HB

522

Attachment 1

GOVERNOR'S COUNCIL FOR THE HANDICAPPED AND GIFTED

ESTIMATES OF NEED AND FISCAL IMPACT OF GUARDIANSHIP BILL

(9)

COMMITTEE REPORT

HOUSE

1/18/80

FURTHER:

Date: _____

Mr. Speaker:

The Committee on JUDICIARY has had HB 572

"An Act relating to guardians and conservators; and providing for an effective date."

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[✓] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

R. Lee Ice D. Rs
Tom Martin
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

MEMBERS HAVING
OTHER RECOMMENDATIONS:

[illegible]
CHAIRMAN

H 60 (Rev. 12/78)

CURRENT NEED FOR GUARDIANS

Facility	# without Guardian	# which do not need Guardian	# needing Guardian	# needing Private Guardian	# needing Public Guardian
Southcentral Region					
Harborview	53	38	15	11	4
Hope Cottages	123	111	12	6	6
Valley	4	3	1	0	1
Wesleyan	59	3	56	35	21
Glenmore	142	81	61	3	58
Careage House	42	37	5	4	1
Northern Region					
Careage North	65	38	27	21	6
Hope Center	19	4	15	12	3
Southeast Region					
Island View Manor	0	0	0	0	0
Wrangell General (long-term care)	10	3	7	2	5
Gateway	4	0	4	1	3
St. Ann's	19	12	7	0	7
TOTALS	540	330	210	95	115
Percent of Total Facility Population	81%	50%	32%	14%	17%

CURRENT STATUS OF GUARDIANSHIPS

Facility	# Patients	# with Guardians	# with Private Guardians	# with Public or Disint. Guardians
Southcentral Region				
Harborview	90	37	26	11
Hope Cottages	126	3	1	2
Valley	6	2	2	0
Wesleyan	61	2	0	2
Glenmore	158	16	4	12
Careage House	43	1	0	1
Northern Region				
Careage North	73	8	6	2
Hope Center	25	6	5	1
Southeast Region				
Island View Manor	43	43	43	0
Wrangell General (long-term care)	14	4	0	4
Gateway	5	1	1	0
St. Ann's	21	2	1	1
TOTALS	665	125	89	36
Percent of Total Facility Population		19%	13%	5%

PROJECTED NEED FOR GUARDIANSHIPS

Facility	Admissions (Approx. per yr.)	# needing Guardian	# needing Private Guardian	# needing Public Guardian
Southcentral Region				
Harborview	7	4	3	1
Hope Cottages	32	4	2	2
Valley	8	5	4	1
Wesleyan	38	36	22	14
Glenmore	36	17	1	16
Careage House	36	3	2	1
Northern Region				
Careage North	236	40	30	10
Hope Center	4	3	3	0
Southeast Region				
Island View Manor	17	17	17	0
Wrangell General (long-term care)	4	4	1	3
Gateway	0	0	0	0
St. Ann's	45	19	2	17
TOTALS	463	152	87	65
Percent of Total Admissions		33%	19%	14%

TOTAL UTILIZATION OF GUARDIANS

Facility	Total # of Guardians who could be in use now	# Private Guardians	# Public Guardians
Southcentral Region			
Harborview	52	37	15
Hope Cottages	15	7	8
Valley	3	2	1
Wesleyan	58	35	23
Glenmore	77	7	70
Careage House	6	4	2
Northern Region			
Careage North	35	27	8
Hope Center	21	17	4
Southeast Region			
Island View Manor	43	43	0
Wrangell General (long-term care)	11	2	9
Gateway	5	2	3
St. Ann's	9	1	8
TOTALS	335	184	151
Percent of Total Facility Population	50%	28%	23%

COURT INFORMATION ON GUARDIANSHIPS

District	1976*		1977*		1978**	
	Guardianships	Protective Proceedings	Guardianships	Protective Proceedings	Guardianships	Protective Proceedings
#1 (Juneau, Ketchikan, Sitka)	7	7	11	14	7	6
#2 (Nome)	1	2	1	1	1	2
#3 (Kodiak, Anchorage, Kenai)	10	100	5	88	2	83
#4 (Fairbanks, Barrow, Bethel)	0	16	2	23	0	15
TOTALS	18	125	19	126	10	106

* Calendar year
** First nine months

FISCAL IMPACT-GUARDIANSHIP

PERSONAL SERVICES		**$54,218**
Admin Officer II (Rg 19) $2243/mo	$26,916	
Legal Secretary I (Rg 10) $1194/mo	14,328	
	41,244	
FICA-.0613% x $37,228	2,282	
PERS- 17.70%	7,300	
Health Ins- 24 mm x $141.32	3,392	
	$54,218	
TRAVEL		**$24,300**

Quarterly visits to wards and visitor inquiries estimated at 5 trips per month- 60 annually

Transportation- $225/trip	$13,500
Per Diem $60/day x 3 days/trip	10,800
	$24,300

Assumptions made:

(1) Quarterly visitation requirement would be delegated to Public Administrator at judicial district level.

(2) Length of trip provides concurrent visitation with several wards

(3) No distinction is made in cost for visitor requirements as it is presumed quarterly visitation to wards could not be fully complied with in initial year.

CONTRACTUAL SERVICES		**$151,055**
Basic telephone & long distance $600/month	$ 7,200	
Postage- Routine correspondence $300/month	540	
Certified estimated 15/mo @ $1.25	225	
Copy machine-USAGE ONLY 10,000 copies @ $.25	2,500	
Printing- Lettersets, envelopes	1,200	
Forms requirements	2,500	
Typewriter rental $365/mo	4,380	
	$18,545	

Professional fees & services- 210 current backlog of cases

Court system estimates on 188 cases in first 4 months of FY 79 reflects average cost of $525 per case. This provided approximately 14 hours attorney time and 2 hours of hearing time before a Standing Master

$110,250

Expert testimony- Rules of Court specifications $50/hr
Assumption: 2 hours per case. $ 21,000

CONTRACTUAL SERVICES:continued

Physciatric or other evaluative testing is arbitrarily estimated at 2% of the total caseload. Current costs vary from $180-$300 per case.

$ 1,260

$151,055

COMMODOTIES $ 1,200

EQUIPMENT $ 2,450

Desk, Executive	$ 280.96
Desk, Secy	345.16
Bookcase 3 shelf	81.85
Legal files (2 4 dwr)	349.54
Chair, Exec	141.01
Chair, Secy	92.72
Calculator	218.47
Transcriber	464.86
Dictating unit	464.86
	$2,439.43

TOTAL PROJECTED FY 80 BUDGET REQUEST $233,212

ANTICIPATES 100% federal funding through existing programs.

As the present caseload in the courts for all guardianship cases is averaging 45- 50 cases per month statewide, it is reasonable to assume the current backlog would more likely be dealt with over a two year period.

The budgeting alternative would be to provid funding as follows:

	FY 80 A	FY 80 B	FY 81(2)
Personal Services	$ 54,218	$ 54,218	$ 58,013(1)
Travel	24,300	24,300	26,730
Contractual Serv	151,055	85,430	136,961(3)
Commodoties	1,200	1,200	1,320
Equipment	2,439	2,439	
Total	$233,212	$167,587	$223,024

Funding would be federal funds passed through interagency to the Court System.

(1) FY 81 increase assumes maximum 7% increase in keeping with the President's guidelines.

(2) Basic inflation 10% all other costs

(3) Assumes 170 cases (50% current backlog plus 65 projected additional.)

Possible federal funds identified are:

Governor's Council Handicapped & Gifeed $50,000

While it is not feasible to identify other specific amounts it is reasonable to assume certain programs would be appropriately billed for such costs, ie.

Office of Ageing- under requirements for advocacy & legal services to those over 60.

Foster Care- under protection & advocacy

Other social services programs.

APPENDICES

Appendix One	Present Alaska Statutes AS 13.26.005 - 315
Appendix Two	CSHB 63
Appendix Three	Protection of Persons under Disability and Their Property
Appendix Four	Limited Guardianship for the Mentally Disabled
Appendix Five	Guardianship of the Mentally Impaired: A Critical Analysis
Appendix Six	Protective Services: A Private Sector Approach
Appendix Seven	Legal Issues in State Mental Health Care: Proposals for Change: Guardianship including the Suggested Statute on Guardianship
Appendix Eight	Guardianship Questionnaire Proposed Federal Regulations
Appendix Nine	Model Guardianship and Conservatorship Act Draft-9/10/78, American Bar Association
Appendix Ten	Summary of Comments on First Guardianship Draft, Nov. 1978

APPENDIX ONE

PRESENT ALASKA STATUTES AS 13.26.005 - 315

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

Chapter 26. Protection of Persons Under Disability and Their Property.

Article
1. General Provisions (§§ 13.26.005—13.26.020)
2. Guardians of Minors (§§ 13.26.030—13.26.085)
3. Guardians of Incapacitated Persons (§§ 13.26.095—13.26.155)
4. Protection of Property of Persons Under Disability and Minors (§§ 13.26.165—13.26.315)
5. Powers of Attorney (§§ 13.26.325—13.26.330)

Article 1. General Provisions.

Section
05. Definitions and use of terms
10. Jurisdiction of subject matter; consolidation of proceedings
15. Facility of payment or delivery
20. Delegation of powers by parent or guardian

Sec. 13.26.005. Definitions and use of terms. Unless otherwise apparent from the context, in this code:

(1) "incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person;

(2) a "protective proceeding" is a proceeding under the provisions of § 165 of this chapter to determine that a person cannot effectively manage or apply his estate to necessary ends, either because he lacks the ability or is otherwise inconvenienced, or because he is a minor, and to secure administration of his estate by a conservator or other appropriate relief;

(3) a "protected person" is a minor or other person for whom a conservator has been appointed or other protective order has been made;

(4) a "ward" is a person for whom a guardian has been appointed; a "minor ward" is a minor for whom a guardian has been appointed solely because of minority. (§ 1 ch 78 SLA 1972)

Sec. 13.26.010. Jurisdiction of subject matter; consolidation of proceedings. (a) The court has jurisdiction over protective proceedings and guardianship proceedings.

(b) When both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated. (§ 1 ch 78 SLA 1972)

Sec. 13.26.015. Facility of payment or delivery. Any person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding $5,000 a year, by paying or delivering the money or property to, (1) the minor, if he has attained the age of 18 years or is married; (2) any person having the care and custody of the minor with whom the minor resides; (3) a guardian of the minor; or (4) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor. This section does not apply if the person making payment or delivery has actual knowledge that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending. The persons, other than the minor or any financial institution under (4) of this section, receiving money or property for a minor, are obligated to apply the money to the support and education of the minor, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services

necessary for the minor's support. Any excess sums shall be preserved for future support of the minor and any balance not so used and any property received for the minor must be turned over to the minor when he attains majority. Persons who pay or deliver in accordance with provisions of this section are not responsible for the proper application thereof. (§ 1 ch 78 SLA 1972; am § 22 ch 56 SLA 1973)

Sec. 13.26.020. Delegation of powers by parent or guardian. A parent or a guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding one year, any of his powers regarding care, custody, or property of the minor child or ward, except his power to consent to marriage or adoption of a minor ward. (§ 1 ch 78 SLA 1972)

Article 2. Guardians of Minors.

Section
50. Status of guardian of minor; general
35. Testamentary appointment of guardian of minor
40. Objection by minor of 14 or older to testamentary appointment
45. Court appointment of guardian of minor; conditions for appointment
50. Court appointment of guardian of minor; venue
55. Court appointment of guardian of minor; qualifications; priority of minor's nominee
60. Court appointment of guardian of minor; procedure
65. Consent to service by acceptance of appointment; notice
70. Powers and duties of guardian of minor
75. Termination of appointment of guardian; general
80. Proceedings subsequent to appointment; venue
85. Resignation, or removal proceedings

Sec. 13.26.050. Status of guardian of minor; general. A person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian and minor ward. (§ 1 ch 78 SLA 1972)

Sec. 13.26.035. Testamentary appointment of guardian of minor. The parent of a minor may appoint by will a guardian of an unmarried minor. Subject to the right of the minor under § 40 of this chapter, a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated, if before acceptance, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority. This state recognizes a testamentary appointment effected by filing the guardian's acceptance under a will probated in another state which is the testator's domicile. Upon acceptance of appointment, written notice of acceptance must be given by the guardian to the minor and to the person having his care, or to his nearest adult relation. (§ 1 ch 78 SLA 1972; am § 23 ch 56 SLA 1973)

Sec. 13.26.040. Objection by minor of 14 or older to testamentary appointment. A minor of 14 or more years may prevent an appointment of his testamentary guardian from becoming effective, or may cause a previously accepted appointment to terminate, by filing with the court in which the will is probated a written objection to the appointment before it is accepted or within 30 days after notice of its acceptance. An objection may be withdrawn. An objection does not preclude appointment by the court in a proper proceeding of the testamentary nominee, or any other suitable person. (§ 1 ch 78 SLA 1972; am § 24 ch 56 SLA 1973)

Sec. 13.26.045. Court appointment of guardian of minor: conditions for appointment. The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order. A guardian appointed by will as provided in § 35 of this chapter whose appointment has not been prevented or nullified under § 40 of this chapter has priority over any guardian who may be appointed by the court but the court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within 30 days after notice of the guardianship proceeding. (§ 1 ch 78 SLA 1972; am § 25 ch 56 SLA 1973)

Sec. 13.26.050. Court appointment of guardian of minor; venue. The venue for guardianship proceedings for a minor is in the place where the minor resides or is present. (§ 1 ch 78 SLA 1972)

Sec. 13.26.055. Court appointment of guardian of minor; qualifications; priority of minor's nominee. The court may appoint as guardian any person whose appointment would be in the best interests of the minor. The court shall appoint a person nominated by the minor, if the minor is 14 years of age or older, unless the court finds the appointment contrary to the best interests of the minor. (§ 1 ch 78 SLA 1972)

Sec. 13.26.060. Court appointment of guardian of minor; procedure. (a) Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor is to be given by the petitioner in the manner prescribed by AS 13.06.110 to:

(1) the minor, if he is 14 or more years of age;

(2) the person who has had the principal care and custody of the minor during the 60 days preceding the date of the petition; and

(3) any living parent of the minor.

(b) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of § 45 of this chapter have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings, or make any other disposition of the matter that will best serve the interest of the minor.

(c) If necessary, the court may appoint a temporary guardian, with the status of an ordinary guardian of a minor, but the authority of a temporary guardian shall not last longer than six months.

(d) If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 years of age or older. (§ 1 ch 78 SLA 1972)

Sec. 13.26.065. Consent to service by acceptance of appointment; notice. By accepting a testamentary or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian, or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner. Letters of guardianship must indicate whether the guardian was appointed by will or by court order. (§ 1 ch 78 SLA 1972)

Sec. 13.26.070. Powers and duties of guardian of minor. A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of his minor and unemancipated child, except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons by reason of the parental relationship for acts of the ward. In particular, and without qualifying the foregoing, a guardian has the following powers and duties:

(1) A guardian must report the condition of his ward and of the ward's estate which has been subject to his possession or control, as ordered by court on petition of any person interested in the minor's welfare or as required by court rule.

(am § 26 ch 56 SLA 1973)

Sec. 13.26.075. Termination of appointment of guardian; general. A guardian's authority and responsibility terminates upon the death, resignation or removal of the guardian or upon the minor's death, adoption, marriage or attainment of majority, but termination does not affect his liability for prior acts, nor his obligation to account for funds and assets of his ward. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. (§ 1 ch 78 SLA 1972)

Sec. 13.26.080. Proceedings subsequent to appointment; venue. (a) The court where the ward resides has concurrent jurisdiction with the court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(b) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever is in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed. (§ 1 ch 78 SLA 1972)

Sec. 13.26.085. Resignation or removal proceedings. (a) Any person interested in the welfare of a ward, or the ward, if 14 or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.

(b) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

(c) If, at any time in the proceeding, the court determines that the interests of the ward are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 or more years of age. (§ 1 ch 78 SLA 1972)

Article 3. Guardians of Incapacitated persons.

Section
95. Testamentary appointment of guardian for incapacitated person
100. Venue
105. Procedure for court appointment of a guardian of an incapacitated person
110. Findings; order of appointment
115. Acceptance of appointment; consent to jurisdiction
120. Termination of guardianship for incapacitated person
125. Removal or resignation of guardian; termination of incapacity
130. Visitor in guardianship proceeding
135. Notices in guardianship proceedings
140. Temporary guardians
145. Who may be guardian; priorities
150. General powers and duties of guardian.
155. Proceedings subsequent to appointment; venue

Sec. 13.26.095. Testamentary appointment of guardian for incapacitated person. (a) The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. A testamentary appointment by a parent 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, if, prior thereto, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

(b) The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. The appointment 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 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)

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 person. Alternatively, the court may dismiss the proceeding or enter any other appropriate order. (

Sec. 13.26.115. Acceptance of appointment; consent to jurisdiction. By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner. (§ 1 ch 78 SLA 1972)

Sec. 13.26.120. Termination of guardianship for incapacitated person. The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in § 125 of this chapter. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward. (§ 1 ch 78 SLA 1972; am § 27 ch 52 SLA 1973)

Sec. 13.26.125. Removal or resignation of guardian; termination of incapacity. (a) On petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(b) An order adjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the ward or any person interested in his welfare may petition for an order that he is no longer incapacitated, and for removal or resignation of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

(c) Before removing a guardian, accepting the resignation of a guardian, or ordering that a ward's incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court. (§ 1 ch 78 SLA 1972)

Sec. 13.26.130. Visitor in guardianship proceeding. A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing or social work and is an officer, employee or special appointee of the court with no personal interest in the proceedings. (§ 1 ch 78 SLA 1972)

Sec. 13.26.135. Notices in guardianship proceedings. (a) In a proceeding for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or the person alleged to be incapacitated and his spouse, parents and adult children;

(2) any person who is serving as his guardian, conservator or who has his care and custody; and

(3) in case no other person is notified under (1) of this subsection, at least one of his closest adult relatives if any can be found.

(b) Notice shall be served personally on the alleged incapacitated person, and his spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in AS 13.06.110. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the visitor. Representation of the alleged incapacitated person by a guardian ad litem is not necessary. (§ 1 ch 78 SLA 1972)

Sec. 13.26.140. Temporary guardians. If an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian pending notice and hearing. If an appointed guardian is not effectively performing his duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed six months. A temporary guardian is entitled to the care and custody of the ward and the authority of any permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make

any report the court requires. In other respects the provisions of this code concerning guardians apply to temporary guardians. (§ 1 ch 78 SLA 1972)

Sec. 13.26.145. Who may be guardian; priorities. (a) Any competent person or a suitable institution may be appointed guardian of an incapacitated person.

(b) Persons who are not disqualified have priority for appointment as guardian in the following order:

(1) the spouse of the incapacitated person;

(2) an adult child of the incapacitated person;

(3) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

(4) any relative of the incapacitated person with whom he has resided for more than six months before the filing of the petition;

(5) a person nominated by the person who is caring for him or paying benefits to him. (§ 1 ch 78 SLA 1972)

Sec. 13.26.150. General powers and duties of guardian. (a) A guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

(1) to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode inside or outside this state;

(2) if entitled to custody of his ward he shall make provision for the care, comfort and maintenance of his ward and, whenever appropriate, arrange for his training and education; without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of his ward is in need of protection;

(3) a guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service;

(4) if no conservator for the estate of the ward has been appointed, he may:

(A) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;

(B) receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward; but, he may not use funds from his ward's estate for room and board which he, his spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible; he must exercise care to conserve any excess for the ward's needs;

(5) a guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as required by the court or court rule;

(6) if a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this code, and the guardian must account to the conservator for funds expended. (am § 28 ch 56 SLA 1973)

Sec. 13.26.155. Proceedings subsequent to appointment; venue. (a) The court where the ward resides has concurrent jurisdiction with the court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(b) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed. (§ 1 ch 78 SLA 1972)

Article 4. Protection of Property of Persons Under Disability and Minors.

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Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of §§ 165—315 of this chapter, the court may appoint a conservator or make other protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by his minority, or that funds are needed for his support and education and that protection is necessary or desirable to obtain or provide funds;

(2) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds. (§ 1 ch 78 SLA 1972)

Sec. 13.26.170. Protective proceedings; jurisdiction of affairs of protected persons. After the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the court in which the petition is filed has

(1) exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated;

(2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state shall be managed, expended or distributed to or for the use of the protected person or any of his dependents;

(3) concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and his title to any property or claim. (§ 1 ch 78 SLA 1972)

Sec. 13.26.175. Venue. Venue for proceedings under §§ 165—315 of this chapter is

(1) in the place in this state where the person to be protected resides whether or not a guardian has been appointed in another place; or

(2) if the person to be protected does not reside in this state, in any place where he has property. (§ 1 ch 78 SLA 1972)

Sec. 13.26.180. Original petition for appointment or protective order. (a) The person to be protected, any person who is interested in his estate, affairs or welfare including his parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a conservator or for other appropriate protective order.

(b) The petition shall set out to the extent known, the interest of the petitioner; the name, age, residence and address of the person to be protected; the name and address of his guardian, if any; the name and address of his nearest relative known to the petitioner; a general statement of his property with an estimate of its value, including any compensation, insurance, pension or allowance to which he is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also shall set out the name and address of the person whose appointment is sought and the basis of his priority for appointment. (§ 1 ch 78 SLA 1972)

Sec. 13.26.185. Notice. (a) On a petition for appointment of a conservator or other protective order, the person to be protected and his spouse or, if none, his parents, must be served personally with notice of the proceedings at least 14 days before the date of hearing if they can be found within the state, or, if they cannot be found within the state, they must be given notice in accordance with AS 13.06.110. Waiver by the person to be protected is not effective unless he attends the hearing or, unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor.

