ALASKA STATE LEGISLATURE
SENATE STATE AFFAIRS COMMITTEE
February 19, 2002
3:40 p.m.

MEMBERS PRESENT

Senator Gene Therriault, Chair
Senator Randy Phillips, Vice Chair
Senator Ben Stevens
Senator Bettye Davis

MEMBERS ABSENT

Senator Rick Halford

COMMITTEE CALENDAR

SENATE CONCURRENT RESOLUTION NO. 23
Relating to declaring April 6, 2002, as Alaska Tartan Day.
MOVED SCR 23 OUT OF COMMITTEE

SENATE BILL NO. 87
"An Act providing special absentee ballots for voters in remote areas."
MOVED SB 87 OUT OF COMMITTEE

SENATE BILL NO. 190
"An Act relating to guardianships, conservatorships, and protective orders; relating to the actions of the office of public advocacy concerning guardianships and conservatorships; relating to the appointment and duties of a court visitor appointed for a patient through the office of public advocacy; amending Rule 77, Alaska Rules of Civil Procedure; and providing for an effective date."
HEARD AND HELD

PREVIOUS COMMITTEE ACTION

SCR 23 – No previous action to record.

SB 87 - See State Affairs minutes dated 5/05/01 and 2/10/02.

SB 190 – No previous action to record.

WITNESS REGISTER

Dan Henderson
No address provided
POSITION STATEMENT: Testified on SCR 23

Senator Georgianna Lincoln
Alaska State Capitol, Room 11
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of SB 87

Sara Boario
Staff to Senator Lincoln
Alaska State Capitol, Room 11
Juneau, AK 99801-1182
POSITION STATEMENT: Introduced SB 87

Gayle Fenumiai
Division of Elections
P.O. Box 110017
Juneau, AK 99811-0017
POSITION STATEMENT: Explained provisions of SB 87

Yuri Morgan
Staff to Senator Wilken
Alaska State Capitol, Room 514
Juneau, AK 99801-1182
POSITION STATEMENT: Introduced SB 190

Brant McGee
Department of Administration
Office of Public Advocacy
900 W. 5th Ave Ste 525
Anchorage, AK 99501-2090
POSITION STATEMENT: Answered questions on SB 190

ACTION NARRATIVE

TAPE 02-02-9, SIDE A

CHAIRMAN GENE THERRIAULT called the Senate State Affairs Committee meeting to order at 3:40 p.m. Present were Senators Stevens, Phillips and Chairman Therriault. Senator Davis arrived at 3:45 p.m.

The first order of business was SCR 23.

#SCR 23

SCR 23-ALASKA TARTAN DAY

SENATOR RANDY PHILLIPS, prime sponsor, explained the bill declares April 6, 2002 Alaskan Tartan Day, which is a Scottish holiday. He introduced the bill last year and was asked to do so again this year.

DAN HENDERSON testified via teleconference in hearty support of the resolution. He informed members that in 1995 the Alaskan Scottish community learned that Canada celebrates Tartan Day on April 6 each year. They thought this was a good idea and approached their legislators to do the same. Since 1997, the day has been celebrated across the Lower 48.

CHAIRMAN THERRIAULT noted the language is identical to that in the resolution from the previous year and the attached fiscal note is zero.

There was no additional testimony.

He asked for the will of the committee.

SENATOR PHILLIPS made a motion to move SCR 23 and accompanying fiscal note from committee with individual recommendations.

There being no objection, SCR 23 moved from committee.
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#SB 87

SB 87-SPECIAL ABSENTEE BALLOTS

SENATOR GEORGIANNA LINCOLN, bill sponsor, thanked the committee for hearing the bill and said Sara Boario would introduce the bill.

