

HB

63

GENERAL ANALYSIS OF

HOUSE BILL NO. 63

House Bill No. 63 would amend AS 13.26 relating to Guardians of Incapacitated Persons, to institute a new concept in guardianship law. Alaska's Title 13, is based upon the Uniform Probate Code, and both contain express provisions for only the appointment of a guardian for incapacitated persons who is given complete control of his ward's care and living arrangements, and total authority to act in the ward's place in matters of law where incapacity is a problem.

However, the latest thinking on the handling of persons who may because of certain handicaps require assistance in their maintenance and performance of actions having legal effect, is that there are many degrees of incapacity and not all of them require total guardianship. At the same time, they see a benefit in permitting such a handicapped individual to exercise as much responsibility as he is capable of in ordering his affairs.

The authors of the Uniform Probate Code, believe that it, and state statutes based upon it, contain implicit authority for the appointment and service of "partial" as well as "plenary" or full guardians. As far as can be ascertained no partial guardians have ever been used in this state, so those advocating their appointment, where appropriate, have urged that express language be inserted in the Alaska statute to encourage the adoption of this concept by creating a greater awareness of its possibilities.

(Sections 1 and 2)

The amendment proposed in these two sections does not address the partial guardian concept directly, but would merely include in the chapters definition of

"incapacitated person" one who is impaired by reason of a developmental disability as well as mental illness, deficiency or retardation. Still retained would be impairment from "physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority)". Section 2 then defines "developmental disability". Since AS 13.26.005(1) uses the language "or other cause (except minority)" there is no real expansion of scope, but the condition of "developmental disability" is given equal emphasis with the other named causes.

Section 2 is also where the terms "partial" and "plenary" as applied to guardians, are defined. A "partial guardian" would have less than all of the legal rights and powers of a plenary guardian — just which ones would be specified by the court order appointing him.

(Section 3)

This would insert a purpose section restricting guardianship to only "the extent necessitated by the individual's actual mental and adaptive limitations."

(Section 4)

Because AS 13.26 treats of guardians appointed by will as well as those named by the courts, provision is made here for reconciling the partial guardianship with that set up in a will when the condition of the ward at the time of the testator's death could not be known. This section would provide that a guardian named by a will would have "plenary guardian" powers until the court determines whether the powers of a "partial guardian" would be adequate, or whether no guardian is required at all.

(Section 5)

This section rewrites AS 13.26.105, but mainly to set out in great detail and chronological order the steps in the procedure for appointment of a guardian. About the only substantive change is to require a recommendation proposing the "type and scope" of guardianship services needed.

(Section 6)

This section expands AS 13.25.110 by inserting a more detailed description of the hearing procedure, but in a new provision requires the court to consider the feasibility of a partial guardian, before a plenary guardian is appointed.

(Section 7)

This is a new section requiring the court order establishing partial guardianship to contain the findings of fact that indicate its desirability; define the powers and the duties of the guardian that will be most beneficial to the ward, and set out the specific legal disabilities to which the ward is subject. It also contains a provision formerly in AS 13.26.105, for examining the proposed living arrangements for the ward. A new requirement would be for all guardians to inform the court when they have placed their wards outside of the ward's home, whether or not the placement has resulted from a court order. This will let the court know of the location of all placements, so that they cannot be hidden away.

(Section 8)

AS 13.35.120 would be amended to provide that a guardianship would end at the expiration of the period set in the court order, in addition to the other termination triggers now in that section such as the death of the ward, or the death or incapacity of the guardian or his removal or resignation.

(Section 9)

This amendment would permit the court to reduce or increase the authority of the guardian, as well as to remove or replace him, in response to a petition by the guardian as well as the present provision for the ward or other persons interested in the ward's welfare. This section would also eliminate a one year

period which had to elapse if the court did not grant special leave to petition for an adjudication that the ward was no longer incapacitated. The petition would not be able to be filed at any time, and could ask that more if not total responsibility could be given to the ward.