(b) Notice of a petition for appointment of a conservator or other initial protective order, and of any subsequent hearing, must be given to any person who has filed a request for notice under § 190 of this chapter and to interested persons and other persons as the court may direct. Except as otherwise provided in (a) of this section, notice shall be given in accordance with AS 13.06.110. (§ 1 ch 78 SLA 1972)

Sec. 13.26.190. Protective proceedings; request for notice; interested person. Any interested person who desires to be notified before any order is made in a protective proceeding may file with the registrar a request for notice subsequent to payment of any fee required by statute or court rule. The clerk shall mail a copy of the demand to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and his address, or that of his attorney, and is effective only as to matters occurring after the filing. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings. (§ 1 ch 78 SLA 1972)

Sec. 13.26.195. Procedure concerning hearing and order on original petition. (a) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if 14 years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(b) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice, the court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

(c) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate protective order. (§ 1 ch 78 SLA 1972)

Sec. 13.26.209. Permissible court orders. The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

(1) while a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents;

(2) after hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, his family and members of his household;

(3) after hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will; these powers include, but are not limited to power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer;

(4) the court may exercise, or direct the exercise of its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20 per cent of any year's income of the estate or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that he either is incapable of consenting or has consented to the proposed exercise of power;

(5) an order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person. (§ 1 ch 78 SLA 1972)

Sec. 13.26.205. Protective arrangements and single transactions authorized. (a) If it is established in a proper proceeding that a basis exists as described in § 165 of this chapter for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct or ratify any transaction necessary or desirable to achieve any security, service or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

(b) When it has been established in a proper proceeding that a basis exists as described in § 165 of this chapter for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other transaction relating to the protected person's financial affairs or involving his estate if the court determines that the transaction is in the best interests of the protected person.

(c) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of

his disability, whether the protected person needs the continuing protection of a conservator. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment. (§ 1 ch 78 SLA 1972)

Sec. 13.26.210. Who may be appointed conservator; priorities. (a) The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(1) a conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(2) an individual or corporation nominated by the protected person if he is 14 or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

(3) the spouse of the protected person;

(4) an adult child of the protected person;

(5) a parent of the protected person, or a person nominated by the will of a deceased parent;

(6) any relative of the protected person with whom he has resided for more than six months before the filing of the petition;

(7) a person nominated by the person who is caring for him or paying benefits to him.

(b) A person in priorities (a)(1), (3), (4), (5), or (6) of this section may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the court is to select the one who is best qualified of those willing to serve. The court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority. (§ 1 ch 78 SLA 1972)

Sec. 13.26.215. Bond. The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in his control plus one year's estimated income minus the value of securities deposited under arrangements requiring an order of the court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization. The court in place of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land. (§ 1 ch 78 SLA 1972)

Sec. 13.26.220. Terms and requirements of bonds. (a) The following requirements and provisions apply to any bond required under § 215 of this chapter:

(1) unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the conservator and with each other;

(2) by executing an approved bond of a conservator, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party defendant; notice of any proceeding shall be delivered to the surety or mailed to

him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner;

(3) on petition of a successor conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator;

(4) the bond of the conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation. (§ 1 ch 78 SLA 1972)

Sec. 13.26.225. Acceptance of appointment; consent to jurisdiction. By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the conservator, or mailed to him by registered or certified mail at his address as listed in the petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner. (§ 1 ch 78 SLA 1972)

Sec. 13.26.230. Compensation and expenses. If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate. (§ 1 ch 78 SLA 1972)

Sec. 13.26.235. Death, resignation or removal of conservator. The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. After his death, resignation or removal, the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of his predecessor. (§ 1 ch 78 SLA 1972)

Sec. 13.26.240. Petitions for orders subsequent to appointment. (a) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order

(1) requiring bond or security or additional bond or security, or reducing bond;

(2) requiring an accounting for the administration of the trust;

(3) directing distribution;

(4) removing the conservator and appointing a temporary or successor conservator; or

(5) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning his fiduciary responsibility.

(c) Upon notice and hearing, the court may give appropriate instructions or make any appropriate order. (§ 1 ch 78 SLA 1972)

Sec. 13.26.245. General duty of conservator. In the exercise of his powers, a conservator is to act as fiduciary and shall observe the standards of care applicable to trustees as described by AS 13.36.-075. (§ 1 ch 78 SLA 1972)

Sec. 13.26.250. Inventory and records. Within 90 days after his appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed. The conservator shall provide a copy of it to the protected person if he can be located, has attained the age of 14 years, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator shall keep suitable records of his administration and exhibit them on request of any interested person. (§ 1 ch 78 SLA 1972)

Sec. 13.26.255. Accounts. Every conservator must account to the court for his administration of the trust upon his resignation or removal, and at other times as the court may direct. On termination of the protected person's minority or disability, a conservator may account to the court, or he may account to the former protected person or his personal representative. Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to his liabilities concerning the matters considered in connection with it; and an order, made upon notice and hearing, allowing a final account, adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship. In connection with any account, the court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the court may specify. (§ 1 ch 78 SLA 1972)

Sec. 13.26.260. Conservators; title by appointment. The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact. The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator. (§ 1 ch 78 SLA 1972)

Sec. 13.26.265. Recording of conservator's letters. Letters of conservatorship are evidence of transfer of all assets of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate from the conservator to the protected person, or his successors. Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship, and orders terminating conservatorships, may be filed or recorded to give record notice of title as between the conservator and the protected person. (§ 1 ch 78 SLA 1972)

Sec. 13.26.270. Sale, encumbrance or transaction involving conflict of interest; voidable; exceptions. Any sale or encumbrance to a conservator, his spouse agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the court after notice to interested persons and others as directed by the court. (§ 1 ch 78 SLA 1972)

Sec. 13.26.275. Persons dealing with conservators; protection. A person who in good faith either assists a conservator or deals with him for value in any transaction other than those requiring a court order as provided in § 200 of this chapter, is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in § 290 of this chapter are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries. (§ 1 ch 78 SLA 1972)

Sec. 13.26.280. Powers of conservator in administration. (a) A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. In addition, a conservator of the estate of an unmarried minor under the age of 18 years, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in § 70 of this chapter until the minor attains the age of 18 or marries, but the parental rights so conferred on a conservator do not preclude appointment of a guardian as provided by §§ 30 — 85 of this chapter.

(b) A conservator has power without court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

(c) A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act, without court authorization or confirmation, to

(1) collect, hold and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest and reinvest estate assets in accordance with (b) of this section;

(6) deposit estate funds in a bank including a bank operated by the conservator;

(7) acquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) subdivide, develop, or dedicate land to public use; to make or obtain the vacation of plats and adjust boundaries; to adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an estate asset, to take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(17) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(18) borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets and the conservator has a lien on the estate as against the protected person from advances so made;

(19) pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(20) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration and protection of the estate;

(21) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) pay any sum distributable to a protected person or his dependent, without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to his guardian or if none, to a relative or other person with custody of his person;

(23) employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator to advise or assist him in the performance of his administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(24) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties; and

(25) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator (§ 1 ch 78 SLA 1972; am §§ 29, 30 ch 56 SLA 1973)

Sec. 13.26.285. Distributive duties and powers of conservator. (a) A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care or benefit of the protected person and his dependents in accordance with the following principles:

(1) the conservator is to consider recommendations relating to the appropriate standard of support, education and benefit for the protected person made by a parent or guardian, if any; he may not be surcharged for sums paid to persons or organizations actually furnishing support, education or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless he knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person;

(2) the conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to

(A) the size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him;

(B) the accustomed standard of living of the protected person and members of his household;

(C) other funds or sources used for the support of the protected person;

(3) the conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves and who are in need of support;

(4) funds expended under this subsection may be paid by the conservator to any person, including the protected person to reimburse for expenditures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(b) If the estate is ample to provide for the purposes implicit in the distributions authorized by (a) of this section, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20 per cent of the income from the estate.

(c) When a minor who has not been adjudged disabled under § 165(2) of this chapter attains his majority, his conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(d) When the conservator is satisfied that a protected person's disability (other than minority) has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the formerly protected person as soon as possible.

(e) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into his possession, inform the executor or a beneficiary named in the will that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled to it. If after 40 days from the death of the protected person no other person has been appointed personal representative and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative so that he may proceed to administer and distribute the decedent's estate without additional or further appointment. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under AS 13.16.070 and to any person nominated executor in any will of which the applicant is aware, the court may order the conferral of the power upon determining that there is no objection, and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section has the effect of an order of appointment of a personal representative as provided in AS 13.16.115 and AS 13.16.245—13.16.655 except that estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative. (§ 1 ch 78 SLA 1972)

Sec. 13.26.290. Enlargement or limitation of powers of conservator. Subject to the restrictions in § 200(4) of this chapter, the court may confer on a conservator at the time of appointment or later, in addition to the powers conferred on him by §§ 280 and 285 of this chapter, any power which the court itself could exercise under § 200(2) and (3) of this chapter. The court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by §§ 280 and 285 of this chapter or previously conferred by the court, and may at any time relieve him of any limitation. If the court limits any power conferred on the conservator by §§ 280 and 285 of this chapter, the limitation shall be endorsed upon his letters of appointment. (§ 1 ch 78 SLA 1972)

Sec. 13.26.295. Preservation of estate plan. In investing the estate, and in selecting assets of the estate for distribution under § 285(a) and (b) of this chapter, in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, the conservator and the court should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person. (§ 1 ch 78 SLA 1972)

Sec. 13.26.300. Claims against protected person; enforcement. (a) A conservator shall pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship upon their presentation and allowance. A claim is considered presented on the first to occur of receipt of the written statement of claim by the conservator, or the filing of the claim with the court. A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within 60 days after its presentation. The presentation of a claim tolls any statute of limitations relating to the claim until 30 days after its disallowance. A claim may be presented by either of the following methods:

(1) the claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed;

(2) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and deliver or mail a copy of the statement to the conservator.

(am § 31 ch 56 SLA 1973)

(b) A claimant whose claim has not been paid may petition the court for determination of his claim at any time before it is barred by the applicable statute of limitation, and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

(c) If it appears that the estate in a conservatorship is likely to be exhausted before all existing claims are paid, preference is to be given to prior claims for the care, maintenance and education of the protected person or his dependents and existing claims for expenses of administration. (§ 1 ch 78 SLA 1972)

Sec. 13.26.305. Individual liability of conservator. (a) Unless otherwise provided in the contract, a conservator is not individually

.. contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(b) The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a conservator in his fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in his fiduciary capacity, whether or not the conservator is individually liable for them.

(d) Any question of liability between the estate and the conservator individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding or action. (§ 1 ch 78 SLA 1972)

Sec. 13.26.310. Termination of proceeding. The protected person, his personal representative, the conservator or any other interested person may petition the court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The court, upon determining after notice and hearing that the minority or disability of the protected person has ceased may terminate the conservatorship. Upon termination, title to assets of the estate passes to the former protected person or to his successors subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected person or his successors, to evidence the transfer. (§ 1 ch 73 SLA 1972)

Sec. 13.26.315. Payment of debt and delivery of property to foreign conservator without local proceedings. (a) Any person indebted to a protected person, or having possession of property or of an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate or other like fiduciary appointed by a court of the state of residence of the protected person, upon being presented with proof of his appointment and an affidavit made by him or on his behalf stating:

(1) that no protective proceeding relating to the protected person is pending in this state; and

(2) that the foreign conservator is entitled to payment or to receive delivery.

(b) If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this state, payment or delivery in response to the demand and affidavit discharges the debtor or possessor. (§ 1 ch 73 SLA 1972)

Sec. 13.26.320. Foreign conservators. If no local conservator has been appointed and no petition in a protective proceeding is pending in this state, a domiciliary foreign conservator may file with a court in this state in a judicial district in which property belonging to the protected person is located, authenticated copies of his appointment and of any official bond he has given. Thereafter, he may exercise as to assets in this state all powers of a local conservator and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally. (§ 32 ch 56 SLA 1973)

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

APPENDIX TWO

CSHB 63

Copy prepared in Senate RESS

Original sponsor: Rules Committee
by request of the Governor

Offered: 4/25/78
Referred: Rules

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 63

IN THE LEGISLATURE OF THE STATE OF ALASKA

TENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to guardians of incapacitated persons."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 13.26.005(1) is amended to read:

(1) "incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental retardation or other developmental disability, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person;

* Sec. 2. AS 13.26.005 is amended by adding new paragraphs to read:

(5) "developmental disability" means a disability of a person which

(A) is attributable to mental retardation, cerebral palsy, epilepsy, autism, or any other condition resulting in significant impairment of general intellectual functioning and adaptive behavior;

(B) originates before the person attains the age of 18;

(C) has continued and can be expected to continue indefinitely; and

(D) constitutes a substantial handicap to the person's ability to function normally in society;

(6) "partial guardian" means a guardian who possesses fewer than all of the legal rights and powers of a plenary guardian, and whose

rights, powers, and duties have been specifically enumerated by court order;

(7) "plenary guardian" means a guardian who possesses the legal rights and powers of a full guardian of the person.

* Sec. 3. AS 13.26 is amended by adding a new section to art. 3 to read:

Sec. 13.26.090. PURPOSE AND BASIS FOR GUARDIANSHIP. Guardianship for incapacitated persons shall be used only as is necessary to promote and protect well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence in the individual, and shall be ordered only to the extent necessitated by the individual's actual mental and adaptive limitations.

* Sec. 4. AS 13.26.095 is amended by adding a new subsection to read:

(e) A testamentary guardian has the powers of a plenary guardian initially, but is subject to the authority of the court to modify the scope of guardianship or to be removed as guardian as provided in sec. 125 of this chapter.

* Sec. 5. AS 13.26.105 is repealed and re-enacted to read:

Sec. 13.26.105. PROCEDURE FOR COURT APPOINTMENT OF A GUARDIAN OF AN INCAPACITATED PERSON. (a) A petition for the appointment of a guardian for an individual who is incapacitated must be accompanied by a report which contains:

(1) current evaluations of the individual's mental, physical, social, and educational condition;

(2) a recommendation proposing the type and scope of guardianship services needed by the individual;

(3) a judgment as to the most appropriate living arrangement for the individual;

(4) the signatures of all persons, one of whom must be a physician or psychologist, who performed the evaluations upon which the

report is based.

(b) If no report accompanies the petition, the court shall appoint a qualified person who may but need not be an employee of the state, a municipality, or the court, to arrange for evaluations to be performed, to prepare a report, and to file it with the court.

(c) Upon the filing of a petition, the court shall set a date for a hearing on the issues of incapacity.

(d) If the allegedly incapacitated person does not have an attorney of his own choice, the court shall appoint an attorney to represent him in the proceeding. The appointed attorney has the powers and duties of a guardian ad litem.

(e) The person alleged to be incapacitated must be examined by a physician appointed by the court who shall submit his report in writing to the court, and must be interviewed by a visitor sent by the court. The visitor shall also interview the person seeking appointment as guardian, and visit the present residence of the person alleged to be incapacitated and the place it is proposed that he or she will be detained or will reside if the requested appointment is made. The visitor shall submit the report in writing to the court.

(f) 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 or she is entitled, through an attorney, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issues may be determined at a closed hearing without a jury if the person alleged to be incapacitated or his or her attorney requests it.

* Sec. 6. AS 13.26.110 is repealed and re-enacted to read:

Sec. 13.26.110. FINDINGS; ORDER OF APPOINTMENT. (a) The court, at a hearing for the appointment of a guardian for an incapacitated

person, shall:

(1) inquire into the nature and extent of the general functioning of the person asserted to need a guardian;

(2) determine the extent of the impairment of the person's behavior;

(3) ascertain his capacity to care for himself.

(b) If it is found that the person for whom a guardian is sought possesses the capacity to care for himself, the court may dismiss the action or enter any other appropriate order.

(c) If it is found that the person for whom a guardian is sought is able to perform some but not all of the functions necessary to care for himself, the court may appoint a partial guardian to provide limited guardianship services, but may not appoint a plenary guardian.

(d) If it is found that the person for whom a guardian is sought is totally without capacity to care for himself, the court may appoint a plenary guardian, but not before the feasability of a partial guardian has been considered.

(e) The duration of the term of guardianship under this section shall be specified in the court order.

* Sec. 7. AS 13.26 is amended by adding new sections to read:

Sec. 13.26.112. PARTIAL GUARDIANSHIP. A court order establishing partial guardianship shall contain findings of fact, shall define the powers and duties of the partial guardian so as to permit the incapacitated person to care for himself to the extent he is able, and shall specify legal disabilities to which the incapacitated person is subject.

Sec. 13.26.114. LIVING ARRANGEMENTS. (a) In addition to evaluating capacity, the court with the help of a physician it has appointed and a visitor (as defined in sec. 130 of this chapter) shall examine proposed and alternative living arrangements for the person asserted to

need a guardian.

(b) A guardian who, other than in response to a court order, places his ward in an out-of-home living situation shall inform the court of the placement.

* Sec. 8. AS 13.26.120 is amended to read:

Sec. 13.26.120. TERMINATION OF GUARDIANSHIP FOR INCAPACITATED PERSON. The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in sec. 125 of this chapter, or upon the expiration of the period specified by court order for the duration of the guardianship. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect his liability for prior acts nor the guardian's [HIS] obligation to account for funds and assets of the [HIS] ward.

* Sec. 9. AS 13.26.125 is amended to read:

Sec. 13.26.125. REMOVAL OR RESIGNATION OF GUARDIAN; CHANGE IN OR TERMINATION OF INCAPACITY. (a) On petition of the ward, the guardian, or any person interested in the ward's [HIS] welfare, the court may modify the provisions of the court order to change the responsibilities of the guardian or remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(b) The [AN ORDER ADJUDICATING INCAPACITY MAY SPECIFY A MINIMUM PERIOD, NOT EXCEEDING ONE YEAR, DURING WHICH NO PETITION FOR AN ADJUDICATION THAT THE WARD IS NO LONGER INCAPACITATED MAY BE FILED WITHOUT SPECIAL LEAVE. SUBECT TO THIS RESTRICTION, THE] ward, the guardian,

or any person interested in the ward's [HIS] welfare may petition for an order that he or she is no longer incapacitated or no longer incapacitated to the same degree, [AND] for removal or resignation of the guardian, or for a change in the guardian's responsibilities. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

(c) Before removing a guardian, changing his responsibilities, accepting the resignation of a guardian, or ordering that a ward's incapacity has changed or terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.

(d) If at any time the incapacitated person requests or indicates to his guardian or to the agency (or employees of the agency) responsible for his care that he desires a change in guardianship or change in living arrangements, the guardian or the agency providing care shall inform the court of the request.

* Sec. 10. AS 13.26.135(a) is amended to read:

(a) In a proceeding for the appointment, change in responsibilities, or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or the person alleged to be incapacitated and his or her spouse, parents and adult children;

(2) any person [WHO IS] serving as his or her guardian or [,] conservator or having [WHO HAS] his or her care and custody; [AND]

(3) in case no other person is notified under (1) of this subsection, at least one of his closest adult relatives, if any can be found;

(4) the petitioner;

(5) any person who performed an evaluation for the petitioner's report;

(6) the director of the facility in which the individual is residing; and

(7) the individual's guardian ad litem if one has been appointed.

* Sec. 11. AS 13.26.135 is amended by adding a new subsection to read:

(c) A reasonable effort shall be made by the court at the time a guardian is appointed to acquaint the incapacitated person with his right to request, at a later date, his guardian's dismissal or a modification of the guardianship order, and a written statement shall be provided to him, explaining his rights and specifying the procedures to be followed in petitioning the court.

* Sec. 12. AS 13.26.140 is amended to read:

Sec. 13.26.140. TEMPORARY GUARDIANS. If an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian pending notice and hearing. If an appointed guardian is not effectively performing his duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed six months whose powers and duties shall be specifically enumerated by court order. [A TEMPORARY GUARDIAN IS ENTITLED TO THE CARE AND CUSTODY OF THE WARD AND THE AUTHORITY OF ANY PERMANENT GUARDIAN PREVIOUSLY APPOINTED BY THE COURT IS SUSPENDED SO LONG AS A TEMPORARY GUARDIAN HAS

AUTHORITY. A TEMPORARY GUARDIAN MAY BE REMOVED AT ANY TIME. A TEMPORARY GUARDIAN SHALL MAKE ANY REPORT THE COURT REQUIRES. IN OTHER RESPECTS THE PROVISIONS OF THIS CODE CONCERNING GUARDIANS APPLY TO TEMPORARY GUARDIANS.]

* Sec. 13. AS 13.26.145 is amended to read:

Sec. 13.26.145. WHO MAY BE GUARDIAN; PRIORITIES. (a) Any competent person or a suitable agency or institution, public or private, including any private association capable of conducting an active guardianship program for an incapacitated person, may be appointed guardian of an incapacitated person, but the court may not appoint as guardian a public or private agency that is providing direct care to the incapacitated person if the appointment could conflict with the best interests of the incapacitated person.

(b) Persons who are not disqualified have priority for appointment as guardian in the following order:

(1) the spouse of the incapacitated person;

(2) an adult child of the incapacitated person;

(3) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

(4) any relative of the incapacitated person with whom he or she has resided for more than six months before the filing of the petition;

(5) a person nominated by the person who is caring for the incapacitated person [HIM] or paying benefits to him;

(6) a public or private agency, institution, or association capable of conducting an active guardianship program for an incapacitated person.

* Sec. 14. AS 13.26.150(a)(5) is amended to read:

(5) a guardian is required to report the condition of his

ward and of the estate which has been subject to his possession or control, as required by the court or court rule but at least once a year; the report shall as a minimum contain statements indicating:

(A) the person's current mental, physical and social condition;

(B) his present living arrangements;

(C) the need for continued guardianship services;

(D) any other information requested by the court or necessary or desirable in the opinion of the guardian;

* Sec. 15. AS 13.26.170 is amended by adding a new subsection to read:

(b) When both guardianship and protective proceedings as to the same person are commenced or pending, the proceedings may be consolidated.

POSITION PAPER/Department of Health and Social Servi

COMMITTEE SUBSTITUTE FOR HOUSE BILL 63

The Department of Health and Social Services has offered an amendment to House Bill 63 which would create the Office of Public Guardian within the Department as a functionally independent position. In the Department's view, such a provision would allow for an independent public guardian for incapacitated persons, many of whom reside in private nursing homes and state institutions. These persons have special needs which cannot adequately be met solely by reliance upon private individuals and organizations. The Office of Public Guardian would be available for appointment for those persons without family, friends or service organizations willing to take responsibility for their personal matters.

Other states have established centrally-located, specialized guardianship positions. Some travel for a centrally-located position would be necessary, but most of the work of a public guardian can be done in writing or by phone. Because the Office of Public Guardian would operate largely on behalf of persons who are institutionalized, most of the public guardian's work would be with the facilities and little, if any, direct contact with individuals would be necessary.

Guardianship is not a new role, but as patient rights have become more widely acknowledged by states, the necessity for separating treatment from personal affairs of the patient have become necessary. Private nursing homes that are responsible for patient care are becoming increasingly uncomfortable about having the responsibility for making independent decisions on how patient monies should be spent. Potential for abuse exists, putting these facilities in a tenuous legal position. Creating the Office of Public Guardian would eliminate this conflict of interest.

