

**MARYLAND JUDICIAL CONFERENCE**  
**GOVERNMENT RELATIONS AND PUBLIC AFFAIRS**

Hon. Matthew J. Fader  
Chief Justice

187 Harry S. Truman Parkway  
Annapolis, MD 21401

**MEMORANDUM**

**TO:** House Judiciary Committee  
**FROM:** Legislative Committee  
Suzanne D. Pelz, Esq.  
410-260-1523  
**RE:** House Bill 698  
Estates and Trusts – Guardianship of the Person of a Disabled  
Person – Expedited Proceedings  
**DATE:** February 7, 2024  
(2/14)  
**POSITION:** Oppose

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The Maryland Judiciary opposes House Bill 698.

Although well intentioned, this bill raises constitutional issues and would undermine rights and protections afforded to respondents in guardianship proceedings.

**Guardianship generally.** Guardianship is an intervention that may be necessary to protect a person’s safety, welfare, or property, but is an extreme measure that is designed to be a last resort. This is because guardianship curtails, and some cases removes, all of a person’s basic rights and liberties including the right to make decisions about their medical care, housing, clothing, property. It impacts whether they can vote, marry, get divorced, or visit with family and friends.

Estates & Trust Art., § 13-705 and the Title 10 of the Maryland Rules outline a series of rights afforded to *alleged* disabled persons (ADPs) in proceedings to establish guardianship that in many ways make Maryland law a model of due process. The term “alleged” is used because there is a presumption of capacity, and these are adversarial proceedings. Because ADPs face significant and usually permanent loss of their rights, they are entitled to notice about the proceeding, to an attorney, and if they do not have an attorney of their own choosing, the right to a court-appointed attorney who is paid for by the state if they are indigent. They have the right to a hearing and for that hearing to be held at a place the ADP can reasonably access, and a jury trial if guardianship of the person is sought. They also have the right to request discovery, to present evidence, to cross-examine witnesses against them, and to an expedited appeal. These protections are consistent with other proceedings that involve the deprivation of a person’s rights and required for due process.<sup>1</sup>

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<sup>1</sup> *In re Sonny Lee*, 132 Md. App. 696 (2000).

In guardianship of the person proceedings, the petitioner has the burden of proving by clear and convincing evidence that the ADP 1) lacks decision-making capacity **and** 2) that there are no less restrictive forms of intervention available. These interventions are referred to as “alternatives to guardianship,”<sup>2</sup> which alone or together allow a person to have their needs met without needing a guardian. Alternatives to guardianship can also help limit a guardian’s powers to address the demonstrated needs of an ADP and prevent guardianship from being used as a hammer when all that is needed is a scalpel.

**Constitutional and practical issues.** The mechanics of the bill are difficult to implement and would infringe upon the rights of ADPs and other interested persons.

The proposed amendments of §13-705(f) would require the court to hold a hearing on a petition for guardianship for the purposes of obtaining consent to discharge or transfer an alleged disabled person from a hospital within ten (10) calendar days. This timeline is unworkable as it would not allow for scheduling of contested cases or a jury trial if needed. The timeline does not recognize the demands of other pending cases or the trial calendars of the attorneys involved. The Judiciary is in the best position to schedule the matters before it in consideration of all relevant factors

This abbreviated timeline would also limit the abilities of attorneys for alleged disabled persons to effectively represent their clients, and for local Departments of Social Services and Area Agencies on Aging to conduct necessary investigations. It would also create barriers to identifying family, friends, and others who can provide relevant evidence or obviate the need for guardianship. The provision would also prioritize petitions filed by hospitals over petitions filed by agencies, including adult protective services, and families. It also conflicts with safeguards set forth in the statute.

This provision also makes it difficult for local Departments of Social Services and Area Agencies on Aging to conduct necessary investigations into alternatives to guardianship and the needs of the ADP. Attorneys for ADPs would have limited time to meet with their clients, identify and interview witnesses, request discovery, explore alternatives to guardianship, and prepare a defense as required by law. If agencies and defense attorneys do not have time to conduct investigations or prepare a defense, ADPs are at risk of being placed under the most restrictive form of guardianship of the person – public guardianship. This means that a stranger will make decisions for them, and they will more likely be discharged into a facility rather than back to their homes or communities.

Most petitions filed by hospitals include requests for the appointment of a guardian of the property. There is no public guardianship of property, so courts must rely on the group of attorneys who do this work and who are paid from the person under guardianship’s assets. The work is complicated and most guardianships that originate from healthcare settings involve patients with limited resources. Attorneys are often asked to do this work on a *low bono* or *pro bono* basis, which is a challenge.

