



## Report on Public Policy Position

**Name of Committee:**

Standing Committee on Justice Initiatives

**Contact Person:**

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**Bill Number:**

**SB 60** (Cherry) Family law; child custody; custody action by third person; add incapacitated parent as basis for action. Amends sec. 6c of [1970 PA 91](#) (MCL [722.26c](#)).

**Date position was adopted:**

February 17, 2005

**Process used to take the ideological position:**

In-person and teleconference discussion and vote

**Number of members in the decision-making body:**

Seventeen

**Number who voted in favor and opposed to the position:**

Twelve in favor, zero opposed

**Position:**

Oppose SB 60.

**The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:**

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-SB-0060>

**RECOMMEND STATE BAR ACTION ON THIS ISSUE:**

**Arguments for the position:**

1. SB 60 Duplicates Existing Mechanisms that are Better Suited to Address Parental “Incapacity.”

This legislation appears to be aimed at allowing relatives of a child to obtain custody if the child’s parent is incapacitated. Michigan law already provides several other mechanisms to ensure a child’s well being if the parent is incapacitated. These other mechanisms are preferable to SB 60 because they provide more procedural protections to both children and parents, and because they are better suited to address the fluid nature of situations involving parental illness or drug use.

First, allegations that a child is at risk because a child's parent is incapable of caring for the child due to physical illness, mental illness, or substance abuse, can currently be addressed through Michigan's child protection system. This system offers impartial investigation by child protective services agencies, as well as court supervision of either an in-home or out-of-home placement. Moreover, the aim is to address the parent's issues and provide services to the parent that may permit reunification if the underlying problems can be corrected. The parent will receive a court appointed attorney, and the child is represented by a guardian ad litem. The court will ultimately make a decision on the appropriate permanent placement for the child. By contrast, in custody case the intention is to identify a permanent custodial placement for the child, rather than to ensure the child's well being while the allegations against the parent are addressed. In custody cases, parents do not have a right to court appointed counsel. Moreover, the appointment of guardians ad litem to protect the children is rare.

Second, Michigan law regarding guardianships already provides a method for appointing caregivers for children when parents are unable to care for them. Guardianships are available when a parent's rights have been suspended or terminated due to disappearance or a judicial determination of mental incompetency. Guardianships are also available when a parent permits the minor to reside without legal authority (such as a power of attorney) with relatives or other people. See MCLA 700.5204. The guardianship laws afford protections for children through appointment of a guardian, court supervision of the appointment, and reporting requirements for the guardian.

Michigan law regarding guardianships already provides that persons who have been given guardianship may petition for custody. MCL 722.26b. This method of employing the custody statute is preferable to SB 60 because it provides for initial court oversight of the placement and allows for possible reunification with the parent, especially when the reason for the guardianship may be temporary. For example, when a parent successfully completes substance abuse or mental health treatment, or when a parent who has a debilitating disease recovers, a guardianship would allow for a reintegration plan and return of the child. If the parent continues to use drugs, or if the parent's mental or physical health does not improve, the guardian can then petition for custody. Thus, the guardianship law is the appropriate mechanism to address fluid circumstances, which can then be finalized into a custody order if circumstances warrant. The Michigan custody statute, MCL 722.26c, by contrast, has historically addressed more permanent situations (e.g. adoption, death, disappearance). SB 60 would expand the custody statute's coverage into situations that may or may not be permanent. Under SB 60, parents who are undergoing a temporary illness, whether physical or mental, or who are in substance abuse recovery, risk losing custody of their children.

SB 60 serves a similar purpose as existing child protective and guardianship laws, which are better suited to addressing the inherently fluid circumstances surrounding parental illness or substance abuse. The bill would create a duplicative system that eliminates procedural protections for vulnerable children and adults.