The same conflict of interest exists with public institutions but the additional responsibility of decisions concerning treatment modalities is important. Without an independent guardian to represent the patient's interest, the Division of Mental Health, for example, may be placed in the position of having to make a treatment decision without the patient's point of view being represented, putting the State in a questionable position.

Committee Substitute for House Bill 63 has been proposed by the House Judiciary Committee in the belief that the creation of a central Office of Public Guardian would not allow for adequate services to be provided to individuals throughout the State. In order for the Department to provide for these guardianship duties on a local basis, additional positions would be needed within the Division of Social Services. The Division of Public Assistance has estimated approximately 285 nursing home patients, or 42% of the statewide total, are in need of guardians. There may be additional persons within Pioneer Homes and outside of institutions who are in need of a public guardian. If CSHB 63 is the favored approach, the Department requests that funds for three social worker positions and one clerk typist position be allocated for the Division of Social Services to permit statewide guardianship services.

The Department still believes that the amendment proposing the creation of the Office of Public Guardian is the best approach to achieving an independent, responsible guardianship program. It should be recognized that a potential conflict of interest exists whenever an agency providing care or services to a

person is called upon to act as a guardian for that person. The actions of a guardian must be completely independent of any interests or duties that are incompatible with the interests of individuals. The creation of an Office of Public Guardian, functionally independent of the agencies providing services, is perhaps the most efficient and cost-effective means of providing this needed service.

Recommended by:

Sam Granato, Director
Division of Social Services

5/4/78
Date

Approved by:

Helen D. Beirne, Commissioner
Department of Health & Social Services

5/4/78
Date

PUSH NON PAPER/Department of Health and Social Servic

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 PUBLUC 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 and are a preferred claim against the estate of the ward after death.

Page 9, line 12:

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

TENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. CS House Bill No. 63

Title "An Act relating to Guardianship of Incapacitated Persons"

Requested by _____ Date 4/28/78

II. FISCAL DETAIL

Agency Affected Department of Health and Social Services

Program Category Affected Social Services

Budget Request Unit(s) Affected Social Services

EXPENDITURES (Thousands of Dollars)

		FY 78	FY 79	FY 80	FY 81	FY 82	FY 83
100	PERSONAL SERVICES		104.4	110.7	117.3	124.3	131.8
200	TRAVEL		4.6	4.9	5.2	5.5	5.8
300	CONTRACTUAL		2.9	3.1	3.3	3.5	3.7
400	COMMODITIES		1.6	1.7	1.8	1.9	2.0
500	EQUIPMENT		2.5	0	0	0	0
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL		116.0	120.4	127.6	135.2	143.3

FUNDING (Thousands of Dollars)

GENERAL FUND		116.0	120.4	127.6	135.2	143.3
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

FULL TIME		3	3	3	3	3
PART TIME		2	2	2	2	2
TEMPORARY		0	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 1979.

B. Program Summary:

New Positions. It is assumed four positions (½ Social Worker in Juneau, ½ Social Worker in Fairbanks, 2 Social Workers and a Clerk-Typist in Anchorage) will be required to carry out this new function as follows:

Class Title	Salary	Benefits	Equipment	Travel	Other Costs	Total
Social Workers III	68.3	19.8	1.3	4.6	4.1	98.1
Clerk-Typist III	12.4	3.9	1.2	-0-	.4	17.9

IV. DATE April 28, 1978 PREPARED BY Mary Eldemar

AGENCY Health and Social Services

PHONE 465-3279

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)

GENERAL FUND		63.1	64.7	68.6	72.8	7.2
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

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 Rick W. Lange For

AGENCY Health and Social Services

PHONE 465-3331

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/77)

APPENDIX THREE

PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

PART FIVE

THE PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

CHAPTER 26

INTRODUCTION TO GUARDIANSHIP AND CONSERVATORSHIP

§ 26.01 Introduction

The concept and necessity of guardianship derive from the circumstance when a person is under some type of disability which causes that person to be unable to manage his own personal or business affairs or both. [Woerner, § 1]. Through the guardianship device, such a disabled person's rights and interests can be protected. Generally, the person who suffers from such disabilities is either a minor, mental incompetent or other incompetent. The disability of a minor is presumed by legislative determination depending upon the person's age. [Woerner, § 1]. The other forms of disability require voluntary action by the person or some form of legal proceeding to determine the incompetency status.

An important feature of guardianship is that it serves two distinct functions. The first and most

apparent is guardianship of property. Under such a guardianship, the guardian manages (receives and expends) his ward's property or estate for the purposes of the guardianship. The second, which is particularly important in the case of minors, is the guardianship of the person. Here the guardian has custody and, therefore, physical control over the ward. The same person may be permitted to serve in both capacities.

Guardianship laws, with a few exceptions, have typically remained unchanged for many years. [2 UPC Practice Manual, 495]. Consequently, many of the procedures and substantive regulations suffer unreasonably from excessive formality or administrative restrictions or both. In addition, they frequently are antiquated, poorly organized, fragmented and insufficient in coverage. Despite these inadequacies, legislatures have not acted. Although in 1946 the draftsmen of the Model Probate Code attempted to improve and modernize guardianship laws, it did not stir reform in the states. [Model Probate Code, 189–234].

In order to remedy this unfortunate state of affairs, the Code includes a comprehensive and modernized article on the law dealing with the protection of persons under a disability and their property. The Code's general purposes are to streamline guardianship, to consolidate and reorganize existing concepts, to make guardianship more responsive to modern commercial and societal needs and to eliminate guardianships when

they are not essential. [Art. V, General Comment]. The inherent goal of the Code is to make a guardian of a person as effective and efficient as an ordinary prudent person would be in managing his own estate and conducting his own personal relationships. [2 UPC Practice Manual, 500].

CHAPTER 27

GENERAL PROVISIONS ON GUARDIANSHIP AND CONSERVATORSHIP

§ 27.01 Overview and Definitions

In modernizing the law of guardianship, the Code renovates, reorganizes and renames many of the guardianship devices and concepts used in non-Code states. Although the concept and term "guardian" is retained under the Code, it is only concerned with the person who has physical control over or custody of the ward and does not include guardians ad litem or guardians of the estate. [Art. V, Pts. 2 and 3; see 1-201(16)]. The terms "ward" and "minor ward" are separately defined as and limited to a person "for whom a guardian has been appointed." [5-101(4)]. A guardian of a minor ward is further limited to an appointment made solely because of minority. In addition, as with these two definitions, the Code's provisions concerning guardians of minor wards are separated and distinct from those concerning guardians of incapacitated persons. [Compare 5-201 to 5-212 with 5-301 to 5-313]. The various issues raised by these two types of guardianship are sufficiently different to justify separate treatment.

For the protection of a disabled person's property the Code incorporates a procedure called

"protective proceedings." This procedure is to be used for the determination of the need for protection and the administration of the estate of a minor or other disabled person. [5-101(2)]. Various methods of using this procedure are provided, including the appointment of a conservator to manage the estate. The fiduciary position of conservator is similar to the position of guardian of the property which may be created in many non-Code states. Accordingly, a conservator is defined as one "who is appointed by a Court to manage the estate of a protected person." [1-201(6)]. Concomitantly, a protected person is one "for whom a conservator has been appointed or other protective order has been made." [5-101(3)]. All provisions concerned with the conservator and other protective proceedings are included within a single part of the Code regardless of whether the protected person is a minor or otherwise disabled. [5-401 to 5-431]. Because management of asset issues associated with minors are generally the same as those associated with other disabled persons, there was no reason to separate the protective proceedings into two parts.

It is also important to emphasize that under the Code, just because a guardian of the person is necessary, it does not mean that protective proceedings are required or vice versa. Situations may arise in which a person may need a guardian but has no property or assets requiring a conservator. On the other hand, a person may require

a conservator but not require a guardian. For example, a missing person whose assets require management certainly does not need a guardian appointed to take care and custody of his absent person.

§ 27.02 Jurisdiction and Venue for Guardianship and Protective Proceedings

A. JURISDICTION OVER THE SUBJECT MATTER

The Code Court is expressly given jurisdiction over the subject matter for guardianship and protective proceedings. [5–102(a)]. With the following exceptions, jurisdiction over the subject matter, venue and other related matters are the same for proceedings concerned with persons under disability as they are for proceedings concerned with the other matters with which the Court may deal. [See §§ 3.01, 3.02]. For emphasis and clarity, however, the Code includes several special provisions which are exclusively related to proceedings concerned with persons under disability.

First, guardianship and protective proceedings for the same person may be consolidated if they are commenced or pending in the same court. [5–102(b)]. Because the requirements for the above two proceedings are not identical, however, it is necessary that the parties involved take care to satisfy the requirements of both proceedings

even though consolidated. Differences between the two proceedings include variations between (1) the priority of persons who request appointment as the fiduciary, (2) notice of date and time of the hearing, (3) waiver of notice of hearing, (4) the necessity for the appointment of the fiduciary, (5) the qualification of the "visitor" and (6) the issues to be determined at the hearing. [2 UPC Practice Manual, 503–04].

Second, the Code recognizes that in a proceeding subsequent to appointment concerned with a guardian of a minor or a guardian of an incapacitated person, the ward may not reside any more in the judicial subdivision wherein the initial proceeding for appointment was instituted or in which acceptance of a testamentary appointment was filed. Under such a circumstance, the Court where the ward presently resides has concurrent jurisdiction over matters such as resignation, removal, accounting and other proceedings relating to the guardianship with the court in which the guardian was appointed or the acceptance was filed. [5–211(a), 5–313(a)]. Any Code Court with such concurrent jurisdiction must notify the other court whether the latter court is in the same or other state. After consultation with that other court, the Court with concurrent jurisdiction must determine whether to retain jurisdiction or to transfer the proceedings to the other court, considering always the best interests of the ward. [5–211(b), 5–313(b)]. Before retaining jurisdiction, however, the Court should consider

whether it is able to obtain the same personal jurisdiction over the guardian which the acceptance or appointive court is capable of obtaining. [5–211, Comment]. Generally, the decision whether to retain or to transfer should be based upon concepts similar to those employed under the doctrine of forum non conveniens. If the Court retains jurisdiction and accepts resignation or orders removal of the guardian, a copy of the order must be sent to the other court.

Third, for formal protective proceedings the Code recognizes a distinction between exclusive and concurrent jurisdiction. The Court in which the protective proceeding petition has been filed has until termination exclusive jurisdiction over the following issues:

(1) The determination of the need for a protective order or the appointment of a conservator [5–402(1)];

(2) The determination of the manner in which the protected person's estate which is subject to the laws of the Code state must be managed, expended or distributed to or for the use of the protected person or any of his dependents [5–402(2)];

(3) The determination of matters subsequent to appointment such as bonding, accounting, distribution or any other appropriate relief [5–416(a)];

(4) The determination of instructions requested by the conservator [5–416(b)]; and

(5) The determination of termination of the protective proceeding. [5–430].

The Court also has concurrent jurisdiction with any other court which also may obtain jurisdiction over issues concerned with the determination of the validity of third persons' claims against the protected person individually or against his estate and for the determination of his title to any property or claim. [5–402(3); see 5–428].

B. JURISDICTION OVER THE PERSON

Similar to the rule applicable to personal representatives, the Code provides a continuing type of personal jurisdiction power in the Court of appointment or acceptance over the fiduciaries serving persons under disability. This continuing jurisdiction power is applicable to guardians of minors [5–208], guardians of incapacitated persons [5–305] and conservators of their estates. [5–413]. It subjects these fiduciaries to any proceedings relating to their fiduciary office which may be instituted by any interested person. The only special requirement to sustain this jurisdiction is that a specific notice requirement must be satisfied for each proceeding. For a guardian of a minor or an incapacitated person, notice of each proceeding must either be delivered to the guardian or mailed to him by ordinary mail both

to his official address listed with the Court and to any other address known to the petitioner. [5–208, 5–305]. The conservator must be notified of any proceeding brought against him either by delivery of the notice or by registered or certified mail sent to his last address listed with the Court and to any other address known to the petitioner. [5–413].

C. VENUE

Venue rules for proceedings concerned with persons under a disability are also set out in the Code. For proceedings dealing with the guardianship of a minor, venue is in the place where the minor resides or is present. [5–205]. Venue for proceedings dealing with the guardianship of an incapacitated person is also generally in the place where the incapacitated person resides or is present. [5–302]. Venue in such latter proceedings, however, may also be in a Court of competent jurisdiction which had ordered the incapacitated person admitted to an institution. Venue for protective proceedings may be either in the place where the person to be protected resides or if that person does not reside in the Code state, in any place where he has property. [5–403(1)–(2)]. Venue for protective proceedings based upon the person's residence is not affected by a guardian having been appointed in another place. [5–403(1)]. It is important to note that the one appropriate venue recognized for all three types of proceedings concerned with a person under a

disability is based upon the disabled person's residence and not his domicile. Reconciliation of identical proceedings in two or more appropriate venues must be made according to Section 1–303. [See § 3.01].

CHAPTER 28

AVOIDANCE DEVICES AND DURABLE POWERS OF ATTORNEY

§ 28.01 Miscellaneous Avoidance Devices

One of the avowed goals of the Code's provisions concerned with persons under disabilities is to minimize the necessity for employing the devices and procedures and to simplify these procedures and devices when it is essential to employ them. [Art. V, General Comment]. Many features of the Code which attempt to attain these goals will be emphasized throughout the explanation of the Code's guardianship and conservatorship provisions. Several collateral but related devices incorporated within the Code which seek these goals deserve discussion at this point.

In the case of a minor, the Code includes a facility of payment provision. Under it, any person who owes the minor $5,000 or less of cash or personal property per year may pay or deliver it either to the minor, if eighteen or married, to the minor's custodian, to the minor's guardian or into a federally insured financial institution savings account in the minor's name and with notice to the minor of the deposit. [5–103]. If these conditions are met, the person making the payment or delivery is discharged from liability for misappropriation by the recipient. Any person to

whom the property is delivered or paid, other than the minor and the financial institution, is obligated to apply the money or property (1) to the minor's present needs for support and education, (2) to preserve any excess for future payment for support, and (3) to preserve any excess above the first two purposes for delivery to the minor upon his attaining majority. These same recipients are also empowered to reimburse themselves for out of pocket expenses for the minor's support although they may not pay themselves for their own services. Payments or deliveries may not be made under this section if the person who owes the minor has actual notice that an appointed conservator exists or that a proceeding for the appointment of one is pending. This facility of payment provision will provide a convenient alternative to a conservatorship and other protective proceedings, for example, where contractual obligors such as insurance companies have small and annual payments due to a minor. [5–103, Comment].

The Code includes another provision which, under its limited circumstances, may also avoid the necessity of the appointment of a guardian for both a minor and an incapacitated person. Except for the power to consent to a minor's marriage or adoption, a parent or guardian may temporarily delegate to another person any of his care, custody and property powers over the ward. [5–104]. The only two requirements for such a delegation are that the form of the delegation

must be made by a properly executed power of attorney and its term cannot exceed six months in duration. This provision provides a parent or a guardian with a convenient and simple method to provide continual guardianship protection in case an emergency would arise while the parent or appointed guardian was absent. For example, the delegatee could give consent to an emergency operation. [5–104, Comment].

§ 28.02 Durable Powers of Attorney

The Code contains two provisions which make powers of attorney more durable than under the law of most non-Code jurisdictions. One provision applies to all written powers of attorney and adopts the civil law rule with regard to the effect of the principal's death, disability or incompetence. [5–502]. It provides that actions by the attorney in fact in good faith and according to the written power of attorney are valid even though such actions take place after the principal's death, disability or incompetence so long as the attorney in fact did not have actual knowledge of the happening of such an event. [5–502(a)]. Any such valid action taken binds the principal and his heirs, devisees and personal representative. For the protection of third parties dealing with the attorney in fact and in the absence of fraud, an affidavit executed by the attorney in fact stating that he did not have knowledge at the time of his action of a revocation or

termination caused by death, disability or incompetence is conclusive proof of nonrevocation or nontermination of his power to act at that time. [5–502(b)]. If the action taken requires the execution and delivery of a recordable instrument, the affidavit is also recordable when authenticated. Significantly, this provision does not alter or effect any inconsistent provision in the power of attorney dealing with revocation or termination. [5–502(c)].

The second provision truly creates a durable power of attorney but requires specific draftsmanship in the instrument creating the power. Under this provision, a written power of attorney may specifically provide that the disability of the principal does not affect the power of the appointed attorney in fact to act. [5–501]. The Code offers suggestions for the necessary phrases to create such a power. For a power of attorney which is to become immediately effective, the phrase suggested is "this power of attorney shall not be affected by disability of the principal." For a power which will become effective in the future due to disability, the suggested phrase is "this power of attorney shall become effective upon the disability of the principal." Neither phrase constitutes words of art and the substance of their purpose and effect may be stated with other similar words. All actions taken according to the power by the attorney in fact during a period of disability or incompetence of the principal have the same binding and beneficial effect as if

the principal was not disabled. In addition, under such a power of attorney the same effect applies to actions taken under circumstances where it is uncertain whether the principal is dead or alive. If due to the disability or disappearance a conservator is appointed for the principal, the attorney in fact must account to the conservator rather than the principal. The conservator now has the same power over the attorney in fact as the principal would have had if incapacity or disappearance had not occurred, including the power to revoke, suspend or terminate any part or all of the power.

These two subsections dealing with written powers of attorney will be particularly useful with older clients who do not wish to enter into complex trusts but who anticipate impending senility or incompetence. Similarly, these provisions will avoid in may situations the need for and the embarrassment of formal protective proceedings. It has also been suggested that these provisions might be used by military personnel whose whereabouts or death or both may become unknown while on military assignments. [2 UPC Practice Manual, 549–50].

CHAPTER 29

THE GUARDIAN OF A MINOR

§ 29.01 Necessity, Selection and Appointment of the Guardian of a Minor

Under the Code, no guardianship by any method may be created for a person who is incapacitated solely because of minority unless the minor is unmarried and all parental rights of custody have been terminated or suspended. [5–204]. Consequently, a natural or adoptive parent is automatically the guardian of the person of his or her minor natural and adopted children. There need be no official acceptance or court action taken in these situations. Presumably, any parent would have to be removed according to removal proceedings before any other person could be appointed guardian of that parent's minor children. [5–204; see 5–212]. When a guardian of a minor is needed, the Code includes two procedures by which one may be appointed. The first procedure is called "testamentary appointment" [5–202] and the other, "court appointment." [5–204].

Under the Code's testamentary appointment procedure a parent of a minor may appoint by will a guardian for his unmarried minors. [5–202]. The appointment in the will of the last parent to die has priority over the first to die un-

less the survivor has also been adjudged incapacitated. Any testamentary appointment becomes effective upon the nominated person filing his acceptance in the Court in which the will is either informally or formally probated. Unless a written objection is filed before or within thirty days of acceptance by a minor ward, who is fourteen years old or more, the nominated person becomes the guardian without additional court proceedings. [5–203]. Letters of guardianships by the clerk of court to the guardian must indicate that he was appointed by will. [5–208]. A testamentary guardian who has accepted appointment under a will probated in another state which is the testator's domicile must also be recognized in the Code state. To safeguard against misuse of this very casual procedure, the guardian upon acceptance must give written notice to the minor and to the person having his care or his nearest adult relation. Once the acceptance procedure is complete, however, the testamentary guardian must be removed before the Court can appoint another person guardian. [5–202, 5–204, Comment].

If a parent is unable to serve as guardian, a minor of fourteen years or more objects to the testamentary nominee or a testamentary appointment has not been accepted for thirty days, a guardian of a minor must be appointed by the Court. [5–204]. Presumably, a petition for such an appointment may be filed by any person interested in the ward's welfare. [2 UPC Practice Manual, 511; see 5–212(a)]. Notice of the time

and place of the hearing must be given in a manner prescribed by Section 1–401 to the minor, if fourteen or more years of age, to the person who has the custody and care of the minor for the sixty days prior to the petition and to the minor's living parents, if any. [5–207(a); see § 4.01]. In addition, if the Court determines that the ward's interests are or may be inadequately represented, it can appoint a guardian ad litem for the minor at any time during the proceeding. [5–207(d)]. When the minor is fourteen or more years of age, the Court is to give preference to the attorney selected by the minor.

Priority of appointment is left basically to the discretion of the Court. If a minor of fourteen years or more nominates a person of his choice, this person must be appointed unless the Court finds that such an appointment would be against the best interest of the minor. [5–206]. In all other cases, the Court upon petition may appoint any person including the contested testamentary nominee, whose appointment would be in the best interest of the minor. [5–206, 5–203]. Letters of guardianship issued by court appointment to the guardian must indicate he was appointed by court order. [5–208].

At the hearing the Court is to make the appointment only after it determines that: (1) a qualified person seeks appointment; (2) venue is proper; (3) the necessary notices have been given; (4) the proper priorities have been observed; and (5) the appointment would serve the welfare

and best interests of the minor. [5–207(b)]. Although "qualified person" is not defined in the Code, it is not restricted either and would not preclude an otherwise qualified non-resident from being appointed. In its determination of the proper priorities, the Court must find that all parental rights of custody are terminated or suspended and that no qualified testamentary guardian exists. [5–204]. When the circumstances do not qualify, the Court can dismiss or make any other appropriate order which would be in the minor's best interest. Under the latter discretion or when otherwise appropriate, the Court has a convenient option to appoint, at any time with or without a hearing, a temporary guardian who would have ordinary guardian status except his authority has a maximum duration of six months. [5–207(c)].

§ 29.02 Powers, Duties and Liabilities of the Guardian of a Minor

Except that a guardian of a minor is neither obligated to use his own funds for the minor's support nor liable to third persons for the acts of the ward as a parent would be, he has the powers and duties of a parent who properly has custody and whose child is unemancipated. [5–209]. Every guardian of a minor has the following specifically mentioned duties and powers:

(1) To take reasonable care of the ward's property;

(2) To apply money received for the ward to the ward's current needs for support, care and education, including payment to himself for room and board;

(3) To conserve any excess sums for the ward's future needs, such as deposit in a federally insured financial institution account;

(4) To report the ward's condition and the condition of the ward's estate which has been subject to the guardian's possession or control to the Court on petition of any person interested in the minor's welfare or as required by court rule;

(5) To receive according to any type of contract, trust, devise or fiduciary entity sums for the support of the ward;

(6) If a conservator has not been appointed, to receive payments and property under the facility of payment provision, Section [illegible]–103;

(7) To institute legal proceedings in order to compel third persons having a duty to support the ward or owing sums for the ward's welfare to perform their duties;

(8) To facilitate the ward's education, social and other activities;

(9) To authorize medical and other professional care, treatment or advice; and

(10) To consent to the marriage or adoption of the ward.