SARA BOARIO, chief of staff to Senator Lincoln, explained that purpose of the bill is to offer a voter living in a remote location the opportunity to vote using the 60 day, special advance absentee ballot. In current statute, only voters living, working, or traveling outside the United States are eligible to use this type of absentee ballot. However, distance, terrain and natural conditions have prevented voters in remote areas from reaching a community with a polling station or from receiving a ballot by mail. Absentee ballots are now mailed out three weeks prior to an election.

The Division of Elections already distributes the special 60 day special advance absentee ballot so this legislation would not impose any administrative difficulties. The bill has a zero fiscal note.

During the previous hearing, there were concerns about the interpretation of the words, “remote” and “reasonable.” legislative legal advised them to review how the Division of Elections applies their current regulations to determine permanent absentee voters. This should provide a good indication of how they would apply SB 87 to determine which remote voters would be eligible to receive the special ballot. The regulations to review are 6 AAC 25.650. One of the criteria used by the division to identify permanent absentee voters is if the voter “resides in a remote area in Alaska or distance, terrain or other natural conditions deny the voter reasonable access to the polling place.” The definition of “remote” is inherent in regulation and in the bill and the key phrase is “reasonable access.” In the past, courts have interpreted “reasonable” as a matter or degree, which depends upon the specific facts of the case. The Division of Elections reviews the specific facts of the permanent absentee voters and as Gayle Fenumiai indicated in her follow up letter of January 22, 2002, voters who would benefit from this bill are uniquely identified within the voter registration system.

She said Ms. Fenumiai addressed the concern expressed about people taking responsibility to exercise their duty to vote in her recent letter. Voters are taking the necessary steps to apply for the absentee ballot but they don’t receive them in time to vote. In more urban areas, additional accommodations have been made for absentee voters. There are now absentee voting stations at international airports and at UAA and UAF so in addition to the regular mail-in absentee ballots absentee voters in urban areas have a back up system to make their vote count.

They have also been asked to discuss the by-pass mail system and how that might affect the bill. Some people believe the changes proposed by Senator Ted Stevens and Representative Don Young will hurt mail and passenger service to Bush Alaska and others think it will at least save the system. Under the current structure, the U.S. Postal Service is losing over $100 million per year in Alaska. Without the proposed changes the Postal Service will be forced to eliminate the service altogether, which could have a devastating impact on both mail and passenger service to rural Alaska. Opposing forces have stalled Representative Young’s HR. 3444 and the last report from Senator Stevens was not optimistic.

CHAIRMAN THERRIAULT asked whether an individual that wants this ballot would make application to the regional election supervisor

and be added to the list as a person that qualifies for the special 60 day absentee ballot.

SENATOR LINCOLN advised Ms. Fenumiai was on line to answer that type of question.

GAYLE FENUMIAI explained voters that are designated as permanent absentee voters in the voter registration system, still need to apply for an absentee by-mail ballot. This bill would allow them to receive the 60 day advance ballot but they would still need to complete an absentee by-mail ballot application.

CHAIRMAN THERRIAULT asked how individuals would be cleared to be eligible for permanent absentee voting.

MS. FENUMIAI said individuals who are identified as permanent absentee voters are mailed absentee ballot applications at specific times during the year. If the division received a registration form from a voter who lived in one of the areas they have designated as rural due to remoteness or lack of reasonable access to a polling place, their record is flagged, which would trigger their receiving a by-mail application. The voter would still need to complete the application to receive any kind of absentee ballot.

CHAIRMAN THERRIAULT asked her if she had any idea how many people might be affected with the passage of the bill.

MS. FENUMIAI said she didn't have any numbers to offer and didn't know whether every voter that might qualify would apply for the special 60 day absentee ballot.

SENATOR LINCOLN asked Ms. Fenumiai if she hadn't already identified nearly 1,000 people that would qualify to receive the special ballot.

MS. FENUMIAI said that is correct; Shelly Growden, the elections supervisor from Fairbanks, reported she has over 1,000 voters living in remote areas that have been classified as permanent absentee voting areas. Any of these individuals that apply to vote would be eligible to receive the special ballot.