(Section 10)

This adds to the persons who must be notified of an appointment or modification proceeding. The present law calls for only notice to the guardian, ward, and ward's immediate family, while the amendment would expand the notice provision to the petitioner, anyone who made an evaluation for the petition's report, the director of a facility where the ward is living, and the ward's guardian ad litem if one has been appointed for him.

(Section 11)

A new subsection in AS 13.26.135 would require the court to try to make the ward understand that he could petition later for the reduction or elimination of guardianship, and for the ward to be given written information concerning the petition procedure.

(Section 12)

As temporary guardians are also treated in AS 13.26, this section provides that their powers and duties shall be specified in a court order, instead of being set out in AS 13.26.140 as they are now. This language was eliminated to comport with the partial guardian approach where the powers are contained in the court order.

(Section 13)

This change would add qualified guardianship agencies to the list of potential guardians, but would not permit the court to appoint the agency having director care, to also be guardian because of a possible conflict of interest.

(Section 14)

This section would require a report annually on the condition of the ward and his estate, and provides that it evaluate the ward's condition comprehensively, describe his current living arrangements, indicate the need if any for continued guardianship services, and any other information the court requests or the guardian thinks is pertinent.

(Section 15)

Would amend AS 13.26.170 to permit the consolidation of guardianship and protective proceedings required for the same person. Protective proceedings refers to the appointment of a conservator to manage the property of an incapacitated person.

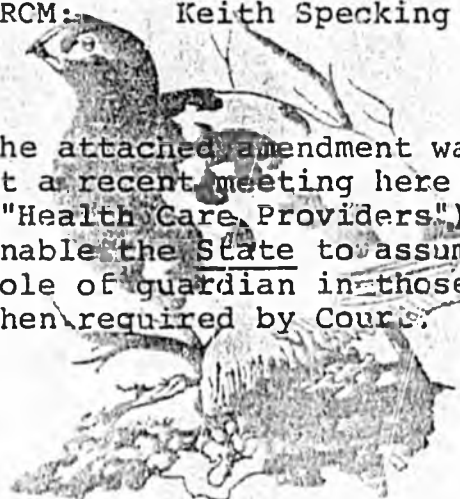
SUMMARY

This measure would not change any rules of court because there are no rules at this time on the subject of guardians, as the probate forms for this procedure cite the statutes in AS 13.26 rather than a court rule, and the probate rules are extremely brief because they rely largely on the civil rules. Thus a two-thirds majority vote of each house is not needed, and a simple plurality will suffice.

from the desk of . . .

Representative Keith Specking

MEMO TO: Terry Gardiner
FROM: Keith Specking



The attached amendment was adopted at a recent meeting here in Juneau ("Health Care Providers") to enable the State to assume the role of guardian in those instances when required by Court.

Compliments of Alaska Legislative Report
four fifteen "L" Street Anchorage, Alaska 99501 (907)279-4531

Offered to:
HOUSE BILL NO. 63

Page 8 , line 15

change period to comma and add

"except as provided in sec. 158 of this chapter."

Page 9, between lines 11 and 12:

insert the following:

Sec. 15. AS 13.26 is amended by adding new sections to read:

AS 13.26.158. PUBLIC GUARDIAN. There is created the Office of Public Guardian which is located for administrative purposes only in the Department of Health and Social Services. It is completely independent of, and has no functional relationship with any other agency of that department which has the custody of minors or other incapacitated persons who may require guardians. When appointed guardian by the court, the public guardian has the same powers and duties as private guardians under this chapter.

AS 13.26.160. WHEN PUBLIC GUARDIAN MAY BE APPOINTED. The court may appoint the public guardian as a last priority under sec. 145 (b)(6) of this chapter when there is no person or private institution or agency willing or qualified to act as guardian, including those listed in sec. 145(b)(1) - (6) of this chapter.