[5-209(a)-(d)]. The guardian does not have a duty to provide bond or to file periodic or final accountings. Presumably, the Court with its inherent power over these matters could order both to be given. [See 2 UPC Practice Manual, 509-10]. In addition, it is very significant to emphasize that a guardian's duties and powers do not terminate even though he moves himself and his ward from the state of appointment. [5-201]. The guardian, of course, is liable to his ward for injury caused by any breach of duty or improper exercise of a power or both. He is not liable for injury to his ward caused by the negligence or acts of third persons merely because the guardian consented to the activity, unless the consent would have been illegal if given by a parent. [5-209(c)].

The Code contains provisions concerned with the important relationship between guardianship and protective proceedings. First, the guardian has an affirmative duty to commence protective proceedings when necessary to protect the ward's estate or property. [5-209(a)]. Consequently, for example, anytime the guardian comes into possession of property of the ward which requires investment or administration, he must commence these protective proceedings, including the possibility of requesting for a conservator to be appointed. [2 UPC Practice Manual, 508]. Second, although the guardian may use funds of the ward received for support, care and education, he may not use sums received for the compensation for

his personal services unless the compensation is approved by court order or approved by a duly appointed conservator who is not also the guardian. [5-209(b)]. Third, when a conservator has been appointed the guardian's duties and powers are modified and more limited. Under these circumstances and if sums are received in excess of the ward's present needs, the guardian must pay over these sums to the conservator at least on an annual basis. In addition, because of the appointment of a conservator, the guardian is no longer entitled to receive payments under the facility of payment provision. [5-103]. Significantly, the restrictions and limitations prohibiting a guardian of a minor from acting as a conservator, do not apply vice versa. [See 5-424(a), § 31.04 (B)].

§ 29.03 Duration and Termination of the Guardian of a Minor

A guardianship of a minor continues until the minor dies, is adopted, marries or attains majority and it terminates upon the guardian's death, removal or approved resignation. [5-210]. A testamentary appointment is also terminated if the will which makes the appointment is denied probate in formal testacy proceedings. Although a guardian may resign his fiduciary office, the resignation does not terminate the guardianship until it is approved by the Court. Termination means the guardian's authority and responsibility end, but does not affect the guardian's liability

for prior acts or his duty to account for the ward's funds and assets.

Removal proceedings may be instituted by any person interested in the ward's welfare or by the ward himself if fourteen years of age or more. [5–212(a)]. The ground for removal is that it would be in the best interests of the ward. After notice and a hearing, the Court may order termination by removal and may make any other appropriate orders. [5–212(b)]. If the Court determines that the ward's interests are or may be inadequately represented, it can appoint a guardian ad litem for the minor at anytime during the proceeding. [5–212(c)]. When the minor is fourteen or more years of age, the Court is to give preference to the attorney selected by the minor.

CHAPTER 30

THE GUARDIAN OF AN INCAPACITATED PERSON

§ 30.01 Necessity, Selection and Appointment of the Guardian of an Incapacitated Person

The Code defines an incapacitated person as one who for any reason except minority "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." [5–101(1)]. Although any cause which meets the standard is covered, specifically mentioned examples of the cause of such a condition include mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs and chronic intoxication. It must be emphasized that this guardian is not the guardian of the incapacitated person's property but is the caretaker of the incapacitated person's person. [See 5–312]. Consequently, the definition of incapacity makes questions concerning the alleged incapacitated person's ability to manage his estate irrelevant. [2 UPC Practice Manual, 520].

As with guardians of minors, the Code recognizes the testamentary appointment device for the appointment of a guardian for an incapacitated person. [5–301; see § 29.01]. Although this

device for appointment is commonly recognized in statutes dealing with the appointment of a guardian for minors, it has not generally existed when dealing with guardians of incapacitated persons. Under the Code, the power to make a testamentary appointment of a guardian in these situations is limited to the two special circumstances when the testamentary appointment is made (1) by the incapacitated person's spouse or (2) by his parent. [5-301(a)-(b)]. A spouse's appointment takes priority over a parent's appointment if they conflict. [5-301(b)]. In addition, the appointment in the will of the last parent to die has priority over the first to die unless the surviving parent has been adjudged incapacitated or the will of the last parent to die is denied probate in formal testacy proceedings. [5-301(a)]. Apparently any person can be appointed. [See 5-301(d); 5-301, Comment]. A testamentary guardian who has accepted appointment under a will probated in another state which is the testator's domicile must also be recognized in the Code state. [5-301(c)].

A testamentary appointment becomes effective upon the nominee's filing of an acceptance of appointment in the Court in which the will has been either informally or formally probated. [5-301(a)-(b)]. The appointed guardian must give seven days advance notice to the incapacitated person and to the person having his care or to his nearest adult relative. The incapacitated person can prevent the appointment from taking effect

or terminate a previous testamentary appointment by filing a written objection with the Court. [5-301(d)]. This objection would not necessarily foreclose the person from eventually being appointed but would restrict that person's appointment solely to the result of a court appointment procedure.

When testamentary appointment is not available or desired, a guardian for an incapacitated person must be appointed by the Court. The Code's court appointment procedures are meritoriously designed to prevent unwanted appointments of such guardians. The procedure is initiated by the incapacitated person or any person interested in his welfare filing a petition for a finding of incapacity and for the appointment of a guardian. [5-303(a)]. Although the Code does not state what the contents of the petition must have, it is very explicit with regard to the requirements for notice of the date and time of the hearing on such a petition. [5-309]. The person alleged to be incapacitated must be personally served with notice and waiver of such notice is ineffective unless he is present at the hearing or a visitor confirms the waiver after an interview with the person. [5-309(b)]. His spouse, parents and adult children must also be personally served if they can be found within the state. [5-309(a)(1), (b)]. Finally, his guardian, conservator, caretaker, or custodian, if any, and his parents and spouse if not found within the state must be given notice as provided in Sec-

tion 1–401. [5–309(a)(2), (b)]. If the alleged incapacitated person's spouse, parents, and adult children are not notified, then one of his closest adult relatives must be notified if one can be found. [5–309(a)(3)].

Protection is also provided the alleged incapacitated person throughout the proceeding. First, he must be represented by his own or an appointed counsel who has the duties and powers of a guardian ad litem. [5–303(b)]. Second, he must be examined by a court appointed physician who must submit a written report on his examination to the Court. Third, he must be visited before appointment by a "visitor" who has no personal interest in the proceeding and who is either trained in law, nursing or social work. [5–303(b), 5–308]. Finally, the alleged incapacitated person is entitled to be present at the hearing and to have counsel present evidence and cross-examine all relevant witnesses. [5–303(b)].

The scope and necessity of a jury trial in a hearing concerned with the incapacity of a person is left to the option of the enacting jurisdiction. [5–303]. The bracketed phrases permit the alleged incapacitated person to have a jury trial or not to have one at his election.

The Code is much more specific as to the person who can become or should become guardian of an incapacitated person than it is for a guardian of a minor. For the court appointment procedure, a full priority list is established which

ranks by status the persons ordinarily most desirable for the job. [5–311(b)]. Chart 6 describes these priorities set for appointment.

CHART 6. PRIORITY ORDER FOR APPOINTMENT OF A GUARDIAN OF AN INCAPACITATED PERSON

Priority Rank	Description of Candidates
1	The spouse of the incapacitated person.
2	Any adult child of the incapacitated person.
3	A parent of the incapacitated person, including a deceased parent's nominee identified in the latter's will or other writing.
4	Any relative with whom the incapacitated person resided for more than six months prior to the petition.
5	Any person nominated by the person caring for or paying benefits to the incapacitated person.

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The Code neither explains how the parents' nomination authority under priority rank 3 coincides with their testamentary appointment authority nor why the spouse of the incapacitated person is not given the former authority. It is also asserted without explanation that the first four rankings may confer their priority on a nominee. [2 UPC Practice Manual, 520–21]. When consistent with the priority list, any competent person or institution may be appointed guardian of an incapacitated person. [5–311(a)].

Before a guardian for an incapacitated person is appointed, the Court must be satisfied that the

person for whom a guardian is sought is actually incapacitated and that the appointment is necessary or at least desirable for the purpose of providing continuing care and supervision of the incapacitated person. [5–304]. If the circumstances do not satisfy these criteria, the Court may dismiss or make any other appropriate order which presumably must be in the incapacitated person's best interest.

The Code also has provisions concerning the Court's power to appoint temporary guardians. When an emergency exists for an incapacitated person who has no guardian, the Court is given the authority to exercise the power of a guardian pending proper notice and a hearing. [5–310]. The Court is also empowered to suspend the authority of a court appointed permanent guardian and to appoint a temporary guardian for a period of time not to exceed six months, if it finds that the appointed guardian is not effectively performing his duties and the welfare of the incapacitated ward requires immediate action. Such an appointment may be made with or without notice. The appointed temporary guardian is entitled to the care and custody of the ward and possesses all the powers of a permanent guardian except as directed by court order. [See 5–312, Comment]. A curious, probably unintentional, omission contained in this provision is that it only specifically applies to guardians who obtain their positions by court appointment and not to guardians who obtain their positions by testamentary appointment.

Consequently, termination by removal may be the only way a temporary guardian can enforce his right to custody and care of the ward against a testamentary appointee. [2 UPC Practice Manual, 522]. All appointed temporary guardians must make reports to the Court as it requires and are subject to removal at any time apparently with or without notice or hearing.

§ 30.02 Powers, Duties and Liabilities of the Guardian of an Incapacitated Person

Generally, the powers, duties and obligations of a guardian of an incapacitated person are the same as those which a parent has over his unemancipated child but without parental relationship liability to third persons for the ward's acts. [5–312(a)]. On these matters the Code does not distinguish between testamentary appointment and court appointment. Accordingly, except as modified by a court order, every guardian of an incapacitated person has the following specifically mentioned duties and powers:

(1) To take custody of the person of his ward unless a court of competent jurisdiction has otherwise detained or committed the ward;

(2) To provide for the care, comfort and maintenance of his ward when he has custody;

(3) To arrange for his training and education whenever appropriate;

(4) To take reasonable care of the ward's clothing, furniture, vehicles and other personal effects;

(5) To commence protective proceedings if the ward's property needs protection;

(6) To consent to or approve necessary medical or other professional care, counsel, treatment or services for the ward; and

(7) To report the condition of the ward and of the ward's estate which has been subject to his possession or control to the Court as required by the Court or by court rule.

[5-312(a)(1), (2), (3) and (5)]. The restriction, on a guardian of an incapacitated person's right to custody when a court of competent jurisdiction has detained or committed the ward, permits the Code to avoid any conflict of its provisions with those of commitment laws.

Only if a conservator has not been appointed for the ward does the guardian of an incapacitated person have the following additional powers:

(8) To institute proceedings to compel third persons having a duty to support the ward or owing sums for the ward's welfare to perform their duties;

(9) To receive money or tangible property owing to the ward;

(10) To conserve any excess sums for the ward's future needs (such as depositing

them in a federally insured financial institution account).

[5-312(a)(4)(i)-(ii)]. Upon the appointment of a conservator, these powers of the guardian are terminated. The guardian must pay over to the conservator all funds in his possession or control which are in excess of current needs and must account to the conservator for all funds expended previous to the latter's appointment. [5-312(a)(6)]. Presumably, the newly appointed conservator must be substituted in all actions and proceedings concerning the ward's estate to which the guardian was a party.

A guardian of an incapacitated person does not have a duty to provide bond or when no conservator is appointed, to file periodic or final accountings. Presumably, the Court with its inherent powers over these matters could order both to be given. As with a guardian of a minor, the duties and powers of a guardian of an incapacitated person do not terminate even though he moves himself and his ward from the state of appointment. [5-312(a)(1)]. The guardian of an incapacitated person, of course, is liable to his ward for injury caused by a breach of duty or improper exercise of a power or both.

The Code also deals with the relationship between a guardianship and protective proceedings instituted for the same incapacitated person. As indicated, if a conservator has been appointed, the powers and duties of the guardian of the in-

capacitated ward are more restricted. Therefore, those actions which a guardian could take if no conservator had been appointed, must now be done by the conservator after his appointment. Even if there is no conservator, the guardian may not charge the ward's estate for room and board unless the charge is approved by order of court after notice to at least one of the ward's next of kin. [5-312(a)(4)(ii)]. If a conservator has been appointed, the conservator must still approve the room and board charge and it must be reasonable under the circumstances. [5-312(b)]. Notwithstanding, this pervasive authority which an appointed conservator has over the ward's assets and property, the guardian continues to have the control over the ward's custody and care. The guardian may request the conservator to pay the ward's funds directly to third persons and institutions that have cared for or maintained the ward. Significantly, whereas a conservator of a minor may when necessary act as his guardian, a conservator for an incapacitated person does not have that similar power but would have to seek court appointment. [See 5-424(a), § 31.04(B)].

§ 30.03 Duration and Termination of the Guardian of an Incapacitated Person

Termination of a guardianship for an incapacitated person occurs when either the guardian or the ward dies, when the guardian is determined incapacitated or when the guardian is removed or

resigns according to proper procedures and proceedings. [5-306]. A testamentary appointment is also terminated if the will which makes the appointment is denied probate in formal testacy proceedings. Such a termination means the guardian's authority and responsibility end but does not affect the guardian's liability for prior acts or his duty to account for the ward's funds and assets.

Removal proceedings may be instituted by the ward or by any other person interested in the ward's welfare. [5-307(a)]. The ward may request a removal order merely by sending an informal letter to the Court or judge and any intentional interference by any person with such a communication may constitute contempt of court. [5-307(b)]. So that a ward who is displeased about being judicially found to be incapacitated does not continually bring new removal proceedings, the order adjudicating incapacity can specify a discretionary restriction on review. This discretionary restriction on review is phrased in terms of time and cannot exceed one year. [See 5-307, Comment].

The procedures for removing a guardian, for accepting the resignation of a guardian or for ordering that the ward is no longer incapacitated contain the same safeguards as the proceedings to appoint a guardian. [5-307(c)]. These safeguards also specifically require the appointment of a visitor who can then visit the present guardi-

an's residence or the place where the ward resides or is detained and who can observe the conditions under which the ward lives. Notice requirements for removal proceedings are the same as for appointment proceedings. [5–309(a)].

CHAPTER 31

PROTECTIVE PROCEEDINGS AND THE CONSERVATOR

§ 31.01 Protective Proceedings

A. NECESSITY

As previously emphasized, the Code separates its provisions concerned with the custody and care of the ward's person from its provisions concerned with the management of the protected person's estate. Under the heading "Protective Proceedings," disabled persons who are in need of having their assets and property managed or protected may have a conservator appointed or obtain some other protective court order for such a purpose. [5–401]. The term "disabled person" is not separately defined but means a person who is either a minor or an incapacitated person or who is confined, detained or missing.

Although the provisions dealing with the management of property for minors and for all other disabled persons are combined into a single part of the Code, there are several important differences in treatment. Most important of these is that the standards upon which the Court is to base its decision to act are different. Thus a conservator may be appointed or other protective orders issued by the Court for a minor only when the minor (1) has property needing otherwise

unobtainable management or protection, (2) has business affairs which minority may jeopardize or prevent or (3) has a need for support and education funds better obtainable through a protective proceeding. [5–401(1)]. Whereas for all other disabled persons, similar court action may be taken only when a person for any reason is unable to manage his property and affairs and either (1) the person's property may be wasted or dissipated without proper management or (2) support, care and welfare funds for that person are necessary and better obtainable through a protective proceeding. [5–401(2)].

B. INITIATION PROCEDURE

The only method by which protective action may be obtained, including the appointment of a conservator, is by formal proceedings before Court. [5–401]. These proceedings are initiated by a petition requesting a protective order or appointment. They may be filed by any of the following persons: (1) the prospective protected person; (2) any person interested in the protected person's estate, affairs or welfare; or (3) any person adversely affected by the lack of effective management. [5–404(a)]. The petition must contain the following information and statements to the extent known by the petitioner:

(1) The petitioner's interest in filing the petition;

(2) The protected person's name, age, residence and address;

(3) The name and address of any guardian for the protected person;

(4) The name and address of the protected person's nearest relative;

(5) Generally, a description and estimated value of the protected person's property, including any obligations due him such as compensation, insurance, pension or allowance; and

(6) The reason why the requested court action is necessary.

[5–404(b)]. When the petition requests the appointment of a conservator, it must also set forth the following additional information:

(7) The name and address of the person requesting appointment; and

(8) The basis of the applicant's priority for appointment.

C. PRE–HEARING NOTICE

The Code is very explicit with regard to the requirements for notice of the date and time of the hearing on such a petition. [5–405]. The person to be protected must be personally served with such notice and waiver of notice is ineffective unless (1) he is present at the hearing, (2) he is a minor ward or (3) a visitor confirms the waiver after an interview with him. [5–405(a)]. Either his spouse or, if no spouse, his parents must also be personally served with notice if they may be found within the state. Any required personal

service under this provision must be accomplished at least fourteen days before the hearing date. If personal service cannot be accomplished on the person's spouse or parents, then the petitioner must give notice to these people in accordance with Section 1–401. Finally, notice given in accordance with Section 1–401 must also be given as follows: (1) to all interested persons; (2) to persons who the Court directs; and (3) to any person who has filed a request for notice under Section 5–406. [5–405(b)].

In a procedure similar to the demand for notice procedure in Article III, the Code provides that any interested person may file a request for notice with the Registrar. [5–406; see 3–204, § 14.03(E)]. Governmental agencies paying or planning to pay benefits to the protected person are considered interested persons under this procedure. The request must include the following information and statements: (1) the interest of the person making the request; (2) the demandant's address or that of his attorney; and (3) that the request is effective only to matters occurring after the date of its filing. Upon the payment of any required fee, the clerk must mail a copy of the request to any appointed conservator.

D. SAFEGUARDS AGAINST MISUSE

The Code attempts to protect a person from misuse of its protective proceedings by requiring representation for the person or review of his

condition by independent third persons. In the case of minors, if the Court determines that it would be in the best interest of the minor to have an attorney appointed, it may appoint an attorney who can represent the minor as a guardian ad litem. [5–407(a)]. For other disabled persons, the person to be protected must have his own counsel or the Court must appoint an attorney to represent him as a guardian ad litem. [5–407(b)]. In addition, if the person to be protected is an incapacitated person, the Court may direct that the alleged incapacitated person be examined by a physician or send a visitor to interview him, or both. The physician selected must not be affiliated with any institution in which the person is a patient or is committed. The visitor may either be a guardian ad litem or a court officer or employee. The Code in dealing with protective proceedings does not contain any special rule with regard to the right of a jury trial.

E. COURT DETERMINATIONS AND ORDERS

The Court may appoint a conservator or make some other protective order only after a hearing and after it is convinced that a need is established. [5–407(c)]. It is important to emphasize that the Court has the authority to issue orders which are less drastic than the appointment of a conservator. [5–409]. The scope of these orders include what are called both protective arrangements and single transaction authorization. [5–409(a)–(b)]. Actually, it is difficult to make

a clear distinction between the two devices. Basically, protective arrangements deal with court orders which are designed to set up stable and continuing arrangements for purposes of handling the ward's foreseeable needs with respect to security, service or care. [5–409(a)]. In a non-exclusive list of permissible arrangements, the Code permits the Court under this device to issue orders dealing with payment arrangements concerned with the ward's cash or personal effects, real estate or contractual rights. In addition, the Court is given the authority to establish a suitable trust for the ward. These protective arrangements may be particularly beneficial to third persons including, for example, life insurance or annuity companies which owe the person to be protected sums of money but which do not know to whom or how properly to pay. A protective order is available under these protective arrangements to direct such third persons on these matters and to protect them from potential liability for improper payment.

Basically the single transaction power permits the Court to make any authorization, ratification or other direction which would be in the best interests of the protected person with respect to any transaction relating to the person's financial affairs or estate. [5–409(b)]. Such court orders would include single transactions such as the sale of an asset or may be a series of independent but related transactions. As its name indicates, this power is related to isolated or related transac-

tions and not to a continuing type of an arrangement.

Under the terms of both of these devices, the Court is specifically given the authority to exercise them without appointing a conservator. [5–409(a)–(b)]. Consequently, they have obvious usefulness any time a conservatorship is not necessary. Notwithstanding this usefulness, the Court must give consideration to the interests of the protected person's creditors and dependents as to whether the continuing protection of a conservator is required. [5–409(c)]. In addition, in order to be able to carry out the protective arrangement or authorized single transaction, the Court is given the authority to appoint a special conservator for these purposes. Such a conservator has the authority conferred by the Court, must report to the Court all matters pursuant to his appointment and is discharged only by court order.

§ 31.02 Selection and Bonding of the Conservator

Because of the authority and power given by the Code to an appointed conservator and the potential for misuse of this device, the Code establishes several guidelines by which one must be appointed. A pervasive requirement is that the conservator must be an individual or a corporation possessing trustee powers. [5–410(a)]. As with other appointment procedures in the Code, it

also lists specific priorities for the Court's consideration in making an appointment. [5–410(a)(1)–(7)]. Chart 7 describes these priorities for appointment.

CHART 7. PRIORITY ORDER FOR APPOINTMENT OF A CONSERVATOR

Priority Rank	Description of Candidates
1	Similar kind of fiduciary appointed by an appropriate court in any jurisdiction in which the protected person resides.
2	Nominee of the protected person if the latter is at least fourteen years of age and the Court determines he has sufficient mental capacity to make an intelligent choice.
3	The spouse of the protected person.
4	Any adult child of the protected person.
5	A parent of the protected person including a deceased parent's testamentary nominee.
6	Any relative with whom the protected person resided for more than six months prior to the petition.
7	Any person nominated by the person caring for or paying benefits to the protected person.

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Chart 7 requires additional explanation. The first priority would apparently include an appropriate fiduciary appointed in a foreign country. Including the nominee of the protected person, persons holding priority through the first six ranks may nominate in writing another person to serve in the nominator's stead. [5–410(b)]. The seventh priority would include public or governmental agencies such as the Veterans' Administration. [2 UPC Practice Manual, 533]. Be-

tween persons of equal priority, the Court has discretion to select the one best qualified if more than one is willing to serve. In addition, for good cause shown, the Court has discretion to ignore these priorities and to appoint anyone, including a person with less or without any priority. [5–410(b)].

If a conservator is appointed, his obligation to furnish a bond is left to the discretion of the Court. [5–411]. If required, the bond must be conditioned upon the faithful discharge of a conservator's fiduciary duties. Unless the Court directs otherwise, the bond must equal in value the aggregate capital value of the property of the estate plus one year's estimated income reduced by the value of court controlled securities deposited under special arrangements and by the value of real estate held by the conservator but which the conservator cannot sell without court authorization. The Court is also given discretion to accept other means of security for the performance of the fiduciary duties.