CHAIRMAN THERRIAULT commented Ms. Growden's move to the Fairbanks Division of Motor Vehicle office is a loss to the Division of Elections.

There were no committee substitutes or amendments offered. The bill had a zero fiscal note.

He asked for the will of the committee.

SENATOR DAVIS made a motion to move SB 87 and attached fiscal note from committee with individual recommendations.

There being no objection, SB 87 moved from committee.
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#SB 190

SB 190-GUARDIANSHIPS; CONSERVATORSHIPS

CHAIRMAN THERRIAULT announced it was not his intent to move the bill from committee that day. Bill sponsor, Senator Gary Wilken, informed the Chair he would present language for a committee substitute at a subsequent hearing.

YURI MORGAN, staff to Senator Gary Wilken, introduced the bill as the result of a yearlong review of the guardianship system in Alaska.

The 1998 Alaska Guardianship Study, conducted by the McDowell Group of Juneau, found the Alaska guardianship system to be complex and confusing.

In that same year, the 12 member Long Term Care Task Force recommended the Department of Administration give serious consideration to the recommendations given in the McDowell Group study.

In June 1999, the Division of Senior Services formed a stakeholder group to review the recommendations and reach a consensus on the needed changes to the guardianship system. Stakeholders included representatives from the Alaska Court System, court visitors, the Office of Public Advocacy, the Alaska Mental Health Trust Authority and other advocacy groups for the trust beneficiaries, for-profit guardian companies and private guardians for Alaskans. SB 190 incorporates the following statute changes as recommended by the stakeholder group:

- Clarifies the role of an attorney who represents a ward or respondent
- Creates an interim guardian
- Allows the expanded use of private for-profit guardianship services
- Clarifies that a guardian may also serve as a conservator
- Requires a report on the availability of a private guardian or conservator be on an annual basis instead of every six

months
- Clarifies that the Office of Public Advocacy (OPA) may not use improper pressure to influence recommendations

4:00 p.m.

CHAIRMAN THERRIAULT called a brief at ease to wait for Brandt McGee.

4:10

CHAIRMAN THERRIAULT called the meeting back to order. He noted Senator Wilken's anticipated CS adds language to the bill; it doesn't necessarily replace the proposed language.

He said he had several questions that he wanted entered in the record. First, he has anecdotal evidence that OPA is not following the requirement that a public guardian must report to the court every six months on the efforts to find a private guardian or conservator. He expressed concern that the bill proposes to change the reporting from every six months to an annual basis. He would like to understand what has been going on and the reasoning behind the change.

Section 1 states, "The principal duty of an attorney representing a ward or respondent is to represent the ward or respondent zealously. Zealous representation includes at least personal interviews…." He said he's also concerned because a number of times he's heard that some of these individuals appear before the court and have never met the person they are supposedly representing.

He asked Mr. McGee to comment on the bill and discuss the additional sections the committee will be asked to consider in the possible CS.

MR. BRANDT MCGEE from the Department of Public Advocacy said he would give a brief sectional analysis.

Section 1 is designed to separate the duties of an attorney and a guardian ad litem. Those terms are used interchangeably in the 1982 statute and they are separate and distinct functions. The role of the attorney is to represent the wishes of his or her client and the role of a guardian ad litem is to represent their best interests. Both roles cannot be played at once. Although an attorney can switch roles and become a guardian ad litem, the roles must be performed sequentially, not at the same time. Deleting the latter part of subsection 3 clarifies this.

Subsequent sections in the bill further clarify the distinction between an attorney and a guardian ad litem.

Sections 2-5 are devoted to the new legal term, “interim guardianship.” Currently there are only emergency and regular guardianships. If one files for a regular guardianship, it may be months before that guardianship is considered. Emergency petitions are generally filed even though the specific legal criteria may not be met. The purpose of the interim guardianship is to provide another choice for the court and the petitioner. This language is adopted pursuant to the McDowell report in 1998.