AS 13.26.162. REIMBURSEMENT FOR PUBLIC GUARDIAN'S FEES. An incapacitated person for whom the public guardian is appointed is liable for the costs of service rendered by the public guardian according to ability to provide payment. Unpaid fees for the services rendered by the public guardian constitute a debt to the state and are a preferred claim against the estate of the ward after death.

Page 9, line 12:

Change "Sec.15" to read "Sec. 16".

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

Committee files

JAY S. HAMMOND, GOVERNOR

POUCH H 01 - JUNEAU 95311

Document# HJC #3

May 10, 1977

Terry Gardiner, Chairman
House Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Mr. Gardiner;

Enclosed is an amendment to HB 63. Guardians for Incapacitated Persons.
Although I am to understand that this bill will carry-over until the Second
Session, I wanted your committee to be in receipt of the amendment.

Sincerely,

Sue Harris

for David W. Freer
Special Assistant to
the Commissioner

Enclosure as noted.

AMENDMENT

1 Offered to:

2 HOUSE BILL NO. 63

3
4 Page 9, between lines 11 and 12:

5 Insert:

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8 ment of Health and Social Services an Office of Public Guardian. When
9 appointed guardian by the court, the public guardian has the same
10 powers and duties as private guardians under this chapter.

11 * Sec. 16. AS 13.26 is amended by adding a new section to read:

12 AS 13.26.160. WHEN PUBLIC GUARDIAN MAY BE APPOINTED. The court
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15 agency willing or qualified to act as guardian, including those
16 listed in sec. 145(b)(1) - (6) of this chapter.

17 * Sec. 17. AS 13.26 is amended by adding a new section to read:

18 AS 13.26.162. REIMBURSEMENT FOR PUBLIC GUARDIAN'S FEES. An
19 incapacitated person for whom the public guardian is appointed is
20 liable for the costs of services rendered by the public guardian on a
21 sliding-fee scale according to ability to provide payment. The
22 sliding-fee scale shall be established by regulations adopted by the
23 Department of Health and Social Services. Unpaid fees for the services
24 rendered by the public guardian constitute a debt to the state and are
25 a preferred claim against the estate of the patient after death.

26
27 Page 9, line 12:

28 Change "Sec. 15" to read "sec. 18".

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29

POSITION PAPER

HOUSE BJLL NO. 63

"An Act relating to guardianship of incapacitated persons."

House Bill No. 63 would assist long-term care facilities within the State of Alaska in promoting and protecting the well-being of a person found to be incapacitated. This bill would also aid long-term care facilities in correctly monitoring and accounting for patient monies. There are currently no adequate safeguards or guidelines, other than federally imposed regulations, governing this area.

The Department of Health and Social Services recommends amending House Bill 63 to further insure that long-term care patients are guaranteed protection of their personal monies, property and rights when their mental or physical condition does not allow them to act for themselves in a sound and wise manner. Public guardians are currently needed for at least 285 patients, or 42% of a total of 673 nursing home patients. The appointment of a public guardian would establish controls for the honest and forthright spending and accounting of patient monies for personal and medical needs. The proposed amendment, as attached, would add three new subsections to AS 13.26. The proposed language would: (1) establish a court appointed public guardian when there is no person, agency or private institution willing or qualified to otherwise act as guardian; (2) create an Office of Public Guardian within the Department of Health and Social Services to perform this function; and finally, (3) establish a procedure for reimbursing the Public Guardian's fees.

The Department of Health and Social Services strongly supports House Bill 63 with the inclusion of the attached proposed amendments.