When bond is furnished by sureties, the Code sets the following terms and condition:

(1) All sureties must be jointly and severally liable with the conservator and with each other;

(2) Each surety, by executing an approved bond, consents to the jurisdiction of the Court when named party defendant to proceedings pertaining to the conserva-

tor's fiduciary duties (each surety is entitled to notice of such proceeding by personal delivery or by mail to its filed address and any other known address);

(3) Proceedings for the breach of the bond may be brought against the sureties on petition of a successor conservator or any interested person; and

(4) Each surety is liable on its bond until the penalty is exhausted regardless of how many proceedings it takes to exhaust it.

[5–412(a)(1)–(4)]. When applicable, sureties are accorded the defenses of res judicata and of any statute of limitations which might have been raised by the primary obligor. [5–412(b)].

§ 31.03 Powers of the Court

In dealing with the estate of a protected person, the Court is given paramount control and authority. [5–408]. During the pendency of a protective proceeding, the Court is given the power to preserve and to apply the property of the person to be protected in any manner necessary for the benefit both of that person or his dependents. [5–408(1)]. Although the Court must have a preliminary hearing, there need not be any notice to other persons of this hearing.

After proper formal proceedings have been completed, the Court has extensive powers over

the estates of both minors and other disabled persons. With respect to a minor without other disability, the Court has all powers over the minor's estate and affairs which are or might be necessary to the best interest of the minor, his family and members of his household. [5–408(2)]. Much broader powers are given to the Court with respect to the estate of a person needing protection for a reason other than minority. Here, the Court has all powers over the protected person's estate and affairs which that person could exercise if present and not under the disability. [5–408(3)]. The Court, however, explicitly does not have the power to make a will for the disabled person. Among the specifically mentioned powers which the Court has are the power to make gifts, release property interests, create revocable or irrevocable trusts, exercise the elective share for a surviving spouse and change beneficiaries under insurance or other contractual programs. Any such change of beneficiary, release, renunciation or gift exceeding twenty per cent of any year's income of the estate may be ordered by the Court only after notice and hearing and after it is determined to be in the best interests of the ward. [5–408(4)]. Significantly, any court order made under this provision must follow and consider any estate plan of the protected person of which the Court has knowledge. [5–427].

Court orders under this provision have no effect upon the capacity of the protected person. [5–408(5)]. Consequently, the protected person

is, in spite of any court order, still able to bind himself by contract and transfer his property at least as effectively as any equitable owner of property is able. [2 UPC Practice Manual, 537].

When a conservator is appointed, there is a direct relationship between the powers given to the Court and those given to the conservator. First, the Court is given the authority to exercise its powers either directly or indirectly through a conservator. [5–408]. Second, the Court may in its discretion and subject to the restrictions put upon its own powers, confer upon the conservator any of its own powers or it may give the conservator none of its powers and even limit the powers which he normally possesses. [5–426]. Any such limitation on a conservator's ordinary powers, however, would have to be endorsed upon the conservator's letters of appointment in order to bind third parties.

§ 31.04 Powers, Duties and Liabilities of the Conservator

A. INTRODUCTION

The powers, duties and liabilities of a conservator are extensively detailed in the Code. Of the three kinds of fiduciaries provided for persons under disability dealt with in the Code, the conservator is clearly made the most important and is necessarily given the broadest authority as well as being the most supervised by the Court. Gen-

erally, the Code treats the conservator's authority over the property of the protected person in a manner very similar to the authority which a trustee has in dealing with the trust estate. [2 UPC Practice Manual, 535]. Because a conservator both is given extensive powers and is dealing with the property of a person by definition unable to effectively manage or apply his own estate, the Code includes protective devices against overreaching or other abuses by such a fiduciary.

B. POWERS

Although the Court has paramount authority over a conservator's powers, in the ordinary case such powers are not exercised by the Court. The conservator is given, therefore, a broad and explicit array of his own powers. [5–424]. Generally, in addition to specifically conferred powers, the conservator is given all powers which a trustee would have under the law of the Code state. [5–424(a)]. He is specifically accorded the power to invest and reinvest funds of the estate without court authorization or confirmation according to the law applicable to trustees investing trust assets. [5–424(b)]. Finally, when reasonably necessary to carry out the purposes of the conservatorship, he is empowered to take any of a long list of specified actions and transactions without court authorization or confirmation. [5–424(c)]. These enumerated powers accorded a conservator are nearly identical to those given to a personal representative of a decedent's estate under the

Code. [Compare 5-424(c)(1)-(25) with 3-715(1)-(27)]. The following examples illustrate the comprehensiveness of a conservator's powers: (1) to collect, hold and retain assets of the estate although located in another state [5-424(c)(1)]; (2) to participate in the operation of any business or enterprise of the protected person [5-424(c)(3)]; (3) to subdivide and develop real property owned by the protected person [5-424(c)(9)]; (4) to borrow money against the protected person's estate [5-424(c)(18)]; and (5) to pay distributable sums without liability to the protected person's guardian, if any, relative, custodian or directly to the protected person. [5-424(c)(22)].

In addition to the above administrative powers, the conservator is accorded substantial and significant distributive powers. Again, without court authorization or confirmation, the conservator is empowered to expend and distribute the estate's income or principal or both for his protected person's support, education, care or benefit. [5-425(a)]. In making such expenditures and distributions, the conservator is given several guidelines. First, he must consider the recommendations made by the protected person's parent or guardian. [5-425(a)(1)]. By acting pursuant to such recommendations, the conservator will only be liable if he knows that a parent or guardian is deriving personal financial benefit from the payment either directly or indirectly as relief from a legal duty of support, or if the rec-

ommendations are clearly not in the protected person's best interests. Second, when expending or distributing the protected person's assets, the conservator must consider and weigh the size of the estate, the anticipated duration of the conservatorship, the potential for future termination of the conservatorship, the protected person's accustomed standard of living and his other funds or sources of funds. [5-425(a)(2)]. Third, the conservator may also consider the protected person's legal dependents or other members of his household who are in need and are unable to support themselves. [5-425(a)(3)]. Finally, payments may be made to reimburse any person, including the protected person, for proper expenditures or may be made in advance of services when the conservator reasonably expects them to be performed and when advance payment is customary or reasonably necessary. [5-425(a)(4)].

Except for the requirement of court approval for amounts exceeding twenty per cent of the income of the estate for any year, a conservator is permitted to make gifts to charities and to other objects in the same manner as the protected person would be expected to make if the estate is otherwise sufficient for the purposes of the conservatorship. [5-425(b)]. Significantly, this gift-making power does not apply to the conservator of a person who is disabled solely because of minority.

Upon majority for a minor and upon the ceasing of the disability for other protected persons,

the conservator is required to pay over all of the unprotected person's funds and properties to him as soon as possible. [5–425(c)–(d)]. Before making payment, however, the conservator must pay all prior claims and expenses of the administration.

A conservator's power may even extend beyond his protected person's death. If the protected person dies and no personal representative is appointed or no application for such appointment is made within forty days from the date of death, the conservator may be authorized by the Court to act as personal representative. [5–425(e)]. Notice must be given to persons demanding notice under Section 3–204 and to any person nominated executor in any known will of the deceased. Under this section there need not be an actual transfer of title from the conservator to the conservator as personal representative.

If a guardian has not been appointed for a minor who is unmarried, under eighteen years of age, and without parents, a conservator has no duty to commence guardianship proceedings and may, if willing, perform the functions of a guardian until the minor becomes eighteen or married. [5–424(a)]. This discretionary power in a conservator may in the appropriate case eliminate the need for the appointment of a guardian of a minor. The same power does not exist in a conservator for a person who is disabled for reasons other than minority.

C. DUTIES

The duties of a conservator are commensurate with his powers. A conservator's pervasive duty is to exercise his power as a fiduciary according to the standard of care set out in the Code for trustees. [5–417; see 7–302]. In addition, every conservator is required to prepare and to file with the appointing court within ninety days of his appointment a complete inventory of the protected person's estate. [5–418]. Copies of this inventory must be provided to the protected person if he is fourteen years of age or more and if he has sufficient mental capacity to understand these matters. A copy of the inventory must also be provided to the parent or guardian with whom the protected person resides.

A conservator also has a record keeping and accounting requirement. Under the Code, the conservator is required to keep suitable records of his administration for the inspection and perusal of any interested person. [5–418]. On termination, a conservator is required to account either to the Court or to the protected person of his personal representative. [5–419]. The conservator may voluntarily or involuntarily proceed through formal intermediate and final accountings before the Court. [See § 31.09]. In such an accounting proceeding, the Court may require, in any manner it specifies, the conservator to submit to a physical check of the estate under his control.

In the overall administration of a protected person's estate, including the investment and distribution of assets, the conservator, as is the Court in the exercise of its extensive power, is required to take into account any known estate plan of the protected person. [5–427]. The Code includes the protected person's will, trust and any other will substitutes within the term estate plan. Naturally, the conservator is given the authority to examine the protected person's will. This is a beneficial provision with the goal of reducing unfair and unintentional hardship or loss to the eventual beneficiaries of the protected person's estate.

Throughout the administration of the estate, the conservator has the overriding duty to act reasonably according to the functions and purposes of his appointment. [See 5–424(c)]. At any time during the administration of a conservatorship, the Code provides that any person interested in the welfare of the protected person is permitted to file a petition requesting special protection from the conservator's misconduct or for any other appropriate relief. [5–416(a)]. Notice and hearing are necessary for such proceedings. [5–416(c)]. The scope of the petition and of the resultant order is very broad including demands for (1) bond or additional bond, (2) an accounting for the administration, (3) distribution, (4) removal of the conservator and appointment of a successor or temporary conservator, and (5) any other appropriate relief. [5–416(a)].

D. LIABILITIES

Although not specifically stated in the Code, a conservator is liable to interested persons for any damage or loss which results from a breach of his fiduciary duty in the improper exercise of a power. This liability should be characterized as the same as a trustee of an express trust. [See 3–712].

In addition to potential liability for loss and damages due to breach of a fiduciary duty, sales or encumbrances of estate property by the conservator to himself, his spouse, agent, attorney or any corporation or trust in which he has a substantial beneficial interest are voidable unless the Court approves the transaction after notice to interested persons and to others as the Court directs. [5–422]. Similarly, any other transaction which is affected by a substantial conflict of interest on the part of the conservator is voidable.

§ 31.05 The Conservator's Title

Contrary to the common law and to the law of most non-Code states today, the Code vests in a conservator a trustee's title to all of the protected person's property. [5–420; see 2 UPC Practice Manual, 537]. This title vests upon his appointment and covers not only the property presently held by the protected person but any property thereafter acquired and any property held by cus-

todians or attorneys in fact for the benefit of the protected person. In order that this transfer of title by operation of law does not have unexpected and undesired consequences, the Code specifically provides that the vesting of title in the conservator upon appointment is not a transfer or alienation for purposes of general provisions in statutes, regulations, contracts or other estate planning devices which restrict or penalize the transfer or alienation by the protected person. A specific provision in a contract or other dispositive instrument concerning the effect of the appointment of a conservator will be given effect, however. [See 2 UPC Practice Manual, 537–38].

Proof of the transfer of title between a protected person and his conservator, and vice versa, is handled in an extremely efficient manner in the Code. [5–421]. For the transfer from the protected person to the conservator, the letters of conservatorship represent evidence of the transfer. For the transfer between the conservator and the protected person or his successors, an order of the Court terminating the conservatorship is evidence of the transfer.

For the purpose of being able to give record notice of title as between the conservator and the protected person, the Code permits the letters of conservatorship and the court order terminating a conservatorship to be filed or recorded. The requirements of the filing and recording statutes must be satisfied. This procedure is essential to

protect the conservator from third persons claiming title to real estate purchased directly from the protected person. [See 2 UPC Practice Manual, 538]. This conflict of titles is a possibility because conservatorship, alone does not affect the legal capacity of the protected person. [5–408(5)].

§ 31.06 Liability of Third Persons

As previously discussed, the Code confers upon the conservator the authority to perform numerous transactions with third persons without court supervision. Under the present law of most non-Code states, any third person who deals with a conservator faces the possibility of being liable for having participated in the conservator's breach of his fiduciary responsibilities. [See § 19.05]. The principal problem for third persons is not the rule but its application. Consequently third persons have become very cautious and conservative in dealing with fiduciaries such as conservators. Without changing or abandoning the basic rule and for the purpose of encouraging third persons to deal with a conservator, the Code necessarily reduces the potential liability of third persons in their dealings with the conservator. Under the Code, if a third person has dealt with or assisted a conservator in good faith and for value, he is protected as if the conservator properly exercised his powers unless the transaction is of the type which requires a court order

under Section 5–408. [5–423; see § 31.03]. In addition, the third person is not required to inquire into the existence of a power or into the propriety of its exercise because he knows he is dealing with a conservator. An exception to this rule provides that third persons are bound by restrictions on the powers of a conservator which have been endorsed on the letters of conservatorship under Section 5–426. [See § 31.03].

The reason why the exercised power is improper makes no difference in the application of these protective rules. The impropriety of the action may be because of procedural irregularities and jurisdictional defects occurring in proceedings leading to the issuance of the letters. Although this very comprehensive protection for third persons dealing with fiduciaries is much broader than exists under the general law of most non-Code states, it is not intended to substitute for comparable statutes relating to commercial transactions and simplification of security transfers by fiduciaries such as the Uniform Commercial Code and the Uniform Act for the Simplification of Fiduciary Security Transfers.

§ 31.07 Creditors' Claims

As with a fiduciary who manages any kind of an estate, one of a conservator's responsibilities is the payment and settlement of claims against the estate. The Code has a provision dealing with this problem which is in some respects similar to

its provisions concerned with creditor's claims against a decedent's estate. [5–428; see § 21.-03].

A conservator upon presentation and allowance is required to pay all just claims against the estate and the protected person. [5–428(a)]. This rule applies whether the claim arose before or after the date on which the conservator was appointed. Proper presentation of the claim may be made in either of two methods. One method permits the claimant to present a claim by delivering or mailing to the conservator a written statement of the claim which indicates its basis, the claimant's name and address and the amount claimed. An itemized bill containing this information presumably should be sufficient. The other method is for the claimant to make his presentation by filing a written statement with the clerk of court and by delivering and mailing it to the conservator. The form of such a written statement is not set out in the Code and must be prescribed by rule of court. Claims are deemed effectively presented upon receipt by the conservator or upon filing with the Court whichever occurs first.

The conservator may either allow or disallow the claim. [5–428(a)]. Failure to mail notice of disallowance constitutes an allowance sixty days after the claim's presentation. Any applicable statute of limitations against a properly presented claim is tolled until thirty days after

its disallowance. Consequently, actions on disallowed claims must be instituted by the claimant within the applicable statute of limitations and the tolled period.

If claimants desire, they may forego the presentation procedure and directly petition the Court for determination of the claims. [5–428(b)]. Upon due proof of the claim the creditor may obtain an order for its allowance and payment from the estate. In order for a judgment against a protected person to constitute a claim against his estate, however, the successful litigant must give notice of the proceeding to the conservator. This notice is necessary both for proceedings pending against the protected person at the time of the conservator's appointment and for those initiated against the protected person after the appointment.

If the estate of the protected person is insolvent, the conservator must give preference to prior claims for care, maintenance and education of the protected person or his dependents and to existing claims which are for expenses of administration. [5–428(c)].

§ 31.08 The Conservator's Liability to Third Persons

The Code deals directly with the difficult problem of a conservator's personal liability to third persons on contracts, from ownership or control of the estate's property and from torts arising out

of the administration of the estate. [5–429]. The content of the provision is identical to the provision included for personal representatives in Article III. [3–808; see § 19.08]. Under the Code, the conservator's estate is made into a "quasi-corporation" for purposes of such liability. [See 3–808, Comment]. Accordingly, the conservator becomes an agent of this entity and is liable not individually but only as an agent would be liable. More specifically, a conservator is personally liable under the following circumstances: (1) on contracts properly made in the course of the estate's administration only when expressly provided in the contract or when the representative capacity of the conservator is not revealed in the contract. [5–429(a)]; and (2) for torts or for obligations arising from property ownership or control only when the conservator is personally at fault. [5–429(b)]. Third persons may sue the estate for such claims in the name of the conservator in his representative capacity regardless of the conservator's personal liability. [5–429(c)]. The conservator's personal liability to the estate may be litigated during the third person's initial action against the estate or in any other appropriate proceeding such as a proceeding for an accounting. [5–429(d)].

§ 31.09 Duration, Termination and Removal of the Conservator

When a minor obtains majority or when the conservator is satisfied that the protected per-

son's disability no longer exists, the conservator is empowered and required to terminate the conservatorship and to pay over and distribute all funds and assets to the protected person as soon as possible after the payment of claims and expenses of administration. [5–425(c)–(d)]. On such a termination, a conservator is required to account either to the Court or to the protected person or his personal representative. [5–419].

Upon a petition by the protected person, his personal representative, any person interested in the protected person's welfare or the conservator, the Court in its discretion may terminate the conservatorship. [5–430]. Throughout the steps of the termination proceeding, the protected person has the same rights and procedural protections as if it were a proceeding to initiate a protective order. If the Court determines that minority or disability has ceased, it may terminate the conservatorship. Upon termination by Court order, title to the protected person's property passes either to the protected person or to his successors. The order of court may make the title, however, subject to expenses of administration, for evidence purposes to a conservator's conveyance or to both conditions.

Removal proceedings may be instituted by any person interested in the welfare of the protected person. [5–416]. The conservator can be removed by the Court for good cause upon notice and a hearing. [5–415]. Although a conservator may resign his fiduciary office, the resignation does not terminate the guardianship until it is approved by the Court. The Court is empowered to appoint another conservator if a vacancy occurs because of resignation, removal or death. If a new conservator is appointed, the successor conservator assumes the title and the powers of the prior conservator. A conservator who has resigned or has been removed must account to the Court. [5–419].

If a conservator desires to end his potential liability, he may petition for a Court reviewed and approved intermediate or final accounting [5–419]. After notice and hearing, the Court's order concerning such an accounting adjudicates up to the time of the accounting all of the conservator's unsettled liabilities to the protected person and to all his successors subject of course to the ordinary time limitations for appeal or vacation.

§ 31.10 The Foreign Conservator

Similar to the administration of a decedent's estate, the administration of a protected person's estate may require the conservator to administer property in two or more states. [See § 25.01]. Consistent with its general purposes, the Code strives to ease and unify the administration of a protected person's multi-state estate.

To accomplish this goal, the Code contains several provisions for foreign conservators similar to several it has for foreign personal representatives. First, a foreign conservator or similar fi-

duciary appointed by a court in the state where the protected person resides may collect debts or property from persons within the Code state by presenting to the debtors or possessors proof of his appointment and an affidavit. [5–431]. The affidavit must recite that there are no protective proceedings pending within the Code state and that the foreign conservator is entitled to payment or delivery. [Compare 4–201; see § 25.02]. This procedure is available, however, only when there has been no local appointment.

Second, concurrently or alternately, a domiciliary foreign conservator is entitled to exercise all powers which a local conservator could exercise merely by filing in a court in the Code state authenticated copies of the domiciliary appointment and the official bond, if any. [5–432; see § 31.-04(B)]. This proof of authority provision was added by the 1975 Technical Amendments. These powers specifically include the power to bring legal proceedings which any nonresident could bring in the courts of the Code nondomiciliary jurisdiction. Similarly, this filing has the above effect only if no local protective proceeding is pending and no local conservator has been appointed.

Because there is no definition of a "domiciliary foreign conservator," the provision is somewhat unclear. Presumably, it refers to the conservator appointed in the state wherein the person protected is domiciled. This interpretation, however, is

potentially inconsistent with the Code's own venue requirement for the appointment of a conservator. Venue for the appointment of a conservator under the Code is based upon the protected person's residence or where his property is located. [5–403; see § 27.02(C)]. Residence, although related to the concept of domicile, is not the same concept. Consequently, this provision needs further clarification either by alteration or by judicial construction.

An additional deficiency is that unlike its comparable provisions in Article IV, there are no supplemental provisions dealing with the protection of locally interested persons [see 4–207, § 25.02] or providing for personal jurisdiction over the foreign conservator. [See 4–301; § 25.03]. Presumably, these deficiencies can be cured by the inherent power of the Court over protective proceeding matters together with the Code state's long-arm statute.

Several other provisions concerned with foreign conservators deserve mention. First, as previously discussed, any foreign conservator or similar fiduciary appointed in the jurisdiction where the protected person resides has priority over all other persons to be appointed conservator in the local Code state. [5–410(a)(1)]. This provision greatly protects the foreign conservator in the administration of the protected person's property in the local jurisdiction. The Code also attempts to give extraterritorial authority to a conserva-

tor appointed under its provisions. Such a conservator is given the power to prosecute and defend claims of any nature concerning the protection of the estate or of the conservator's fiduciary responsibilities in any jurisdiction. [5-424(c)(24)]. Although some states may refuse to recognize this power, it should aid conservators greatly in admininstering the protected person's assets in most jurisdictions.

APPENDIX FOUR

LIMITED GUARDIANSHIP FOR THE MENTALLY DISABLED

ABA Commission on the Mentally Disabled, 1800 M ST., NW, Washington, DC 20036, (202) 331-2242

Limited Guardianships for the Mentally Disabled

The emergence of the least restrictive alternative concept has fostered a trend away from institutionalization and toward community-based care. A parallel application of the least restrictive alternative concept is occurring in the guardianship area with the increasing acceptance of the concept of limited guardianship.

Current authorities recognize that overly protective, traditional guardianship arrangements may put unnecessary limitations on many disabled persons. Persons under guardianship are found incompetent and are without the power to sue, contract, marry, vote and perform a number of important legal acts.[1] However, many disabled persons do not require such great restrictions of liberty; they may be competent to exercise certain skills and to perform certain functions without the guidance of a guardian.

Under a limited guardianship arrangement, an individual's incompetency is determined for those functions he or she cannot perform due to a disabling condition. A limited guardian is ordered to provide guidance and assistance to the individual only in these specific areas of incompetency. For all other areas, competency is assumed and personal autonomy is maintained.

It is clear that by allowing disabled persons to control their lives to the extent they are capable, community-based treatment is enhanced. This column briefly summarizes the current authority and theories supporting limited guardianships, and notes ongoing legislative efforts to enact limited guardianship laws.

