



**To:** Members of the House Judiciary Committee  
**Re:** Position on HB 4848  
**Date:** September 20, 2021

On behalf of The National Coalition for a Civil Right to Counsel (NCCRC), I write to provide input on HB 4848. As noted below, we do not object to the bill’s right to counsel provisions but urge the Committee to do more to strengthen these provisions, as the right to counsel underpins all the substantive rights at stake for vulnerable adults in such proceedings.

The NCCRC, organized and funded in part by the Public Justice Center, is an association of individuals and organizations committed to ensuring meaningful access to the courts for all. Founded in 2003, our mission is to encourage, support, and coordinate advocacy to expand recognition and implementation of a right to counsel for low-income people in civil cases that involve basic human needs, such as mental and physical health. At present, the NCCRC has over 600 participants and partners in 41 states, a number of whom are in Michigan.

At present, Mich. Code § 700.5305(3) and (4) provide that a court must appoint counsel for indigent respondents in guardianship proceedings where the respondent contests the petition in some way or requests counsel, or the guardian ad litem determines it is in the respondent’s best interests. HB 4848 would preserve these conditions for appointing counsel but add that the guardian ad litem (GAL) has a responsibility for making a recommendation as to whether counsel should be appointed even where the respondent has not requested or retained counsel.

While HB 4848 provides a small improvement to the law, we are concerned that the modified code will still lead to situations where counsel is not appointed for the respondent despite being greatly needed. **We therefore urge the Committee to require appointment of counsel in all cases where counsel has not been retained by amending the bill as follows:**

- **Strike § 700.5305(1)(g) and (5)(h);**
- **Amend § 700.5305(11) to strike all language after the words, “If an individual who is subject to a petition under this part has not already secured legal counsel, the court shall appoint legal counsel”.**

We provide the following justifications for this recommendation.

First, the categorical appointment approach is widely used across the country and is recommended by key policy groups. As shown on our [website](#), 20 states currently take this approach, including Minnesota, Iowa, and Missouri. Just this month, the California Legislature passed [AB 1194](#) (it awaits the Governor’s signature), which abandons the approach currently used in Michigan and instead requires the court to appoint counsel in any conservatorship where the proposed conservatee “has not retained legal counsel and does not plan to retain legal counsel, whether or not that person lacks or appears to lack legal capacity.” Additionally, while the [Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act](#) contemplates two potentially different schemes to govern the right to

counsel (with one being automatic appointment in all cases as we are suggesting), it comments that even in jurisdictions opting for appointment only where requested or recommended,

courts should err on the side of protecting the respondent's rights by finding, absent a compelling reason otherwise, that the respondent needs representation. A guardianship proceeding can involve complex legal issues and can strip the adult of many of the most basic rights. It should be the rare case in which the court does not find that an unrepresented respondent is in need of representation ... In light of these concerns and in the interest of providing full due process to respondents, states may wish instead to adopt Alternative B, which provides for mandatory appointment of counsel. Mandatory appointment has been strongly urged by the A.B.A. Commission on Law and Aging (formerly known as the A.B.A. Commission on Legal Problems of the Elderly) and helps ensure that the respondent's rights are fully represented and protected in the proceeding.

Second, both existing Michigan law and HB 4848 will only lead to counsel being appointed if the respondent understands the proceedings sufficiently to either object, contest the petition, or request appointed counsel (unless the GAL independently recommends appointment, which is addressed below). Yet a primary reason to appoint legal counsel is precisely to help the respondent determine *whether* to object to or contest the petition in some way by providing a confidential attorney-client relationship with a lawyer who can explain the full legal ramifications of the proceedings. Without access to legal counsel and that confidential relationship, there is a risk that respondents will either a) not understand matters sufficiently to know to object to or contest the petition so as to trigger the appointment of counsel; or b) fear to disclose their reasons for objecting to someone with whom they do not enjoy attorney-client privilege.

Third, while the bill attempts to add an additional procedural safeguard by authorizing the GAL to recommend appointment where the respondent has not made such a request, both existing law and the bill specify that "If an individual who is subject to a petition under this part has legal counsel appointed or retained, the appointment of a guardian ad litem terminates." Thus, the GAL is ultimately being asked to make a recommendation that will lead to the GAL's dismissal if the recommendation is to appoint counsel, a fact that may affect the GAL's impartiality.

We appreciate that Michigan is taking a close look at its guardianship code in order to protect the rights of particularly vulnerable adults, and are happy to answer questions about our recommendation if any arise. Thank you for your attention to this matter.

Sincerely,



John Pollock  
Coordinator, NCCRC