Recommended by: Richard R. Wilson Date 2-24-78
Richard R. Wilson, Director
Division of Public Assistance

Helen D. Beirne Date 3-1-78
Helen D. Beirne, Commissioner
Department of Health & Social Services

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2 HOUSE BILL NO. 63

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FISCAL NOTE

I. REQUEST

Bill/Resolution No. House Bill No. 63
 Title "An Act Relating to Guardianship of Incapacitated Persons"
 Requested by _____ Date January 10, 1978

II. FISCAL DETAIL

Agency Affected Department of Health and Social Services
 Program Category Affected Social Services
 Budget Request Unit(s) Affected Office of Internal Review

EXPENDITURES (Thousands of Dollars)

	FY 78	FY 79	FY 80	FY 81	FY 82	FY 83
100 PERSONAL SERVICES		53.3	56.5	59.9	63.5	67.3
200 TRAVEL		3.2	3.4	3.6	3.8	4.0
300 CONTRACTUAL		3.5	3.7	3.9	4.2	4.5
400 COMMODITIES		1.0	1.1	1.2	1.3	1.4
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		63.1	64.7	68.6	72.8	77.2

FUNDING (Thousands of Dollars)

	FY 78	FY 79	FY 80	FY 81	FY 82	FY 83
GENERAL FUND		63.1	64.7	68.6	72.8	77.2
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

	FY 78	FY 79	FY 80	FY 81	FY 82	FY 83
FULL TIME		2	2	2	2	
PART TIME		0	0	0	0	
TEMPORARY		0	0	0	0	

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

A. Assumptions:

A constant 6% cost of living increase was used for fiscal years subsequent to FY 1978.

B. Program Summary:

New Positions. It is assumed two (2) positions will be required to carry out this new function as follows:

Class Title	Salary	Benefits	Equipment	Travel	Other Costs	Total
Guardianship Admin.	29.7	7.3	.8	3.2	2.7	43.7
Clerk Typist III	12.4	3.9	1.3	-0-	1.8	19.4

IV. DATE January 10, 1978 PREPARED BY Roger C. Lange
 AGENCY Health and Social Services
 PHONE 465-3331

Original: Legislative Finance
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

Rich Williams
For

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

Judiciary got this
W. S. HAMMOND, GOVERNOR *pls*

POUCH H 01 - JUNEAU 99811

February 3, 1978

Legislature
Document# General #15

The Honorable Charles Parr
Alaska House of Representatives
Capitol Building, Room 110
Pouch V
Juneau, Alaska 99811

Dear Mr. Parr:

Please find enclosed a copy of correspondence between a social worker in Fairbanks and this Office. The problem indicated therein is addressed in HB 63, "An Act relating to guardianship of incapacitated persons."

This Department is very much in favor of HB 63 and desires to see it become law. The legislation would establish adequate safeguards for the handling and accounting of patient monies. A January 1977 survey indicated 42% of nursing home patients are in need of such guardianship. While protecting the mental, physical, and financial rights of the mentally incompetent, this legislation will also protect the nursing care facilities from liabilities they would otherwise incur in attempting to handle large sums of patient monies.

House Bill 63 is currently in the House Judiciary Committee. If you feel, as we do, that this is an important and needed piece of legislation, please encourage your colleagues on the House Judiciary Committee to consider HB 63.

Thank you for your attention in this matter.

Sincerely,

Helen D. Beirne

Helen D. Beirne
Commissioner

Enclosure

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

POUCH H 01 - JUNEAU 93811

January 17, 1978

Angie Hage
Social Worker
Careage North Convalescent Center
P.O. Box 847
Fairbanks, Alaska 99707

Dear Ms. Hage:

In response to your letter of December 21, 1977 regarding Tom Martin, Mr. Martin was placed in our custody on December 9, 1977 and we were ordered to place him in Careage North or other suitable facility. Arrangements were made for his admission to your facility and he was subsequently admitted.

While Mr. Martin has been placed in our custody I am hesitant to delegate anyone to manage his "belongings or financial affairs" as these are functions normally delegated to a guardian or conservator, and neither of these functions have been specifically delegated to this department.

Also, we are seeking clarification as to the duties, responsibilities and authorities incumbent upon the "custodian" of an adult. While these areas are relatively clear in cases involving minors there is ambiguity in similar situations involving adults.