## 2. The Definition of "Incapacitated" is Overly Broad

The proposed new subsection (3) contains language that is very broad and vague. It is not clear whether the limiting phrase "to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions" applies to all the potential reasons for incapacity (such as mental illness, mental deficiency, etc.), or only to the last "other cause." If courts interpret SB 60 to mean that third parties can gain standing to bring a custody dispute simply by alleging that an individual is mentally ill, physically ill, or on drugs, this could result in many more custody disputes by third parties. At a minimum, the language should be clarified to ensure that parental illness or substance abuse alone is not sufficient to confer standing on third parties; the parent must lack sufficient understanding or capacity to make or communicate informed decisions.

The bill also does not provide adequate guidance for what is meant by “chronic intoxication.” Moreover, the catchall phrase “other cause” is very open-ended.

### 3. Expanding the Standing of Third Parties Is Problematic Given that Subsection (b) Applies Only to Unmarried Parents without Legal Custody

The proposed new language would greatly expand the circumstances when third parties could seek custody. This expansion is problematic in light of the fact that “legal custody” in section 6c (b)(ii) is not clearly defined. Attorneys report that there have been differing views as to whether Section 722.26c applies to parents who have only “legal custody” but not “physical custody.” For example, in many counties, the standard court forms used in paternity and support actions award either “custody” or “physical custody” to one parent. Those forms, which are used in hundreds and hundreds of cases, do not specify whether the other parent has legal custody. Thus, it is unclear in those cases whether a third party has standing to take custody away from the other parent. For example, imagine that a court order awards “physical custody” to the mother, but makes no provisions regarding the father. The father is regularly involved in the child’s life. The mother becomes very ill, and the child goes to live with the father. Because it is not clear if the father has “been granted legal custody under court order,” it appears that the child’s relatives would now have standing to seek custody. Thus, SB 60 would significantly expand the circumstances under which third parties could seek custody, and would interfere with the parental rights of involved parents who do not have legal custody under a court order.

SB 60 is also problematic because it expands the circumstances under which the statute’s existing distinction between legitimate and illegitimate children is applied. Subsection 722.26c (b) of the statute only allows third party actions in cases where the parents were never married. In other words, the statute allows third parties to petition for custody if the child’s parents are unmarried and certain conditions (now including parental incapacity) are met. By contrast, if the parents are married and those conditions are met, the third party cannot petition for custody. This distinction between legitimate and illegitimate children is quite possibly unconstitutional.

Under SB 60, the partner of an incapacitated mother would potentially face a custody challenge, while a husband would not. An example may help to clarify the point. Imagine an unmarried couple that lives together and has a child. The father signs the birth certificate. No court case is ever started as the family lives together happily. By law, the unmarried mother is presumed to have custody. If she becomes ill, the father would not have been granted legal custody under a court order as there was not any court case. Thus, under SB 60 the child’s relatives would have standing to seek to take the child away from the father. By contrast, if the parents had been married, the father would automatically have custody, and there would be no court battle. Whether or not the mother’s illness allows the relatives to seek custody should not depend on whether or not the parents are married.

#### **Arguments against the position (if any):**

None.

#### **If the State Bar currently has a position on this subject matter, state the position, and an analysis of whether the recommended position and the current State Bar position are in conflict.**

On June 11, 2005, the State Bar of Michigan voted unanimously to take no position but authorized the Standing Committee on Justice Initiatives to advocate its position.

#### **Fiscal implications of the recommended policy to the State Bar of Michigan:**

None

**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 competence, and the integrity of the profession.**

**Keller- permissible explanation:**

1. SB 60 relates to the functioning of the courts because it sets up a duplicative system for appointing custodians for children whose parents are incapable of caring for them. The guardianship statute already provides a process. Having duplicative statutory structures and systems creates a confusing and inefficient method of resolving these matters.

2. SB 60 relates to the availability of legal services to society because a) it creates an “end run” around the guardianship statute, which would provide the children a guardian ad litem that is not generally available through the child custody laws. SB 60 also permits certain relatives to bypass the process in the child protection laws, which assure that parents are represented by legal counsel before the parent is deemed incapacitated and a child’s custody arrangements are changed. The standard for legal incapacity in MCR 2.201(E) which sets out the rules on when and how incapacitated persons require a guardian ad litem before they can be served with legal process.