National Policy Recommendations

The notion of limited guardianship has received the endorsement of a number of national, blue-ribbon panels and organizations. In 1962, the President's Panel on Mental Retardation recommended in its Report of the Task Force on Law that:

> . . . as much as possible, mentally retarded adults be allowed freedom — even freedom to make their own mistakes. We suggest the development of limited guardianships of the adult person, with the scope of the guardianship specified in the judicial order.[2]

The Panel's Task Force Report goes on to recommend that "plenary guardianship should be reserved for those who are judicially determined to be incapable of undertaking routine day-to-day decisions and who are found to be incapable of basic self-management."[3]

The American Association on Mental Deficiency released a position paper in 1973 entitled "Guardianship for Mentally Retarded Persons" in which the following general principle was endorsed:

> The boundaries of a specific guardianship should be specified, taking full cognizance of the social competencies and limitations of the individual ward. In other words, the guardian's mandate should be prescriptive in nature permitting the retarded adult to act in his own behalf on all matters in which he is competent.[4]

While not using the term limited guardianship per se, this recommendation embodies the essential aspects of specificity of guardianship control and recognition of individual competencies. In general, the AAMD policy statement urges conservative use of guardianship and maximum feasible participation of retarded persons in decisions which will affect them.

More recently, the President's Commission on Mental Health has recommended that:

> State guardianship laws provide for a system of limited guardianship in which rights are removed, and supervision is provided, for only those activities in which a person has demonstrated an incapacity to act competently.[5]

The Commission noted that guardianship "is a highly restrictive method of providing supervision and assistance to mentally disabled persons . . . ,"[6] and that "[i]t is therefore essential that guardianship laws be carefully tailored to avoid any unnecessary restrictions on the rights of individuals."[7]

Finally, the President's Committee on Mental Retardation, in its 1976 Report to the President, called for the availability of a personal representative for every mentally retarded person who wishes or requires one. Insofar as this includes appointment of a legal guardian, the Report noted the following:

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1. UNITED STATES SENATE SPECIAL COMMITTEE ON AGING, PROTECTIVE SERVICES FOR THE ELDERLY — A WORKING PAPER, 39-40 (July 1977).
2. THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW, at 42 (1963).
3. *Id.* at 43.
4. AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, POSITION PAPER ON GUARDIANSHIP FOR MENTALLY RETARDED PERSONS, at 17 (1973).
5. THE PRESIDENT'S COMMISSION ON MENTAL HEALTH, REPORT TO THE PRESIDENT, at 43 (1978).
6. *Id.*
7. *Id.* at 71.

> There is, however, need in many states to improve and refine the laws to preserve to the individual the exercise of those functions of which he is capable.[8]

Community Care and Less Restrictive Forms of Guardianship

There has emerged in recent years a national commitment to providing care, treatment, habilitation, and social support for various disabled groups in a community setting. A General Accounting Office report issued in January 1977 found that since 1963 a number of federal laws and programs have been mandated by the executive, legislative and judicial branches of government to prevent the unnecessary institutionalization of the mentally disabled and to develop alternative programs and services in the community.[9] The depth of this commitment has been reaffirmed by the President's Commission on Mental Health which completed a year long study of the nation's mental health programs in April:

> In our judgement, people are usually better off when they are cared for within their communities, near families, friends, and homes. Our assessment of the past twenty years shows that progress has been made toward this end.[10]

The Senate Special Committee on Aging has condemned the destructiveness of institutionalization on the elderly and has urged the use of more effective alternatives:

> Most elderly persons would prefer to remain in their homes if at all possible. Many can if appropriate care and assistance are available. In the long run, this can produce savings for our nation because institutionalization is the most expensive form of care.[11]

The fact of "deinstitutionalization," which has brought greater numbers of the mentally disabled back into the community, and the accompanying expansion in types of care, habilitation, and treatment services, has placed new strains on existing guardianship mechanisms. Most state guardianship laws still emphasize the total decision-making role of the guardian,[12] with the result that the prevailing guardianship structure is in many ways more restrictive of personal freedoms than other forms of individual protection and assistance (such as self-help groups, advocacy agencies, and social work services). Consequently, if the guardian is to make possible the degree of autonomy, dignity and personal integrity necessary for successful reintegration into the community, his role must have clearly set limits.

Limited Guardianship and the Uniform Probate Code

The Uniform Probate Code, approved by the Uniform Law Commissioners and the ABA in 1969, constitutes the most significant comprehensive proposal for guardianship law reform in recent decades. The Code is based upon a general principle of unsupervised estate administration, and takes the innovative step of separating procedures for guardianship of incapacitated persons from those for the protection of the property of persons under disability (conservatorship or protective orders).[13]

The Code, adopted in significant part by ten states,[14] is liberal and detailed as to the administrative and distributive powers of conservators and gives the court clear authority to enlarge or limit the powers of a conservator. The Code's guardianship provisions set the powers and duties of a guardian to be generally the same as those of a parent, although the court may modify them as may be appropriate. An important step taken by the Code is the elimination of the typical incompetency standard in favor of one based on capacity to make general decisions.

Unfortunately, the Uniform Probate Code is silent on the following key elements of limited guardianship:

(1) Assessment of actual mental and adaptive limitations of the person needing assistance or protection.

(2) Court finding of lack of capacity to do specific kinds of tasks or to make specific kinds of decisions.

(3) Court order of limited guardianship which specifies those legal disabilities to be imposed and grants only those powers the guardian will need in order to act where a legal disability has been specified.

The purpose of such provisions would be consistent with the underlying direction taken by the UPC in establishing a discreet, protective mechanism for managing and preserving the estates of the mentally incapacitated. The idea of limited guardianship would simply require all parties to examine at the start the nature and purpose of the appointment of

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8. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, REPORT TO THE PRESIDENT — MENTAL RETARDATION: CENTURY OF DECISION, at 93 (1976).
9. THE COMPTROLLER GENERAL, SUMMARY REPORT TO THE CONGRESS — RETURNING THE MENTALLY DISABLED TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE, at 1 (1977), *summarized at* 1 MENTAL DISABILITY L. REP. 370 (March-April 1977), *and at* 11 CLEARINGHOUSE REV. 120 (June 1977).
10. PRESIDENT'S COMM. ON MENTAL HEALTH, *supra* note 8 at 17.
11. U. S. SENATE SPECIAL COMM. ON AGING, *supra* note 2 at iv.
12. ABA Developmental Disabilities State Legislative Proj., A Review of Guardianship Legislation, Table I (January 1978) (to-be-published manuscript).
13. *See*, Uniform Probate Code, Art. 5, Pts. 3 and 4.
14. These are Alaska, Arizona, Colorado, Indiana, Minnesota, Montana, Nebraska, New Mexico, North Dakota and Utah.

guardian that is sought. Although additional specificity would be required in the petition and order, the use of limited guardianship should not be at odds with the general freedom of the guardian to act independently (once his mandate is clear) that is a cornerstone of the UPC.

State Limited Guardianship Laws

Fifteen states currently permit the court to place some limitations on the powers of a guardian.[15] Generally, this is discretionary on the part of the court. Of these states, five, Idaho, Maine, North Carolina, Texas, and Washington, have enacted formal limited guardianship laws which require a court to specify the legal disabilities and the restrictions to be placed on a limited guardian's powers.[16] Limited guardianship bills are currently being considered in the legislatures of Alaska, Connecticut, Florida, Illinois, and Pennsylvania.[17]

Existing limited guardianship laws are quite similar in most respects. For instance, petitions for limited guardianship must usually set forth the nature and degree of any disability, the specific protections needed and limitations of rights required, and the term of limited guardianship requested. The court is required to order an outside investigation or evaluation by a physician, multidisciplinary panel, or designated agency, upon which it will base its decision as to whether a limited guardianship is appropriate.

An important characteristic of the court's order of limited guardianship is that incompetence is not presumed except insofar as a specific legal disability has been imposed. Also, the existing laws allow restriction of decision-making authority on issues pertaining to both property and personal affairs. The legislative purpose is generally to "encourage the development of maximum self-reliance and independence in the individual"[18] needing limited guardianship services, and appointment of a limited guardian is to occur only "as is necessary to promote and protect the well-being of the individual."[19] Those states now considering limited guardianship laws are reviewing bills containing comparable provisions.

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15. These are Florida, Idaho, Maryland, Michigan, Minnesota, New York, North Carolina, South Carolina, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin.
16. 1976 Idaho Session Laws, Ch. 134; 1978 Maine Session Laws, Ch. 627; 1977 N.C. Session Laws, Ch. 725 (2 MDLR 194); 1977 Texas Gen. Laws, S.B. 699; Wash. Rev. Code §11.88.010 (1975 Supp.).
17. Alaska H.B. 255 (introduced February 21, 1977 and carried over) and H.B. 63 (introduced January 17, 1977 and carried over); Connecticut Raised Committee Bill 5541 (February Session 1978); Florida H.B. 1233 (1978 Session); Illinois S.B. 252 (introduced March 16, 1977, passed the legislature on June 30, 1978, and currently awaiting the governor's approval); Pennsylvania H.B. 2162 (introduced March 15, 1978).
18. 1977 Tex. Gen. Laws, S.B. 699.
19. 1976 Idaho Session Laws, Ch. 134.

APPENDIX FIVE

GUARDIANSHIP OF THE MENTALLY IMPAIRED: A CRITICAL ANALYSIS

NCLH Legal Monograph:

GUARDIANSHIP OF THE MENTALLY IMPAIRED: A CRITICAL ANALYSIS

The National Center for Law
and the Handicapped, Inc.
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May, 1977

During the past decade national and international attention has been focused on the issue of guardianship. The idea that there must be someone formally responsible for protecting those individuals lacking mental capacity to safeguard their own interests was established and expressed long ago. Yet today there is widespread dissatisfaction with guardianship, the mechanism which has been developed for implementing this idea. Guardianship as presently provided for in state laws has proven largely ineffective in meeting the needs of the mentally handicapped.

There are many reasons for the present increasing concern over guardianship laws. In earlier times the position of mentally impaired individuals was not unlike that of slaves, serfs, peasants or poor persons. In each case the individual occupying such status was cast in an inferior position and was deemed to have fewer rights than other people. Often the mentally impaired were exploited or neglected without recognition of their special needs.

For the most part, guardianship laws were geared toward the property of persons considered incompetent, and very little was provided in the way of helping the individual himself. The

primary goal was to prevent the ward from being taken advantage of, or otherwise wasting, his or her estate. As such, relatives and other interested parties were the principal beneficiaries. Protection of the individual was largely ignored and left to the state without any guidelines.

Since the time when guardianship laws first came into being, many changes have taken place in society. Today it is recognized that second class citizenship should not be given to anyone merely because of social, economic, or mental status. Each and every citizen has a right to participate to the fullest extent in society. With increased scientific knowledge and our corresponding awareness of the mentally impaired and their problems, there has been a concerted effort to remold guardianship into a more useful and positive device. Guardianship is a legal instrument that can facilitate the fullest possible participation of many handicapped individuals in society.

Guardianship is no longer being viewed solely as a property preservation device. While protective aspects of guardianship still exist, new emphasis is being placed on the developmental and habilitative aspects inherent in a guardianship relationship. Under the new concept of guardianship, a handicapped individual can realize his or her potential to the fullest possible extent. Therefore, the supportive role of a

guardian is as important, and in some cases may be more important, than the protective functions.

However, before considering guardianship, it is important to realize that a retarded person who needs services does not necessarily need a guardian. Assistance from citizen and legal advocacy groups, in conjunction with personal counseling, may provide sufficient guidance and advice to eliminate the need for a guardian. Friendship and support through voluntary and service organizations should be encouraged.

Although guardianship when needed holds many promises, few have been realized to date. This results from the fact that most guardianship laws were drawn many years ago and have not been revised to reflect the new concepts. The vast majority of existing laws provide basically that the guardian has complete power to impose his advice or desires through the decisions he makes on behalf of the other person. The ramifications of this overprotection are that social growth and adaptation are stymied while legal rights are glossed over.

I. WHAT IS GUARDIANSHIP?

Guardianship is a legal mechanism for substitute decision making. A guardian is a person lawfully invested with

the power and charged with the duty of taking care of another person. The individual for whom a guardian is appointed is generally called a ward. As a result of some peculiarity of status, or defect of age, understanding, or self-control, a ward is considered incapable of administering his or her own affairs. Guardianship may extend to the person's activities, his property, or both.

Each state has employed a variety of terms to describe the legal relationship between a guardian (i.e., the competent person to whom care and control is entrusted) and a ward (i.e., an "incompetent" person who is unable to manage personnal and/or financial affairs because of age minority or disability). The "competent" person in the law is known as a conservator, a tutor or a guardian. The term "incompetent person" may include those individuals described as "insane," "lunatics," "idiots," "imbeciles," as well as "alcoholics," "habitual drunkards," the "old-aged" or those of "advanced age," "improvident," "spendthrifts," "drug users" and the "physically disabled."

Since many of our country's guardianship laws were written in the late 19th and early 20th centuries, when most individuals lacked knowledge and understanding of the mentally

ill and mentally retarded persons, it is therefore not surprising that such labels were used. The primary concern is the fact that many of these antiquated and sometimes derogatory terms still remain in the laws of many states.

II. TYPES OF GUARDIANSHIP

Today, the most familiar example of a guardianship relationship is the one between parent and child; a parent is considered a child's natural guardian. The parent's authority is limited to personal custody of the child and does not include control over the child's real property. The natural guardian relationship terminates when the child reaches age 18, or the age of majority in the particular state. Most states have statutes which provide for the parent appointing a testamentary guardian through a will. If the parent dies before the child reaches the age of majority, the testamentary guardian assumes the authority of a natural guardian for that child.

The focus of this booklet, however, is not natural guardianship but guardianship by law, which involves a guardian/ward arrangement sanctioned and supervised by the courts.

Any competent adult can petition the court to establish a guardianship for someone alleged to be incompetent. A judicial determination of the prospective ward's incompetency or incapacity generally is required before a guardianship by law is granted.

The test for incompetency or lack of capacity is provided by state statutes and provisions varying from state to state. Typically, these statutes provide the judge with only vague criteria for determining individual competency. Little distinction is made between adult classifications. Thus, the alcoholic and mentally retarded persons may be treated identically. The purpose of the court proceeding is to determine only whether the adult is suffering from an incapacity. There has been almost no recognition that individuals have varying levels of ability in handling their personal and financial affairs. In most states, the guardianship established by the court can be terminated only upon the ward's return to full competency as determined by statute. This must be changed to take into account a person's functioning capabilities. Guardianship should not be total; rather it should be structured to individual needs, periodically reviewed and revised as needed.

A. ESTATE AND PERSONAL GUARDIANS

Most state laws recognize two basic classes of guardians: the guardian of the estate and the guardian of the person. A guardian of the estate is entrusted with the control of the ward's property. This person is responsible for managing the ward's financial assets. In some state statutes, this type of guardian is called a conservator. A guardian of the person has the right of custody of the ward and control of personal affairs. For example, this person could select a ward's residence, determine an educational program and secure medical care.

B. GUARDIAN AD LITEM

The guardian ad litem, by protecting the ward's legal rights, occupies a unique position. It is the duty of the guardian ad litem to defend the ward and assert his rights in the courts, whether the ward is the person bringing suit or is being sued or prosecuted. Historically, this type of guardian was appointed to represent minors in a court of law, but a number of states now provide for the appointment of a guardian ad litem for an adult ward.

This kind of guardian has no right to interfere with the ward's person or property. Furthermore, though the guardian ad litem is appointed to insure that the ward's best interests are advanced and protected, the guardian ad litem is not a substitute for legal counsel. The need for an attorney to provide legal representation and assistance is still present.

III. SCOPE OF GUARDIANSHIP AUTHORITY

A. GENERAL GUARDIANS

Traditionally, courts, upon the finding of incompetency, have appointed a general guardian. The general or plenary guardian is granted nearly complete authority over both the ward's estate and person. General guardianship is the broadest and most comprehensive noninstitutional mechanism for control. The ward under a general guardianship is deprived of exercising the most basic and fundamental legal rights and decisions that all of us take for granted. While general guardianship serves a protection function, and does so in a less restrictive way than total institutionalization, it has serious shortcomings. It completely fails to take into account that the vast majority of mentally impaired

individuals are capable of making decisions independently. The potential for independent living and normalization is greatly diminished under general guardianship.

B. LIMITED GUARDIANSHIP

The concept of limited guardianship has come about only recently. As mentioned previously, general guardianship whereby the guardian is literally given complete control over the ward, has been the rule among the various states. The possible adverse consequences of overprotection by a general guardian have served as an impetus for some progressive state legislatures to enact laws providing for limited guardianship.

Basically, a limited guardian has only those powers expressly given by the court. Limited guardianship is a response to the fact that every individual is different, possessing his or her own unique abilities and disabilities. Limited guardianship laws require the judge to tailor the guardianship program to individual needs.

Limited guardianship is in essence a refinement of antiquated guardianship concepts. Instead of transfering

total or near total power of the guardian as a substitute decision maker, this type of guardianship limits the guardian's power. Given that the vast majority of mentally impaired individuals are capable of making decisions independently on some matters and with advice and assistance on others, general guardianship is overly restrictive and can lead to repression and dehumanization among these individuals. In contrast, limited guardianship can enhance the functioning capability of the individual and his or her potential for independent living.

IV. GROUP GUARDIANS

Many states have made provisions in their statutes for some type of group, agency or other organization to serve as guardians. This group appointed guardian generally has the same function as an individual guardian.

While group guardians offer certain advantages, there are significant drawbacks to their appointment. Groups and institutions are, by their nature, impersonal and sometimes rigid in dealing with the problems of individual wards.

Guardianship necessarily demands what is perhaps the most personal of human relationships -- the exercise of one's decision-making and individual rights by another individual or group. Recent exposure of the impersonality and dehumanizing aspects of mental institutions should provide sufficient warning that individual human needs cannot effectively be administered on a large scale institutional basis. Personal interaction between the ward and the guardian is a prerequisite to the ward's mental and social functioning and growth.

A more serious criticism of group guardianship revolves around potential conflict of interest. If the group acting as guardian is also responsible for providing the non-guardian types of services to the ward, there is an inherent conflict of interest. The group as a guardian must strive to see that the ward's needs are being met to the fullest extent possible by the service agency. If the group guardian and service agency are one and the same, this become difficult, if not impossible. A ward should never be exposed to this potential conflict; thus groups which are also service providers should never serve as guardians. Similarly, there are some persons who should not be considered as guardians because of this same conflict of interest. These include a

person who is performing some professional or other remunerated service for the ward, e.g., attorneys, physicians, teachers, etc., or someone who is employed in one of the service systems in which the ward is enrolled.

Possible advantages of having groups serve as guardians include efficient administration, greater expertise, and the continuity of the group itself. The accumulative experience of the group, serving in the role of a guardian, should theoretically make the group more efficient, responsive and attuned to particular problems faced by wards. Furthermore, widespread public knowledge of the availability of such groups as potential guardians reduces considerably the serious problem some parents, individuals, and courts face in finding a willing and capable guardian. These advantages of having groups function as guardians are, however, far outweighed if the disadvantages mentioned previously are not first eliminated.

A. PUBLIC GUARDIANSHIPS

The concept of public guardianship originated in Minnesota and has since been adopted by other states. Under this plan, a state agency or its representative serves in the capacity of a guardian.

To date, no state has successfully implemented public guardianship. The major problem is that the public agencies designated to serve as guardians are the same agencies responsible for providing other types of services. What happens, in the words of one observer, is that "the agency oversees itself and evaluates its own decision." Past experience and the conclusions of studies by the President's Panel on Mental Retardation raise serious doubts as to the wisdom of public guardianships.

If public guardianship is to work, it is necessary that built-in control mechanisms be developed. The agency providing guardianship services would have to restrict its role to those services and remain as independent as possible from all other departments of government. Theoretically, this may be possible, but in reality the interrelatedness of governmental departments and their reliance on a common funding source have made this impossible to date.

B. PRIVATE GROUP GUARDIANSHIP

Chartered non-profit organizations and private specially organized groups also are capable of serving as guardians in some states. These types of guardians offer the same advantages as group guardianships. The primary drawback of this type of guardian again centers around the potential conflict

of interest problem. There exists a possibility that a guardianship relation may continue unnecessarily, especially when additional income or appropriations are involved.

To summarize briefly, it is imperative that any individual, group, or agency acting as guardian be carefully selected, have limited and carefully circumscribed powers, and be subjected to strict accountability procedures.

V. WHAT ARE THE LEGAL CONSEQUENCES OF GUARDIANSHIP FOR THE INDIVIDUAL

The following list is a general summary of how guardianship affects specific rights and how these limitations of rights should be scrutinized. Because each state has its own laws, the list may not be accurate in all cases for all states. It is merely provided as a summary of how certain rights are affected by the appointment of a guardian in most states. For specific information for a particular state, that state's law must be consulted.

Right to Enter into Contracts. An adjudication of incompetency has the appointment of a guardian as

an immediate consequence. If a guardian of the estate or a general guardian is appointed, the guardian has the power and duty to manage the ward's financial affairs. Traditionally, the ward has not had the right to enter into a contract. Consequently, any such contract is voidable. However, in applying the progressive concept of limited guardianship, the judge should specifically determine to what degree the individual's impairment affects his ability to enter into contracts and grant the guardian powers commensurate with those disabilities.

Right to Make a Will. The legal effect of general guardianship or guardianship of the person on a ward's ability to make a valid will has been treated in two ways in law. One line of cases holds that adjudication of incompetency creates a presumption of testamentary incapacity. The predominant and preferable line of cases indicates that incompetency is only a part of the evidence available to the court in determining whether the ward possessed the needed testamentary capacity at the time the will was drawn.

Right to Marry and Have Children. Decisions relating to marriage and procreation are fundamental rights protected by the Fourteenth Amendment and the right to privacy. Nevertheless, there are divergent opinions offered by the courts regarding a ward's ability to marry. One holds that if a ward cannot contract, he or she cannot enter into a marriage; however, such decisions can be questioned under the evolving constitutional analysis of fundamental rights. The other holds that the appropriate test to determine eligibility for marriage is the individual ward's soundness of mind at the time of proposed marriage, similar to the test applied to anyone else seeking to marry.

The right to procreate includes decisions concerning sterilization. Some states still permit involuntary sterilization of an individual who is mentally retarded but recent cases indicate such statutes must provide strict procedural safeguards and strictly defined standards based upon a compelling state interest. The trend, moreover, has been away from the involuntary measures toward allowing only truly voluntary sterilizations. Courts continue to wrestle with the question of

who may give consent to the sterilization of an adjudicated incompetent; the direction of many courts, and a direction which would seem to be constitutionally required, is that substituted consent to sterilization is not permissible.