Our social worker will continue to assist in helping Mr. Martin, or a responsible, concerned individual or organization, to manage his personal property and financial affairs until a more satisfactory solution can be worked out.

I appreciate your concern and hope that we can work together in developing a constructive arrangement for Mr. Martin.

Sincerely,

Helen D. Beirne
Helen D. Beirne
Commissioner

UDB/AH/gj

CAREAGE NORTH CONVALESCENT CENTER

POST OFFICE BOX 1001 (ZIP CODE 99707)
FAIRBANKS, ALASKA

(A Division of Ridgeview Care Corporation)
1919 CHILAM WAY (ZIP CODE 99701)
TELEPHONE (907) 452-1921

December 21, 1977



Commissioner Helen Beirnes
Department of Health and Social Services
Room 101
Juneau, AK 99811

Dear Commissioner Beirnes:

I am the Social Worker at Careage North Health Care Center in Fairbanks where Mr. Tom Martin is currently a patient. Mr. Martin was committed to the custody of the Commissioner, Department of Health and Social Services, Division of Social Services for an indeterminate period of time and was placed at Careage North. I am assuming that as Commissioner you will be appointing someone to manage Mr. Martin's affairs. Currently, Everett Jackman, a State Social Worker here in Fairbanks is following Tom's case and arranged for his admission to our facility. Everett Jackman seems to be temporarily acting as a guardian until one is appointed.

I would appreciate your response regarding whom you would designate to be responsible for Mr. Martin's affairs. Mr. Martin had previously been a patient at Careage North about two years ago and caused many hassles regarding financial matters, personal belongings, etc. Careage North is unwilling to assume responsibility for his belongings, financial matters, etc. I am waiting for your immediate response to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Angie Hage".

Angie Hage
Social Worker

CAREAGE NORTH HEALTH CARE CENTER

AH/tlg

14363

January 14, 1977

The Honorable Hugh Malone
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, and in accordance with AS 24.30.060(b) and the Uniform Rules of the Alaska State Legislature, I am transmitting a bill relating to the appointment of guardians for incapacitated persons. It combines several of the provisions of House Bills No. 645 and 734 of the Ninth Alaska Legislature.

The principal effect of this measure would be to provide specifically for two types of guardian for incapacitated persons. A plenary guardian with full responsibility could be appointed, as is done now, for totally incapacitated persons. This bill would also provide for a partial guardian with limited guardianship powers to be appointed for persons whose incapacity is less than total. That authority is implicit in the present statutes (see AS 13.26.110 and 13.26.150), but the bill would set it out explicitly because the courts seem reluctant to act in this way without further direction from the legislature.

It is hoped that the effect of such a change would be to encourage the appointment of guardians for those who are not totally incapacitated to provide assistance not now available, and to give the incapacitated person the opportunity to exercise legally all the functions of which he is capable. The bill would also permit the scope of the guardianship to be reduced or expanded in proportion to the changing capacity of the person. And it would assure that a guardian, whether plenary or partial, and whether court appointed or otherwise, gives notice to the court of his placement of the ward in any out-of-home living situation, if it has not been ordered by the court. This is intended to protect the

ward from simply being put away and forgotten.

These provisions on guardians apply to groups as well as to individuals. Under existing AS 13.26.105(a), a person interested in the welfare of an incapacitated person may petition the court for appointment of a guardian. Currently, AS 13.06.050(29) defines "person" to include an organization, and AS 13.06.050(27) defines "organization" to include "two or more persons having a joint or common interest." Nothing in our statutes prevents a group from petitioning the court or serving as a guardian. See AS 13.26.145. The amendments in sec. 13 of this bill further clarify this, and provide for public agencies to serve in this capacity; however, th's bill makes clear that a public or private agency providing direct care to the incapacitated person would not be permitted to serve as his or her guardian.