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<sup>2</sup> Information about alternatives to guardianship is available at [www.mdcourts.gov/alternatives](http://www.mdcourts.gov/alternatives).

Proposed §13-705(e)(4) would have the rights afforded to ADPs satisfied if the respondent is given the opportunity to exercise these rights virtually. This provision is unnecessary as courts can hold virtual hearings generally. Read together with proposed subsection (f)(2), this language suggests that having giving the ADP the opportunity (e.g., by notifying him, her, or them of the proceeding) is sufficient even if they are not giving the ability to exercise those rights.

Proposed subsection (g) would require all guardianship of the person hearings to be held virtually unless the petitioner or alleged disabled person requests otherwise. This may interfere with the rights of interested persons who are parties to these actions who can, among other things, request discovery, present evidence, and cross-examine witnesses. It could also run afoul of the Americans with Disabilities Act and other similar laws. While virtual hearings are an important option for some, they can create barriers for others, including witnesses. Virtual platforms are not always conducive to meaningful participation in court proceedings, especially for parties and witnesses who do not have access to stable internet connections or devices with reliable audio and camera features. People with visual or auditory impairments may experience additional challenges.

**The “healthcare-to-guardianship pipeline.”** Courts have seen an increase in petitions for guardianship filed by hospitals, skilled nursing homes, and other facilities over the past several years. These cases represent what is referred to as the “hospital-to-guardianship” or, more precisely, the “healthcare-to-guardianship pipeline.” The pipeline refers to when a person enters a healthcare facility experiencing diminished capacity and without a clear legal representative in control and the facility seeks guardianship over that person. This allows the facility to discharge the person when they no longer need acute medical care, or, alternatively, to get them qualified for medical assistance (Medicaid), which may be necessary for them to be transferred to or to remain in a more appropriate care setting. In many cases, the guardianship is plenary and remains in place, even if the precipitating event is resolved. The pipeline can be detrimental to patients, as it curtails their rights, and to public guardianship agencies, as it increases the burden on the same.

This pipeline is not a new phenomenon.<sup>3</sup> In 2011, Maryland Senate Bill 726 was introduced to provide for the appointment of a temporary limited guardian to consent to discharge of an adult with a disability from a hospital. Although the bill failed, a workgroup was convened to “develop a uniform statewide policy relating to the appointment of temporary limited guardians for hospitalized adult disabled persons.” The workgroup ultimately advised against such a policy, finding that “[t]he [] process of establishing guardianship, which relies on the courts to hear guardianship cases, substantially and often times permanently restricts the rights of individuals, and requires costly and lengthy processes when essentially what is needed is “consent for placement”

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<sup>3</sup> See Raymond, A., [The Hospital to Guardianship Pipeline](#), Bifocal Vol. 44, Issue 6, ABA Commission on Law and Aging (2023); and Hirschel, A., & Smetanka, L., [The Use And Misuse Of Guardianship and Conservatorship by Nursing Home And Health Care Providers](#), 72 Syracuse L. Rev. 255, 258 (2022).

in the least restrictive setting (also referred to as “appropriate setting”) upon discharge from a hospital.”<sup>4</sup>

In 2019, Supreme Court of Maryland amended its court rules to provide for an expedited guardianship process “in connection with medical treatment,” in an attempt to respond to complaints from hospitals about delays in addressing their petitions for guardianship.<sup>5</sup> Since those rules went into effect, courts and public guardianship agencies have noted an increase in petitions from healthcare facilities and pressure to move on them faster, further burdening these already under-resourced public structures.

In 2021, the Judiciary received a grant from the Administration for Community Living, U.S. Department of Health and Human Services, to perform an assessment of Maryland’s guardianship system and to examine the pipeline. The project is ongoing but has helped identify drivers of the pipeline and ways to divert patients to less restrictive and more person-centered options than guardianship.

cc. Hon. J. Sandy Bartlett  
Judicial Council  
Legislative Committee  
Kelley O’Connor

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<sup>4</sup> Department of Human Services, “Report of the Workgroup on Hospitalized Adult Disabled Persons – Appointment of a Temporary Limited Guardian,” 2011 at 4 (available at [https://mgaleg.maryland.gov/cmte\\_testimony/2021/hgo/livsqy\\_g5w197DmAWJ\\_EV9148rfYA6jch.pdf](https://mgaleg.maryland.gov/cmte_testimony/2021/hgo/livsqy_g5w197DmAWJ_EV9148rfYA6jch.pdf)).

<sup>5</sup> 198th Report to Ct. App., 2018 (available at <https://www.courts.state.md.us/sites/default/files/rules/order/ro198.pdf>).