Right to Vote. Louisiana denies adjudicated incompetents the right to vote and hold public office. In other states, voting requirements are established under voter registration laws which may state that "idiots" and the "insane" cannot vote. The use of language like "imbecility" and "idiocy" in guardianship statutes has caused confusion regarding the right to vote and may result in the denial of the ward's voting power. Again, in applying the concept of limited guardianship, a judge should make specific findings on this issue and should only restrict this fundamental right when absolutely required by the individual's impairment.

Right to Access to the Court and Civil Liability. Some guardianship statutes give the guardian the right to sue or defend legal action on behalf of

a ward. In other states, the status of wardship is used as evidence of the ward's inability to understand the nature and consequences of personal actions or to sue and be sued. This should be left to the judge's determination given a specific individual.

Right to Obtain a Motor Vehicle Operator's License. In most states, the motor vehicle code establishes the physical and mental capacities an individual must have to operate a motor vehicle. Having been judged incompetent, a ward may be prevented from obtaining a driver's license by the guardianship arrangement. Preferably, this should occur only if a judge finds the necessity of so ordering.

Right to Medical Treatment. Nearly all states provide, either in guardianship statutes or in statutes concerning consent to surgical procedures, that a guardian of the person or general guardian can give consent to hospitalization or surgery on behalf of a ward. This should only extend to routine procedures, however, since some courts have recently held that fundamental

rights cannot be affected through the use of substituted "voluntary" consent. This would apply to a range of activities varying from voluntary commitment to an institution, to consent for procedures such as abortions or human experimentation.

Right to Hold or Convey Property. Guardianship of the estate or general guardianship gives the guardian the right to hold or convey real property of the ward. In most instances, the guardian needs approval from the court before acting on the ward's behalf.

The denials of civil rights which follow when guardianship is granted by the court are the legally definable consequences of a judgment of incompetency. But are these severe restrictions on personal freedom always necessary? What should a guardianship program do for mentally retarded individuals?

VI. ARE PRESENT GUARDIANSHIP LAWS UNNECESSARILY RESTRICTIVE OR STIGMATIZING?

Although a variety of guardianship laws have been written, the major shortcoming of most of them is a failure to recognize that a ward is an individual who has specific abilities and needs which change with time. Most statutes provide the court with only one alternative when the need for guardianship is considered: the judgment of competency or incompetency. This provision often leaves concerned parents and courts in a difficult dilemma. Is it better to risk the dangers of total legal independence or to provide assistance through a general guardianship which restricts most legal rights? A mentally retarded adult who cannot appreciate the significance of large sums of money might very well lose the right to sue someone, drive a car, or vote, in the process of being "helped" through guardianship. Several states have moved to remedy this shortcoming by establishing limited guardianships and a system of community support services. Under this system, the individual ward is neither socially labeled nor legally viewed as an incompetent person and is still able to make many fundamental decisions.

Guardianship laws must start from the premise that wards, like all other persons, are entitled to their personal freedom

to the fullest extent that is consistent with their abilities. Overprotection is a constant threat. Merely because a retarded person needs some form of assistance does not mean that he or she needs a guardian. Personal counseling, friendship and support on a voluntary basis may supplant the need for any type of guardian.

Ideally, habilitation and not punishment should be the goal of any guardianship system. It should provide for the development of self-sufficiency in the ward and eliminate unnecessary dependency on others. The role of the guardian is critical in accomplishing this goal. The guardian must exercise properly limited, but appropriate, control so that the ward can meet situations without being overwhelmed by them. At the same time, new opportunites for growth and independence must be offered. The underlying goal of a guardian should be to do everything possible to help the ward stand on his own feet in all respects. Only in this manner can the principle of normalization be accomplished.

Historically, individual guardians of the person were appointed by the court and charged with the care and custody of the ward. It appeared that the guardian's only duties were to ensure that the ward was fed, clothed and sheltered.

An individual cannot survive if these basic biological or instrumental needs are not met. However, if all the person's instrumental needs are provided by others, the result in nothing more than custodial care. To encourage self-sufficiency in the ward, the guardian should provide access to appropriate education and training which will enable the persons to meet these needs to the maximum degree.

Guardianship programs are incomplete if the guardian's duties are fulfilled at this point. In addition to instrumental needs, everyone has interpersonal needs which are emotional, or expressive, in nature. These include the need for friendship, the need to give and receive love and the need to develop a sense of self-esteem. The conscientious guardian must be aware of these human requirements and provide opportunities for their realization, particularly because of the loss of self-esteem which can occur when a person is adjudged "incompetent". The stigmatizing label of incompetent and the accompanying restrictions on personal freedom associated with general guardianship can seriously affect the ward's self-image. The guardianship program which is unnecessarily broad in application can create in the ward a sense of alienation and rejection. This atti-

tude can happen easily when guardianship is sought and used as a device for controlling social behavior rather than protecting or ensuring legal rights.

In most instances, families of disabled persons have been faced with the difficult decision of abandoning all legal responsibility for their offspring or seeking "all or none" guardianship. Despite the weakness in systems which cause their children to be further stigmatized and unnecessarily denied legal and social standing, many families have opted for guardianship. The parent concerned with a child's welfare has not been given sufficient alternatives which would allow control when necessary and normal development when possible. Guardianship itself must be restructured into a more sophisticated device geared to the particular ward's needs and abilities.

The majority of guardianship statutes can also be criticized for their failure to include provisions for the fulfillment of the ward's instrumental and expressive needs. These statutes were designed to protect an "incompetent" from society and from himself, not to encourage individual growth. Guardianship programs are necessary but they should be designed to assist individuals who currently cannot cope with the variety and complexity of their daily lives.

The type of guardianship program selected and the individual charged with its implementation are important because they have a great impact on the legal, emotional and social life of the ward. An adaptive approach must be developed when writing and revising guardianship statutes. Comprehensive, yet flexible, provisions should be included to allow for different and differing individual needs over time. They should recognize that development, not protection, is the plan's objective. The guardianship program should be viewed as a legal tool which ensures the individual's integration into society.

VII. THE APPOINTMENT OF A GUARDIAN

A. APPOINTMENT UNDER EXISTING LAWS

Under most state laws, guardianship proceedings are initiated by petitioning the appropriate court. Typically, the probate or family court where the proposed ward resides handles the proceedings. A written petition is required. It should set forth all necessary facts, name the person proposed to be guardian and his or her consent to be guardian. Usually the petition must be verified and contain at a minimum the following facts: the person's need for a guardian, the

court's jurisdictional basis, and the qualifications of the person to be appointed. In addition to filing the petition, notice of it must be given to certain persons, including the proposed ward. After this is done, a date is set by the court for a hearing.

The purpose of the hearing is for the judge to determine whether there is need for the appointment of a guardian. This determination is made on the basis of evidence presented concerning the individual's condition. While the law of the state where the proceeding occurs is applied, more often than not, it will not provide specific standards or criteria to be used by the judge in making his findings. Generally, the judge will ask a few questions concerning the proposed ward and will receive reassuring answers from the attorney or other interested persons. The usual result is that a guardian is appointed without a careful evaluation being made of the ward's abilities or needs. In the unlikely event that a petition is opposed, the court must delve more deeply into the need for a guardian and the best alternatives available.

Once the court has decided to appoint a guardian, letters of guardianship are issued to the designated guardian. The appointment made by a court with proper jurisdiction cannot

be set aside or questioned by another court except for fraud or by a direct appellate proceeding. The court having made the decision may, however, later alter or revoke the appointment. After appointment, the guardian is subject to judicial supervision by the appointing court. This court may at any time issue orders, compel obedience, or even remove the guardian for failing to carry out responsibilities to the ward or for not acting in the ward's best interest.

While the foregoing is a brief overview as to how guardianship is provided by most state laws, it is not to say that the procedures and requirements are satisfactory or even in accord with modern day constitutional requirements.

B. DEFICIENCIES IN THE APPOINTMENT PROCESS

Most existing guardianship laws can be traced in origin back to the days of the feudal period in England. During that era, the King assumed the protection of all people who were unable to protect their own interests. The King, through the Chancery Court and the Chancellor, assumed supreme guardianship over these persons. In effect, the Chancellor acted as a substitute father and was to function "as a wise, affectionate, and careful parent."

As substitute parent, the Chancery Court employed the doctrine of equity, meaning that decisions could be based on fundmental fairness rather than strict rules of law. In essence, equity means to interpret the law according to the spirit rather than the letter of the law. It allows a court to provide remedies that are not available under a strict application of the law, giving it greater flexibility.

Due to the equitable nature of guardianship and its paternalistic aspects, many states viewed it solely as a benevolent action. Consequently, very vague laws allowing for the expeditious appointment of guardians were enacted. Little attention was given to the possible adverse effects resulting when a guardian was unnecessarily appointed.

Today there is a growing awareness that unnecessary or overprotective guardianships carry consequences that are equal to, or in some cases greater than, a criminal conviction. While the alleged criminal, who faces a determinate punishment, enjoys the presumption of innocence and detailed procedural safeguards, the alleged incapacitated person is subjected to a deprivation of liberty without similar procedural protections. However, despite the fact that most existing guardianship laws are morally and legally unsatisfactory, the concept itself is still viable and must not be discarded.

Guardianship is a useful device for many handicapped individuals who are unable to effectively act in their own behalf and who require some type of assistance to protect and effect the exercise and enjoyment of their individual rights. It is widely recognized that guardianship services are very important to the well-being of many individuals and that the state, by providing for the appointment of a guardian, serves an important role. Yet, the state's interest in providing these services, no matter how benign or paternalistic, must be limited so as to recognize the basic human and constitutional rights of individuals asserted to be in need of a guardian. Both the individual's right to avoid unfair restrictions of his or her fundamental liberties and the state's power to provide these services must be protected and balanced. Guardianship services must be available without unnecessary delay or cumbersome procedure. The state's power to provide these services must remain intact and operable while respecting and protecting individual rights.

C. INNOVATIVE CONCEPTS

The movement toward community integration, growing concern for protecting and ensuring individual rights, and the development of community services has given impetus to the development of new guardianship strategies. In the past dec-

ade, a few states have begun to revise and/or make additions to existing statutes, or propose new guardianship statutes which relate more specifically to mentally retarded individuals. Changing perceptions of mental retardation have had a positive impact on the wording and intent of these laws. Legislatures are increasingly aware of the need to develop guardianship programs specifically for retarded persons. The principles on which innovative legislation are based include the following:

> There are varying degrees of mental retardation. Although mentally retarded, an individual may have sufficient ability to attend to himself and his personal affairs. For such persons the institution of guardianship must not be invoked.
>
> Mentally retarded persons must be assumed to have full human and legal rights and privileges. The mere fact of retardation must not be in and of itself sufficient to remove rights by appointment of a guardian or otherwise.
>
> Merely because a mentally retarded person is in need of various forms of assistance does not mean a guardian is required. In addition to the institution of formal guardianship, parallel services, such as personal counseling, should be available to retarded individuals who may not require formal guardianship if appropriate guidance and advice is provided on a continuing basis.
>
> Mere intellectual ability or disability is an inadequate determinant as to the necessity for guardianship, as intellect does not necessarily correspond to social adap-

> tation. Determination of the need for guardianship must be a process considering both intelligence and functioning ability. Behavior is the crucial determinant.
>
> An adult is presumed legally capable of directing his or her personal life unless a court determines otherwise through guardianship proceedings.
>
> In those instances in which the retarded person is unable to manage himself or his personal affairs, a suitably designated guardianship program must be arranged.
>
> Guardianship of a mentally retarded person should be viewed positively as a means of implementing rights and opportunities with as much participation by the retarded ward in all decisions as is practical. The underlying goal of a guardian should be to do everything possible to help the retarded ward be self-sufficient in all respects.
>
> Mentally retarded persons must be allowed freedom -- the maximum freedom consistent with their abilities, even freedom to make their own mistakes. Guardianship must be designed to fully utilize the retarded person's abilities and capabilities. Limited guardianship with the scope of the guardianship specified in the judicial order is preferred.
>
> The guardian's role as advisor and personal advocate of the mentally retarded ward must transcend the role as manager of the estate. The welfare of the retarded person, not of the estate, must determine the legal and social provisions.

These principles (found in House Bill No. 1516 of the State of Pennsylvania, 1973) contain a recognition of some of the constitutionally based rights which should be guaranteed in any guardianship program. Other provisions necessary to effective updating of guardianship laws are discussed below.

VIII. DUE PROCESS OF LAW

Since an adjudication of incompetency or incapacity can have serious adverse effects on an individual's ability to exercise many, if not all, civil and legal rights, certain procedures must be followed. These requirements are mandated by the due process clause of the United States Constitution. Basically, due process of law does not embody a fixed set of legal procedures and standards; rather, the specific requirements of due process vary depending upon the importance of the interests involved.

Although the Supreme Court has yet to consider the full impact of the due process clause on guardianship procedures, its decision in other related areas would seem to require the revision of most, if not all, existing guardianship laws. Recent court decisions in the juvenile and mental health areas have mandated that whenever a person may be subjected to the loss of liberty, no matter how benevolent the state's motives, certain procedural safeguards must be followed. Specifically, the Court has required notice, hearing, the right to counsel, and the opportunity to be heard and to present a defense. It is submitted that these are minimum requirements which should also be met in the area of guardianship.

The following is a cursory outline of the major due process procedural safeguards as they would apply to guardianship. The list is not all inclusive; it merely provides those major protections which are lacking in most existing guardianship laws.

A. WHAT PROCESS IS DUE IN GUARDIANSHIP?

1. Notice and Hearing

At a minimum, due process requires that deprivation of liberty be preceded by notice and opportunity for a hearing appropriate to the nature of the case. As mentioned previously, all legal guardianship statutes recognize that some type of notice and a hearing must be given before a guardian can be appointed. Typically, these statutes require only that the proposed ward be notified of the time and date for a guardianship hearing. This policy is grounded on the assumption that guardianship is essentially a benevolent action on the part of the state and that relaxed, informal procedures are most appropriate.

Because of the serious deprivations of liberty which guardianship may entail, it is submitted that the following form of notice and hearing be provided.

The notice given the proposed ward should be sufficiently specific to adequately inform him or her of the character of the proceedings and the serious legal implications that can arise from appointment of a guardian. Meaningful notice, at the very minimum, would require that the individual be given the petition filed for the appointment of a guardian, names of all persons who will testify in the proceedings, notice of the allegations and other bases upon which the need for a guardian is asserted, and, finally, notice of the specific issues to be treated in the guardianship proceedings and the standards that will be applied. In short, notice must be sufficient so as to appraise the individual of the seriousness of the proceedings and to allow him or her a meaningful opportunity to prepare for a hearing.

Notice of the foregoing will not unnecessarily delay or add to the expense of guardianship proceedings. Furthermore, only with this type of notice will a potential ward be in a position to effectively challenge the proceedings. As early as 1863, the Supreme Court stated, "parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 68 U.S. 223, 233 (1863).

2. Right to Counsel

Even though the appointment of a guardian may mean that the ward is denied the rights Americans consider fundamental, most states do not guarantee the mentally impaired individual the right to counsel. This reluctance can be traced once again to the paternalistic origin of guardianship. When most laws were written, it was felt that there was no need to make guardianship into an adversarial process. Instead, the judge would act as a wise parent acts in seeing that justice was done. The problem with this approach is obvious. Without representation for the proposed ward, the only evidence likely to come before the court is that of the petitioners.

Notice and the opportunity to be heard are of little value if the alleged incapacitated person is denied the assistance of counsel. In juvenile proceedings, the Supreme Court has stated that a child whose liberty is in question, "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." In re Gault, 387 U.S. 1, 36 (1967).

3. Right to a Fair and Impartial Hearing

The fundamental requisite of due process is the right to be heard. All states have some type of procedure whereby a judge hears evidence as to the alleged incapacity of the potential ward. In most instances, however, this hearing is merely ex parte, meaning that the only evidence presented and heard is that of the petitioners. Thus, the judge may be exposed to only one side of the story; that is only the proposed ward's alleged incapacities will be presented, while his capabilities are ignored.

To protect an individual from being unnecessarily deprived of legal rights resulting from the erroneous appointment of a guardian or the appointment of a guardian with overly broad powers, the following should be provided:

a. Presence of the Person.
The allegedly incapacitated person should be present at all stages of all proceedings.

b. Right to Confront and Cross Examine Witnesses and to Offer Evidence and Testimony.
Before any findings are made as to the need for guardianship, the proposed ward, through

his attorney, should be given the opportunity to confront and to cross examine witnesses against him and to offer evidence in his own behalf, including the testimony of witnesses. Only by the use of this process will the judge be in a position to make an intelligent decision as to the individual's capacity.

The court should also be required to avail itself of the expertise of behavioral scientists. A comprehensive clinical evaluation should be undertaken covering medical, psychological, educational, social and vocational factors. This evaluation should be utilized in determining the need for guardianship services.

c. <u>The Requirement That There Be Clear and Convincing Proof of Need for Guardianship Services</u>.

That the fact-finder may commit error is a risk of any litigation. In a guardianship proceeding, the questions involved

> are primarily subjective, concerning the subject's mental condition and capacity. Such subjective determination cannot ordinarly be made with the same degree of certainty that might be achieved where purely objective facts are in issue. Consequently, the judge or fact-finder should be persuaded by clear, unequivocal and convincing evidence that the subject is in need of guardianship services and to what extent these services are needed.

In conclusion, the basic guarantees which we feel should be included in comprehensive guardianship legislation are outlined below.

In order to preserve basic civil rights, guardianship statutes should contain language which will guarantee:

> that due process requirements, both procedural and substantive, are recognized and followed in the court proceeding; and
>
> that an individual is presumed competent to manage all personal and financial affairs until proven otherwise.

Procedural due process requirements ensure individuals of a fair hearing before any civil rights are denied. Fair hearing provisions would include:

> the necessity to petition the court to secure guardianship for another;
>
> personal notice of the petition to the person for whom guardianship is requested;
>
> the right to be represented by counsel;
>
> the conducting of the hearing before a judge;
>
> the right of the retarded individual to present evidence on his behalf and to cross-examine all adverse witnesses.

A presumption of competence during the hearing would require guardianship statutes to include provisions for:

> the participation of the potential ward, to the extent of ability, in all phases of the hearing process; and
>
> a panel of professionals (e.g., psychologists and physicians) to make not only an adequate and substantial diagnosis of mental retardation, but also to certify the extent to which the person is debilitated and unable to function as a result of retardation. This evaluation will allow the court to determine what specific rights must be restricted in a guardianship order.

When individual rights are denied in the court of law, even by fair hearing, substantive due process guarantees require that the person be provided a program of habilitation which will help regain lost rights. To satisfy this constitutional principle, guardianship statutes should:

establish a wide range of alternative types of guardianship plans for the court to use in designing an individualized plan. The most flexible alternatives would be provisions for either limited guardianship or guardianship by mutual contract;

require the guardianship plan adopted to state specifically the program of services needed to assist the person to become more competent in the area(s) of incompetency;

require periodic review of the guardianship plan. The plan must be checked for effectiveness and the need to be continued or revised. Appropriate restitution of rights should come as the individual achieves certain developmental goals.

recognize that the success of any guardianship program depends on the guardian. Careful consideration should be given to the qualifications necessary for anyone assuming this role.

APPENDIX SIX

PROTECTIVE SERVICES: A PRIVATE SECTOR APPROACH

Appendix 6

PROTECTIVE SERVICES: A PRIVATE SECTOR APPROACH

(Prepared by Planned Protective Services, Inc., Los Angeles, Calif.)

The Need for Protective Services

The typical recipient of protective services is an aging widow, widower, or couple experiencing difficulty in coping with changes brought about in regard to living arrangements, bill payment, transportation, medical treatment and insurance, credit, psychological adaptation to change, ability to deal with salesmen, contractors, nurses, homemakers, and governmental organizations. The difficulties may have arisen from the onset of physical disability or weakness, organic mental deterioration, low income and inflation, as well as from psychological depression resulting from these and other problems.

Mere possession of money is not always sufficient to avoid many of the above stress situations. In fact, one of the seamiest human traditions has been the preying upon the elderly infirm through ill advised or fraudulent schemes pushed upon afraid and confused individuals by "artful or designing persons" in the guise of bargains, investments, easy money, false promises of free or inexpensive services, oral agreements, and written agreements containing confusing legal jargon or fine print. Homes have been lost, sizeable estates depleted, valuable personal property relinquished for a fraction of value, worthless land purchased, and cheap or worthless goods and services bought at many times real value. Complex financing has been portrayed as simple and inexpensive, though it has often involved repayment plans impossible for the fixed-income senior to follow, thus inviting foreclosure and repossession. Individuals have been locked in hospitals and residential care facilities of varying types, sometimes without need, sometimes involuntarily, with little regard for medical and psychological bases for level of care, and often in surroundings of ill-conceived social planning and poor hygiene.

Although many people caught up in these situations may have no close relatives or no relatives at all, there exist in the southern California area alone thousands of cases where relatives (greedy or well meaning) either are a part of the problem or fail to come to grips with the situation due to their own pressing affairs, their inability to deal effectively with the elderly relative, or their geographical distance from him or her. Husbands, wives, sons, daughters, brothers, sisters, grandchildren, and nieces and nephews have all been known to seize the assets of their elderly relatives and place them in shameful custodial care facilities to waste away and die as one means of "avoiding probate."

Obviously there are available legally based sources of protective services aimed at providing court supervision of the personal and financial affairs of infirm individuals as managed by another party. As will be seen, the nature, scope, and accessibility of these services vary greatly. Some of these sources are traditional and well known; others are relatively new and deserve more study. Still others, of course, are yet to be developed and perfected.

Available Court-Supervised Protective Services

In California, legal guardianship has long been a practice whereby a relative or close friend of an infirm individual is appointed, under court jurisdiction, to manage the personal and financial affairs of his ward. Although court supervision is mandated by the California Mental Health Code and Probate Code, it is more or less limited to the appointment process, the inventory and appraisement, and the current and final accountings. (Negotiation of certain contractual arrangements as well as sales of securities and real property do require additional court involvement.) However, legal guardianship has inherent negative aspects, both generally and as practiced by the inexpert guardian—the so-called one time situation.

First, guardianship involves a finding of incompetency. This results in almost total lack of control and even of input by the ward concerning his or her personal preferences about living arrangements, investment, contracts for services, and other related decisions. This total isolation from direction or control of one's affairs brings on, in the more mentally active wards, feelings of uselessness, low self-esteem, and accelerated further mental and physical deterioration.

Second, even well-meaning lay guardians are themselves called upon to make financial, social, legal, and management decisions often without personal experience or ability. The planning involved, both long and short term, can be a difficult proposition for the lay person. Wrong decisions have been made resulting in financial loss and psychological distress to the ward. Also, increased usage of attorney time due to the lay guardian's inability to make some of the required decisions out of his own prior experience can severely inflate guardianship costs.