Sincerely,

Jay S. Hammond
Governor

ALASKA STATE HOSPITAL ASSOCIATION

Keith Speckling
789-9417

MARCH 16, 1977

- Whereas The Alaska State Hospital Association represents hospitals & long term care facilities in the state of Alaska; and
- Whereas Approximately 50% of residents living in long term care facilities are incapacitated*; and
- Whereas Approximately 98% of incapacitated residents have no legal guardians*; and
- Whereas Incapacitated long term care facility residents have personal needs and business affairs on a routine basis in the areas of health, finance, living arrangements & correspondence that require timely and immediate decisions & action; and
- Whereas The health facility administrator currently and frequently acting in necessity without the protection of legal appointment must perform functions commonly reserved for guardians to protect the patient's best interest; and
- Whereas It is not appropriate for a public or private agency providing direct care to act as or be appointed guardian;
- Therefore Be it resolved that the Alaska State Hospital Association supports HB#63 in the tenth legislature of the state of Alaska first session "An Act Relating to Guardians of Incapacitated Persons;" However; because of the needs of incapacitated residents, be it further resolved that an amendment be requested of the legislature to encompass the following:
1. A guardian of last resort be established within the state government.
 2. The guardian of last resort must be physically available within the areas of residence to have contact with patient's & meet recognized needs and assess possible problem areas.
 3. That the court system be required to hear petitions of incapacitation within two weeks of receipt and appointment of a guardian to be made within an additional two weeks.
 4. ~~Recommend~~ The effective date of legislation be as soon as passed.



Alaska State Legislature

House of Representatives

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

To: Charlie Parr, Chairman, and Members of the House Judiciary
Committee

From: Margaret W. Berck, Staff

Date: March 26, 1980

Re: Fiscal Information from court system relative to HB 572

Mr. Rick Barrier of the Alaska Court System furnished the following fiscal information relative to HB 572 to me over the phone this date. Mr. Barrier stated that the information was his "best guess" at what this bill would cost the court system. A formal fiscal note from the court system is forthcoming.

POSITIONS:

Anchorage -- two guardian/visitors at range 16.

-- one accounting clerk at range 10.

Fairbanks -- one guardian/visitor at range 16.

-- one accounting clerk at range 10.

Juneau -- one guardian/visitor at range 16.

--one accounting clerk at range 10.

Ketchikan -- one assistant guardian/visitor at range 14.

ANNUAL COSTS FOR NEW COURT SYSTEM PERSONNEL-----\$242,000.

\$40,000 -- for contract guardians/visitors, experts, others.

\$50,000 -- for respondents' attorney costs.

COMMODITIES AND EQUIPMENT FOR NEW EMPLOYEES:

\$12,000.

TOTAL \$364,000.

AMENDMENT #1

OFFERED IN THE HOUSE:

By: Heer

To: _____ HOUSE BILL No. 63

SENATE BILL No. _____

PAGE: 1

LINE: 11 & 21

Line 11 - After word "deficiency" insert ", mental retardation" and change the word "development" to "developmental".

Line 21 - beginning of line should have "significant" inserted and the word "or" changed to "and".

1-17-77

COMMITTEE REPORT

JUDICIARY

HOUSE

1-31-77

Date

Mr. Speaker:

The Committee on HESS has had HB 63

under consideration. A majority of the members of the Committee

- recommends it do pass
- recommends it do not pass
- recommends it do pass with attached amendment(s)
- recommends it be replaced with CS for _____ and that CS for _____ do pass
- (and) recommends it be referred to the _____ committee
- reports it back without recommendation
- AND attaches a report of its intent
- (other) _____

MEMBERS SIGNING THE MAJORITY REPORT:

Charles H. P. Do Pass Walter Do Pass
Don Bennett Do Pass Russell E. Bell Do Pass
John D. ... Do Pass Mike ...
C. J. ... Do Pass

MEMBERS NOT CONCURRING IN THE MAJORITY REPORT:

Al ... recommends: _____
 _____ recommends: _____
 _____ recommends: _____

Charles H. P.
 Chairman

AMENDMENT # 1

OFFERED IN THE HOUSE:

By: Heis

To: _____ HOUSE BILL No. 63

SENATE BILL No. _____

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becomes effective when, after having given seven days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated. An effective appointment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.