Section 6-7 expands the definition of those types of entities thatmay be appointed as guardian. For-profit corporations are specifically added to clear up the previous confusion because they haven’t been specifically identified.

Section 8 says the guardian has the powers and duties of a conservator unless another distinct conservator has been appointed. This will be beneficial for financial institutions that sometimes question whether a guardian can perform financial functions as well.

Section 9 clarifies the role of an attorney as in Section 1. Under current ethical standards, it’s not possible for an attorney to also be a guardian ad litem.

Section 10 changes from 6 months to annually, the reporting requirement for a public guardian on efforts to find a suitable private guardian or conservator. The only way a public guardian learns an alternative to guardianship is if someone else steps forward. There is little need for a search for such a person because those searches are conducted by the visitor prior to the appointment of anyone to act as guardian. Public guardians would immediately bring a motion to change guardianship if they learned of another available person because this is one of the few ways they have to control their caseload.

Section 11 is intended to further preclude the Office of Public Advocacy from exercising any undue influence over persons who are acting as OPA contractors.

Section 12 recognizes the difficulty a visitor might have in locating any express wishes regarding medication and changes the wording accordingly. Current law imposes an impossible burden on the visitor.

Section 13 also deals with the roles of attorneys and guardians

ad litem.

CHAIRMAN THERRIAULT referred to Sections 6 & 7 and asked why there is a prioritized system listed in Section 6 while Section 7 says the priorities are not binding.

MR. MCGEE said that is essential because there are often inappropriate people in those categories. There must be a way for the court to use discretion to rule out certain people who might be appointed, but are inappropriate guardians or conservators. The court shouldn't be forced to appoint an individual simply because they fall in a higher level of priority. Of course the court would use discretion and have to show cause for ignoring the priorities. He said he hasn't heard of many conflicts over this.

CHAIRMAN THERRIAULT said the concern he has heard is that the private associations or non-profits are ranked above the public guardian but the visitor, who is a state employee, refers the majority of the cases to the public guardian.

MR. MCGEE said the visitor is a private contractor, not a state employee.

CHAIRMAN THERRIAULT said when he was sitting on the Administration Budget Subcommittee, he remembers hearing that caseloads were high. However, when he was back in the district he would hear from private attorneys and people working for the non-profits that they couldn't get cases referred to them because the public guardians had them all. With that in mind, the proposed deletion in Section 10 raises questions.

MR. MCGEE said that for many years two private guardianship agencies in the Fairbanks area have alleged that OPA is in competition with them for cases because the only way OPA can justify their budget is to continue to add cases. They say they are not being appointed cases because he is telling visitors not to recommend appointment of those entities. He said neither of those allegations is true. Legislative auditors thoroughly examined the competition charge prior to issuing their most recent report. They found the charges to be completely untrue and their recommendation was that the private guardianship agencies needed to do more outreach to improve their competitive economic position. He said OPA has no interest in taking any new cases; his guardians have in excess of 80 cases apiece now, which is over three times the load when they took over this function in 1985. Based on national standards, they have justification for hiring six new guardians. It's clear they don't need new cases to

justify their existing budget.

CHAIRMAN THERRIAULT asked how they were handling the requirement to report to the court at least once every six months on efforts to find a private guardian or conservator.

MR. MCGEE said he has never heard of anyone making a report on that and has never seen such a report. At the same time, he knows of no instances where a public guardian didn't immediately bring it to the attention of the court if they found a suitable substitute guardian.

CHAIRMAN THERRIAULT asked if those cases are generally moved through the court and the guardianship is passed to a family member or private guardian.

MR. MCGEE said typically guardianship is passed to a family member; he doesn't know if such cases have been moved to a private guardianship entity. He knows there is a significant level of distrust of private guardianship entities throughout the system.

CHAIRMAN THERRIAULT asked him to address other areas of the bill that have language proposed for inclusion in the bill.

