could not prevent the ward from accumulating dangerous amounts of newspapers, magazines and other property that certain wards accumulate in their homes. More significantly, a guardian would have to get prior court approval to restrict access to the ward by persons who are attempting to exploit the ward. Presently, a third party who is barred from visitation must initiate court proceedings. For those who are attempting to take advantage of the ward, they rarely come to court, for obvious reasons. Shifting the burden to the guardian means shifting the cost to the ward. As drafted, guardians would have great difficulty in carrying out their duties.

This bill would exacerbate the shortage of persons and agencies willing to serve as guardians of last resort, leaving incapacitated individuals with no one to provide for their care.

RIGHTS OF INDIVIDUALS IN GUARDIANSHIP PROCEEDINGS

The Estates and Protected Individuals Code (EPIC) provides a comprehensive list of rights that are retained by individuals, even if a full guardian is appointed for them. In addition to rights to notice and an opportunity to be heard, individuals retain the right to a court appointed guardian ad litem, an attorney, a jury trial and an independent medical examination. Even with a finding of incapacity, the individual has the right to choose his or her guardian. If the individual is dissatisfied, a mere letter to the court triggers a full review, including whether a guardian is still necessary. The guardian can be replaced, at any time, without a finding of misconduct. The burden is always on the proponent, at all times, to show by clear and convincing evidence, that the ward is incapacitated and that a guardian is necessary. The following list of rights retained by individuals in guardianship proceedings is directly from EPIC in order of its appearance.

- The individual has the right to object to the appointment of a successor guardian by will or other writing. MCL 700.5301(4)
- The individual has the right to have venue in the guardianship proceeding to be in the place where the individual resides or is present. If the individual is admitted to an institution by a court of competent jurisdiction, venue is also in the county in which that court is located. MCL 700.5302
- An individual may petition on his or her own behalf for the appointment of a guardian. MCL 700.5303(1)
- The court is required to appoint a guardian ad litem to represent the individual on a petition to appoint a guardian. MCL 700.5303(3)
- The individual retains the right to have legal counsel of his or her own choice. MCL 700.5303(3)
- The individual has a right to an independent evaluation by a physician or mental health professional at public expense, if indigent. MCL 700.5304(2)
- The individual has a right to be present at the hearing and all practical steps are to be taken to ensure this, including, if necessary, moving the hearing site. MCL 700.5304(4)
- The individual has the right to see or hear all the evidence. MCL 700.5304(4)
- The individual has the right to be represented by legal counsel, to present evidence, and to cross-examine witnesses. MCL 700.5304(5)

- The individual has the right to a trial by jury. MCL 700.5304(5)
- The individual has the right to a closed hearing. MCL 700.5304(6)
- The individual has the right to be personally visited by a guardian ad litem. MCL 700.5305(1)(a)
- The individual has the right to an explanation by the guardian ad litem of the nature, purpose, and legal effects of a guardian's appointment. MCL 700.5305(1)(b)
- The individual has the right to an explanation by the guardian ad litem of the individual's rights in the hearing procedure. MCL 700.5305(1)(c)
- The individual has the right to be informed of the right to contest the petition, the right to request limits on the guardian's powers, to object to a particular person being appointed guardian, to be present at the hearing, to be represented by legal counsel and to have legal counsel appointed if the individual is unable to afford legal counsel. MCL 700.5305(1)(c)
- The individual has the right to be informed of the name of each person known to be seeking appointment as guardian. MCL 700.5305(1)(d)
- The individual has the right to legal counsel if they wish to contest the petition, have limits placed on the guardian's powers, or object to a particular person being appointed guardian. MCL 700.5305(3)
- The individual has the right to request legal counsel for any other reason. MCL 700.5305(4)
- The individual has the right to require that proof of incapacity and the need for a guardian be proven by clear and convincing evidence. MCL 700.5306
- The individual has the right limitation of the powers and period of time of a guardianship. MCL 700.5306(2)
- The individual has the right to a guardianship designed to encourage the development of maximum self-reliance and independence. MCL 700.5306(2)
- The individual retains the right to prevent the appointment of a guardian with powers held by a valid patient advocate. MCL 700.5306(2)
- The individual has the right to periodic review of the guardianship by the court, including the right to a hearing and the appointment of an attorney, if issues arise upon the review of the guardianship. MCL 700.5309, MCR 5.408
- The individual retains the right, at any time, to seek modification or termination of the guardianship by informal letter to the judge. MCL 700.5310(2)
- The individual has the right to a hearing within 28 days of requesting review, modification or termination of the guardianship. MCL 700.5310(3)
- The individual has the same rights on a petition for modification or termination as apply to a petition for appointment of a guardian (ie. appointment of an attorney, independent examination, jury trial, choice of guardian, etc.) MCL 700.5310(4)
- The individual has the right to personal notice on a petition for appointment or removal of a guardian. MCL 700.5311(2)
- The individual has the right to written notice of the nature, purpose, and legal effects of the appointment of a guardian as well as the individual's rights in the proceedings, including the right to appointed legal counsel. MCL 700.5311(3)
- The individual has the right to choose the person who will serve as guardian, so long as the individual is suitable and willing to serve. MCL 700.5313(2)

- The individual retains the right to consultation with the guardian whenever the guardian is making a major decision affecting the individual, if meaningful conversation is possible. MCL 700.5314.
- The individual has the right to quarterly visits by the guardian and the guardian must notify the court within 14 days of a change in the ward's residence. MCL 700.5314(a)
- The individual has the right to expect the guardian to secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time. MCL 700.5314(b)
- The individual has the right to expect the guardian to take reasonable care of the ward's clothing, furniture, vehicles and other personal effects. MCL 700.5314(b)
- The individual has the right to partial management of his or her property to encourage self-reliance and independence. MCL 700.5316

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

<http://legislature.mi.gov/doc.aspx?2007-HB-5499>

RECOMMEND STATE BAR ACTION ON THIS ISSUE:

List any arguments against the position:

N/A

FOR LEGISLATIVE ISSUES ONLY:

This position falls within the following Keller-permissible category:

- The regulation and discipline of attorneys
- ✓ The improvement of the functioning of the courts
- The availability of legal services to society
- The regulation of attorney trust accounts
- The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

Keller-permissible explanation:

This bill would directly impact the ability of the courts to find people willing to serve as guardians and would impair the ability of the courts to protect their wards.