(c) This state recognizes a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.

(d) On the filing with the court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under §§ 100—155 of this chapter. (§ 1 ch 78 SLA 1972)

Sec. 13.26.100. Venue. The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution under order of a court of competent jurisdiction, venue is also in the judicial district in which that court sits. (§ 1 ch 78 SLA 1972)

Sec. 13.26.105. Procedure for court appointment of a guardian of an incapacitated person. (a) The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian.

(b) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an appropriate official or attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician appointed by the court who shall submit his report in writing to the court and be interviewed by a visitor sent by the court. The visitor also shall interview the person seeking appointment as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the court. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. He is entitled to be present

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by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or his counsel so requests. (§ 1 ch 78 SLA 1972)

Jurisdiction. — The jurisdiction of the court to appoint guardians for insane and incompetent persons is derived from the statute, and in order to obtain such jurisdiction it must affirmatively appear that the essential provisions of the statute are complied with. *Martin v. White*, 146 F. 461 (9th Cir. 1906).

The matter of the appointment of a guardian for the person and estate of an insane person is peculiarly within the equitable jurisdiction of the court; it is a proceeding for his benefit and for the protection of his estate. *White's Guardian v. Martin*, 2 Alaska 471 (1905).

Contestant of will has burden of showing lack of testamentary capacity. *Paskvan v. Mesich*, Sup. Ct. Op. No. 557 (File No. 913), 455 P.2d 229 (1969).

Evidence as to testamentary capacity.—Incompetency to make a will is not necessarily established by the fact that one has been adjudged an incompetent in a guardianship proceeding. But this fact is evidence to be considered, along with other evidence, on the issue of testamentary capacity. *Paskvan v. Mesich*, Sup. Ct. Op. No. 557 (File No. 913), 455 P.2d 229 (1969).

A decision of the issue as to testamentary capacity depended largely, if not entirely, on oral testimony given by witnesses seen and heard by the trial judge. It was his province to judge their credibility and the supreme court may not reverse his decision unless it finds it to be clearly erroneous. *Paskvan v. Mesich*, Sup. Ct. Op. No. 557 (File No. 913), 455 P.2d 229 (1969).

Sec. 13.26.110. Findings; order of appointment. The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated per-

Prima facie case of testamentary capacity. — Where a witness stated under oath that the will was signed by decedent in her presence and the presence of one other subscribing witness, that decedent then declared that the instrument was his last will and testament and that at the time of execution of the will decedent was of sound and disposing mind and was not acting under duress, menace, fraud, undue influence or misrepresentation, there was evidence that established a prima facie case of testamentary capacity; the burden was then cast upon the contestants of the will to show that testamentary capacity was lacking. *Paskvan v. Mesich*, Sup. Ct. Op. No. 557 (File No. 913), 455 P.2d 229 (1969).

Determination of insufficient mental capacity.—It was the determination of the supreme court that decedent did not have sufficient mental capacity to understand the nature and extent of his property, the natural or proper objects of his bounty, and the nature of his testamentary act. *Paskvan v. Mesich*, Sup. Ct. Op. No. 557 (File No. 913), 455 P.2d 229 (1969).

Commitment of an insane person pursuant to AS 12.45.110 is a separate proceeding from the appointment of a guardian of an insane person under this section. 1963 Op. Att'y Gen., No. 21.

Am. Jur. and ALR references.—25 Am. Jur., Guardian and Ward, § 17 et seq.

Mental condition justifying appointment of guardian, 17 ALR 1066.