MR. MCGEE said he has spoken with Senator Wilken's staff and Terry Banister from the Legislative Affairs Agency about some ideas he has in light of support findings issued in the spring and fall of 2001 regarding one of the private guardianship entities. First, he proposes that the level of reporting requirements be increased for private guardianship entities that are paid for their services. This includes a provision that requires a CPA audit of their organization on an annual basis. Further, he proposes that they be required to provide a monthly accounting of the charges they make for their services to each client and to get court approval if they charge more that $1,000.00 per month for a client. The reports would be sent to both the probate court and the Office of the Long-Term Care Ombudsman.

Currently there is no significant control over the billing activity of private guardianship entities and their reports are not required to have any detail regarding their charges to clients. They are able to bill whatever they choose and the billing is submitted to an account rather than to an individual who will review the bill.

The court system is responsible for receiving the reports but has

never been staffed to perform investigations other than on an ad hoc basis. If someone speaks up, they will always appoint a visitor to investigate the circumstances, but there is no regular review of billing practices of private guardianship agencies.

There is no state government entity that is an obvious candidate for this function. The court system has no desire to add to their list of non-adjudicated functions and the OPA is an inappropriate entity to investigate complaints about or monitor private guardianship agencies. First they would be charged with being in competition with these agencies and second, they provide representation and advocacy not investigative services.

The Office of the Long-Term Care Ombudsman is suggested because many of the individuals that are protected under long-term care are also guardianship cases. Additionally, they are an investigative agency with the skill to perform investigations.

CHAIRMAN THERRIAULT asked if the state is able to recoup some of the expenses incurred in a guardianship case in which the incapacitated individual has resources.

MR. MCGEE said they recoup money from all their clients unless doing so would cause undo hardship. They collect a standard $40.00 per month charge from each client; even those who are only receiving state and federal assistance because of their mental capacity are charged. They recoup about $250,000.00 a year, and most of it comes from the individual's permanent fund dividends. However, they don't have the ability to charge those individuals that have additional resources more than $40.00 per month unless a significant financial transaction is conducted.

CHAIRMAN THERRIAULT asked how this compares to the private guardians.

MR. MCGEE said they are able to charge whatever they want whenever they want, but the great benefit to private guardianship entities is that there is no cost to the public for their services. In 1989 when the Community Advocacy Project of Alaska (CAPA) was first organized, they were very supportive because they believed private guardianship entities would be an option for individuals with resources to pay for their own guardianship services and OPA would not be involved. They continued to be supportive for many years until "things frankly kind of turned sideways with respect to their operations."

CHAIRMAN THERRIAULT asked what happened.

MR. MCGEE said they do not receive the annual visitor reports on private guardianship entities, but when incapacitated individuals are rendered indigent, OPA inherits the cases and finds that many are "a mess." Also, the former executive director stole about $475,000.00 from the program, which provided a real wakeup call for many within the system.

Two things are increasing their caseloads. First is the graying of Alaska and second, more people are becoming aware of the benefits of guardianships. The only way to reduce their incoming caseload is through private guardianship entities so they are completely supportive of the concept.

CHAIRMAN THERRIAULT asked how he found out about the embezzlement.

MR. MCGEE said he received a call from the current executive director of CAPA in the summer of 2000. The other information he has is contained in the findings of the probate and superior courts in cases in 2001.

CHAIRMAN THERRIAULT asked whether the individual was indicted.

MR. MCGEE said he was not, but he is still under investigation. He added that the records of CAPA in Anchorage burned.

CHAIRMAN THERRIAULT agreed that with the aging of the Alaskan population, this will become a larger issue. He said he wants a better understanding before moving forward on the bill and would like to see the additional language Mr. McGee has for possible inclusion in the CS.

SB 190 was held in committee.
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There being no further business before the committee, the meeting was adjourned at 4:45 p.m.