These factors indicate a need for alternatives both to the one time guardian pattern and to the somewhat extreme nature of the legal guardianship itself. And in California, these alternatives do exist.

Since the late 1950's, the California Probate Code has provided for a middle ground between guardianship and complete self-reliance for the elderly infirm. Legal conservatorship (of the person, estate, or of both) now provides for court-supervised financial and/or personal management involving the same legal safeguards as guardianship, but without the stigma of incompetency. The conservatee has a legal right to consultation with the conservator about the full range of affairs. The conservatee also retains a right to make certain [illegible] on his own. The conservator is required to take adequate consideration of the wishes of the conservatee as a part of the decisionmaking process. Disposition of assets can only be allowed where need or

justification can be shown to the court, either prior to or subsequent to such disposition.

In cases where after-the-fact approval of disposition is not obtained, the conservator may be surcharged personally, or through his required bond, for any amounts involved. In Los Angeles County, probate judges are requiring that conservators promise under penalty of perjury that their conservatees will not be placed in any health care facility against their will. Many conservatees live in their own homes or apartments, or live happily in board and care environments, in the latter case often retaining their own furniture. Where medical and psychiatric advice indicate, conservatees can drive automobiles, travel at will on public transportation, and even move from one county to another, involving only a change in court jurisdiction for the conservatorship. Conservatees have often recovered to an extent that they can do without the protection of conservatorship; in these cases an orderly and prompt termination, accounting, and release is obtainable through the court in approximately 6 weeks, during which time the conservator is responsible for aiding the conservatee in resuming control.

Although family members can be appointed as probate conservators, the same pitfalls await "one time" conservators as their guardian counterparts. The alternatives to relative involvement ideally should offer total impartiality, ready access to expertise in:

Accounting,
Bookkeeping,
Property management,
Business management,
Long and short-range financial planning,
Insurance,
Debt collection,
Creditor relations,
Paralegal services, and
Personal financial counseling.

These services should be available at reasonable cost.

For conservatorship of the person, good alternative sources of protective services should offer:

Visitation, both routine and in crises,
Coordination of medical consultations with both internists and specialists, as inpatient, outpatient, and in-office visits,
Transportation,
Access to professional and semiprofessional nursing services, where indicated by medical advice,
Adequate physician and nurse screening and supervision,
Access to all types of government aid and reimbursement, including aid in filing of claims,
Referral to psychiatric and psychological treatment as inpatient and outpatient (especially where covered by medicare),
Maintenance of existing private medical insurance,
Shopping,
Budgeting, and
Aid in corresponding with friends and relatives.

In addition, where institutional care is medically required, close supervision of care quality, including hygiene, therapy, exercise, security of personal belongings, food value and appeal, ventilation, warmth and air conditioning, and employee attitude toward the patient, should be practiced. All of these services to the person of a conservatee should be provided by or directed and supervised by a competent, professional person or persons, ideally educated in gerontology and social service, and where available, a licensed social service practitioner. Individual caseworkers should be mature, adaptable experienced in dealing with elderly people, and importantly, capable of inspiring trust and confidence; these caseworkers and their supervisor should work toward fostering maximum retention of individua initiative and drive.

Because the organized conservatorship deals with two distinct bu interwoven areas of life management, person and estate, the optimun situation is one in which the two areas are served by the same entity This is because most decisions inevitably require coordination of th two areas of protective services. For example, budgetary considera tions, long and short term alike, involve important inputs juxtaposin available funds and required levels of service. When one organizatio manages both the person and the estate, this coordination is readil attained.

In southern California, as in most regions, banks and trust com panies are regularly serving as legal fiduciaries in live estates such a guardianships and conservatorships. However, these firms are not a lowed in California to handle guardianship and conservatorship o the person. Another entity must be provided if the protection of th person is required. Furthermore, because these firms are profitmakir in character, they have found it financially unrewarding to acce appointments in estates under $90,000 and, with few exceptions, c not now take on smaller cases.

For years, the only organized conservator of the perso and esta combined was the county public guardian. In Los Angeles Count this office traditionally has been a backwater appendage of the coun public administrator's office, handling decedent estates. Press covera and public testimony has indicated in the recent past that the pub guardian has, because of staff shortages, poor management, and la of sufficient budget, been remiss in responding to needful situatio in processing the onset of guardianship or conservatorship, in proper maintaining the supervision of personal care, in effectively respon ing to complaints, changes in care quality, in institutionalizing in viduals before need, and in slow response to improvements in physi or mental condition which might indicate termination of the protect service.

For the past several years, however, a private sector approach organized protective services has been developed, serving several sou ern California counties. It is Planned Protective Services, Inc., a n profit, charitable, Federal and State tax exempt, nonsectari California corporation, specifically incorporated for the purpose providing court-supervised, bonded, expert, professional personal a financial management, through conservatorship, to the elderly infi

as well as to certain other people of more moderate age with management disabilities.

History of Planned Protective Services

As early as 1967, a year-long investigation of the need for new sources of protective services was conducted by the Committee on Aging of the Los Angeles Welfare Planning Council (now a Red Feather agency). Testimony from a broad spectrum of public and private agencies and individuals was heard. The conclusion of the study was that an overwhelming unserviced need for protective services to the aging existed, and that the county public guardian was not able to meet that need. The council recommended the establishment of a model nonprofit, charitable corporation in Los Angeles and that work be initiated toward eventual passage of legislation to alter the probate code whereby such a corporation could be named to serve as conservator or guardian of the person and estate. PPS was incorporated in 1969 and received charitable designation and tax-exempt status from the Federal and State governments in that year.

During the early years, the president of PPS was the appointed guardian or conservator, and he employed the resources, facilities, and staff of the corporation to aid his wards and conservatees. In turn, when he was awarded court reimbursement, he turned over his fees to the corporation. As the culmination of a long, drawn-out effort, legislation was enacted in 1974, largely through the cooperation and efforts of Assemblyman Alan Sieroty, that effectively allowed Planned Protective Services, Inc. to be appointed directly by the probate court. A copy of the enabling legislation is part of the appendix to this report.

Since 1969, Planned Protective Services, Inc. has grown from a one-room operation (its first quarters were located in a donated room in the Los Angeles Episcopal Cathedral) to a set of offices on Wilshire Boulevard in the MacArthur Park section of Los Angeles, as well as a branch office in Torrance serving the south portion of the county. Recently, staff and space were acquired in San Diego as a part of an affiliation program with an organization prominent in social services aid to the elderly in that county. In spring of 1976, the corporation received its first appointment as a conservator in San Diego.

Future plans include the addition of other suburban branch offices, a senior services center for aid and referral of seniors in a variety of problem areas which will include housing, transportation, medical and nursing care and legal services, as well as preretirement counselling. For more than 1 year, PPS has been involved in very promising negotiations with the Social Security Administration, working toward implementation of a large scale representative payee program for SSA beneficiaries who may not require outright court-appointed aid, but who do need some assistance in bill-payment and budgeting.

Operation of Planned Protective Services, Inc.

Under the direction of John M. Mills, PPS employs personnel trained in property management, bookkeeping, fund raising, medical insurance claims processing, and of course a large social service staff, supervised by two professional social workers.

The agency receives requests from many quarters for investigation and aid where elderly individuals are in need of protective services. Referrals have come from acute hospitals, physicians, nursing services, attorneys, family, friends, judges, as well as from individuals seeking aid for themselves. Many referrals have come directly from the Social Security Administration and the Veterans Administration as a result of study by those organizations into PPS' record as a social agency and after the development of a close working relationship between PPS and SSA and the VA.

Staff members of PPS meet personally with proposed conservatees on a confidential basis, in the presence, whenever possible, of their own lawyer or a trusted friend, relative, or neighbor. All aspects of need are investigated, and the nature of conservatorship is explained clearly and in depth. PPS personnel are in contact with the personal physician or psychiatrist, and attempt to interview all persons interested in the care and welfare of each individual.

One of the most interesting facets of the protective services offered by the corporation is the lack of redtape involved. In cases of real crisis, because of the professional experience of PPS in its field, and due to its excellent reputation with the courts, the bar, hospitals, and the medical profession, the agency is sometimes appointed as temporary conservator within as little as 48 hours after the first crisis call.

Once appointed on this temporary basis, the agency moves to secure adequate medical treatment, food and shelter and, when necessary, in-home care or placement. Staff members immediately secure real and personal property and begin in-depth investigation of needs, assets, potential losses and liabilities, and seek information about lost relatives. In a significant number of cases, PPS discovers that some assets of its conservatees have been stolen or misappropriated, and moves toward regaining them. Within a month, all known relatives have been contacted and made aware of the situation, and a court hearing has been held to determine need for longer term conservatorship protection. PPS conservatees are brought into court whenever possible, and only when a medical declaration (under penalty of perjury) by the attending physician is filed with the court may the agency be appointed without the conservatee present. Only complete physical inability to attend court is satisfactory under the probate code in such situations.

Once appointed, the corporation (which must carry a separate bond for each case in the amount of the total annual income of the conservatee plus the value of all personal property) provides a complete and accurate inventory of assets to the court. Every 14 months, or more often, if necessary, the agency provides to the court a complete accounting of all income received and all disbursements made.

Among the many achievements of Planned Protective Services, Inc. in its backlog of individual case histories are: recovery of real property taken over by the State for back taxes, removal of squatters, avoidance of trust deed note foreclosures, recission of prior sales of real property at a fraction of market value, psychiatric treatment of some conservatees resulting in their return to individual living arrangements, and the obtaining of competent medical care for individuals who may not have seen a doctor for years.

A paramount objective of the agency is the maintaining of the personal character of its services. Each case is examined and periodically discussed at staff meetings so that the full organization is aware of the variety of needs and desires and feelings of each conservatee. The client is not merely a name in a log or a number on a computer printout. In many instances, the relationship between the caseworker and client becomes very close, similar to that of an older and younger relative or that of longtime friends.

The Cost of Conservatorship

Compared with attorney costs of from $50 to $75 per hour, and bank or trust company charges of from $30 to $50 per hour, the Planned Protective Services, Inc. fee guideline of only $15 per hour is a bargain. Furthermore, due to the efficiency of the agency, it has been able to guarantee that it will care for the conservatee for life, even if medical care and hospitalization outlays eventually deplete all of the conservatee's assets. Planned Protective Services, Inc. never in its history has requested to be relieved of a case due to lack of funds. No payments are ever received in advance, and only if the court determines that services provided were necessary and reasonable is payment endorsed by the supervising judge in each case.

PPS has been developing a program for volunteer services, to keep the cost of conservatorship low. The corporation has held a biannual ball for donation of funds to support aid to needy conservatees. Several large corporations, including TRW and Northrop, have been involved in yearly donations of funds and gifts, especially at holiday time, for the benefit of the agency's clients. The present ratio of charity cases to private cases is about 31 percent. No public funds have ever been expended by Planned Protective Services, Inc.

Long-Term Care Placement

Most people, lay and professional alike, believe the optimum living arrangement is as a couple or as an individual, in one's own home or apartment. Planned Protective Services works toward supporting its conservatees in this type of personal environment. At-home conservatees, combined with clients living in their own rooms but receiving meals in a residential care setting together make up between 50 and 60 percent of the PPS caseload.

Where inability to walk or incontinence requires placement in a convalescent care facility, the corporation still asserts great care and effort in picking the proper situation for each client in terms of location and quality of care. PPS tries to place such an individual in a neighborhood close to his or her traditional residence area, so that old friends and acquaintances, many of whom have difficulty with transportation, are more likely to continue a relationship with the conservatee. The level of care provided in such facilities is constantly being monitored by the agency, and such facilities are aware that deteriorating conditions of care will cause prompt removal of clients.

As indicated earlier, the probate conservator is not allowed to place its conservatees involuntarily in any medical care facility. In those rare instances where a difficulty arises in this regard, PPS has managed to provide professional outside psychological or psychiatric evaluation combined with its own caring and low key counseling to bring an understanding of the situation to its client. In only one case has the agency been required to submit a conservatee to county investigation and legal hearing under Mental Health Code regulations leading to due process involuntary commitment. (In California an involuntary commitment requires an intensive, involved arbitrary proceeding transacted by a county designated public sector investigating agency, supervised by a special superior court branch.)

Summary: The Private Sector Solution

This is an era when social problem-solving has begun to look away from Government control and responsibility and tax-based financing of social services. And the southern California experience has provided the nongovernmental model. The slow but steady growth of Planned Protective Services, Inc., which has resulted in a vast amount of practical experience in protective services application, from legal, financial, medical and psychological standpoints alike, demonstrates the viability of this private sector approach. Legally administered protective services have been made available to many persons without public fund expenditures through this program. It is expected that the amount of available services will continue to expand, both in terms of numbers and geographical scope.

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APPENDIX SEVEN

LEGAL ISSUES IN STATE MENTAL HEALTH CARE:

PROPOSALS FOR CHANGE:

GUARDIANSHIP INCLUDING THE SUGGESTED STATUTE ON GUARDIANSHIP

LEGAL ISSUES IN STATE MENTAL HEALTH CARE: PROPOSALS FOR CHANGE

GUARDIANSHIP

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GUARDIANSHIP

I. INTRODUCTION

Guardianship is generally intended to protect persons who are unable to care for themselves or manage their property. To this end, courts are authorized, under the *parens patriae* power of the state, to appoint guardians to direct the personal or financial affairs of the ward or both. This protection, however, infringes upon the liberty or personal autonomy of the ward to the extent that the guardian is empowered to make unilateral decisions. Moreover, formal adjudication of incompetence entails stigma comparable to that of civil commitment. Exercise of the guardianship authority, therefore, involves the same tension between civil-liberty interests and the desire of the state to protect the individual as exists in the area of civil commitment.[1]

Both *parens patriae* civil commitments and personal guardianships provide a form of coercive intervention to protect the personal well-being of those who are incapable of caring for their own physical needs but refuse psychiatric and other assistance. Statutory revisions only in the area of *parens patriae* civil commitments might simply result in greater use of personal guardianship. The net result would be simply to shift problems and abuses from one area to another.

This chapter, therefore, examines personal guardianship statutes and practices and gives particular attention to their relationship to the civil commitment statute previously suggested. The recommendation is made that personal guardianship be authorized for persons suffering from serious mental disorder who, as a result thereof, are unable to care for themselves and to make informed decisions about their own welfare and would suffer serious physical consequences in the absence of intervention.

In addition, property guardianships are discussed. Although no complete property guardianship statute is proposed, a few recommendations are made with respect to procedures and criteria.

II. PERSONAL GUARDIANSHIP

A. CURRENT LAWS AND PRACTICES

Problems previously discussed in the chapter on civil commitment which also appear in the guardianship area include various procedural deficiencies such as inadequate notice, the lack of provision for effective assistance of counsel, hearing procedures that do not produce careful fact-finding and undue judicial deference to the conclusions of medical personnel with respect to the conclusions of law. Substantive problems include very broad and vague criteria for the imposition of guardianships, the absence of appropriate time limits and a lack of standards for the mental health treatment of wards.[2]

A study of 1,010 guardianship and conservatorship cases in Los Angeles County during a one-year period in 1973 and 1974 illustrates the procedural deficiencies in this field.[3] The study showed that in only 7.8 percent of the cases did the proposed ward attend the judicial hearing and that in 84.2 percent of the cases the only persons present were the judge, the petitioner and the petitioner's attorney. Although medical evidence was required, this usually consisted of a physician's certificate. In only one case was an examining physician present to testify in court. In only 2.9 percent of the cases was the proposed ward represented by a lawyer or guardian *ad litem*.

Like the criteria for civil commitment, the statutory standards for guardianships frequently lack precise definition. For example, a guardian may be appointed for an "incompetent" in Illinois if, "because of insanity, mental illness, mental retardation, old age, physical incapacity, or imperfection or deterioration of mentality" the individual "is incapable of managing his person or estate. . . ."[3a] In

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[1] With regard to this tension in the civil commitment areas, see 2 MDLR 77-79.

[2] *See Alexander & Lowin, The Aged and the Need for Surrogate Management* (1972); Horstman, "Protective Services for the Elderly: The Limits of Parens Patriae," 40 *Mo. L. Rev.* 215 (1975); Pickering, "Limitations on Individual Rights in California Incompetency Proceedings," 7 *U. Cal. Davis* 457 (1974); Regan, "Protective Services for the Elderly: Commitment, Guardianship, and Alternatives," 13 *Wm. & Mary L. Rev.* 569 (1972); Comment, "North Carolina Guardianship Laws—The Need for Change," 54 *N. Car. L. Rev.* 389 (1976).

[3] Horstman, *supra* note 2, at 235-42.

[3a] *Ill. Ann. Stat.* ch. 3, §112 (Smith-Hurd Supp. 1976).

California an "incompetent person" for purposes of guardianship means "any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful and designing persons."[3b]

In applying the standards, courts have often relied on conclusory medical opinions presented by the petitioner rather than insisting upon hearings where views may be challenged and the capabilities of the proposed ward considered in light of his recent behaviors. By default, therefore, real decision-making authority has been delegated to physicians who often are not even required to appear in court.[3c]

As is the case under some civil commitment statutes, guardianship laws typically fail to provide for time limits. "Restoration to capacity is often a difficult undertaking and rarely occurs. It has been suggested that the order of appointment of guardian includes [*sic*] the phrase 'until death do you part.' "[3d] Not all wards suffer from severe chronic disabilities which warrant long-term guardianships; but state guardianship statutes typically lack provisions for prompt restoration to capacity through periodic judicial review and a requirement that prompt and adequate treatment and rehabilitative services be made available.

Some problems in the guardianship area do not exist in civil commitment. One is the "all-or-nothing" nature of many guardianship statutes. Once a guardianship is imposed, the ward loses all his legal rights to determine his place of residence, to travel freely, to engage in financial transactions—such as signing and endorsing even small checks—and to consent to medical treatment. The ward also may lose such rights as the vote, a drivers' license and the opportunity to marry.[4] Such statutes ignore the fact that a person requiring a guardian for certain specific purposes may be capable of caring for himself or exercising his rights in other areas.

Another problem unique to guardianship concerns the lack of distinction between property and personal guardianships. In some states the imposition of guardianship to provide personal or medical care for the ward results in his automatic loss of control over his financial interests. Thus guardianship may be improperly sought as a means to gain control over the ward's estate for the benefit of the guardian.[5] A further problem in mixing personal and property considerations is the differing qualifications needed for a personal guardian—one who can provide for personal care, treatment and protection—and a property guardian—one who can wisely manage property and invest funds.

Substantial injustice results from the procedural deficiencies and vagueness of guardianship laws. These include the dubious institutionalization of elderly persons by prospective heirs anxious to gain control of their assets[6] and the appointment of state officials primarily to facilitate their access to the ward's estate to reimburse the state, not to protect assets for the individual's benefit.[7]

Yet there has been very little litigation challenging guardianship statutes. In *Schneider v. Radack*,[8] however, the South Dakota guardianship statute was held unconstitutional because of various procedural deficiencies, the lack of periodic review and the vagueness of the statute's criteria.

B. SUGGESTED REFORMS

1. Procedures

Given the similarity of the issues and the stakes involved in civil commitment and personal guardianship proceedings, essentially the same procedural safeguards are warranted. Accordingly, the proposed statute provides for notice, the right to counsel, prompt, mandatory judicial proceedings and the right to jury trial.

However, some procedural aspects of personal guardianship proceedings require a different approach. The most significant variation is the requirement of multidisciplinary pre-hearing investigation and evaluation of the respondent's social and economic circumstances and mental and physical condition to consider the need for a personal guardianship and acceptable alternative arrangements, and to propose the most beneficial form of any needed guardianship. This evaluation report would be filed with the court but would not ordinarily be admissible as evidence. The proposed ward would have the opportunity to file a response to it.

2. Substantive Measures

a. Criteria

Although the purpose of any guardianship is to provide care, treatment or protection for an incapacitated person, such benign intentions cannot change the fact that guardianship represents the exercise of state power to impose unwanted measures on the individual. Moreover, a guardianship is a stigma. The reason for overriding the individual's wishes, therefore, should be manifest and the guardianship should hold out substantial benefit to the individual.

[3b] *Cal. Prob. Code* §1460 (West Supp. 1976).

[3c] *See* Horstman, *supra* note 2, at 226-30; Regan, *supra* note 2 at 603-04.

[3d] Pickering, *supra* note 2, at 472.

[4] *See, e.g.*, Horstman, *supra* note 2, at 231-32.

[5] Pickering, *supra* note 2, at 465.

[6] *Id.*

[7] *Alexander & Lewin, supra* note 2, at 67-75; Note, "The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?" 73 *Yale L.J.* 676 (1964).

[8] No. 74-50 (So. Dak., Yankton County Cir. Ct. July 30, 1974).

It should also be kept in mind that actively suicidal and self-destructive behaviors are dealt with under the proposed civil commitment law and the guardianship statute should not be redundant.

In light of those considerations, the suggested personal guardianship statute criteria require (a) a present inability, resulting from severe mental disorder, to meet one's personal requirements for nutrition, shelter, clothing, health or safety to the extent that serious physical illness, injury or disease are likely to result in the near future, (b) the lack of capacity to make reasoned decisions about proposed personal care or supervision or treatment, and (c) the availability of appropriate resources to provide needed protection or treatment. All three criteria must be satisfied before a guardianship may be ordered.

(i) Inability to Care for Oneself

The first requirement, an inability to care for oneself, is very similar to the criterion for conservatorship under California's Lanterman-Petris-Short Act.[9] The wording of the proposed statute is intended to identify the specific needs which warrant the imposition of a guardianship. The term "severe mental disorder" is defined in the same terms as it was for purposes of civil commitment.

In addition, the proposed statute demands that a finding of inability to care for oneself be supported by evidence of recent behavior that is clearly harmful or potentially dangerous. As in civil commitment, the proof of relevant behavior is to preclude intervention solely on the basis of clinical judgments regarding the individual's mental condition and expert predictions regarding future harmful behavior.

Also, this criterion calls for a finding that the specified harms will likely occur "in the near future." Here again the intention is to eliminate some of the vagueness by requiring the judge or jury to focus on the immediate consequences of imposing or not imposing guardianship.

(ii) Inability to Make Informed Decisions About Proposed Care, Supervision or Treatment

The chapter on civil commitment points out that the inability to decide about proposed care or treatment may be a constitutional precondition to court-ordered intervention.[10] That discussion, together with the discussion of the appropriate standard for judging the individual's ability to make informed decisions, seems fully applicable to personal guardianship proceedings. In essence, the approach suggested in the civil commitment area is that involuntary forms of civil intervention are not warranted, at least under the *parens patriae* doctrine, if the individual is capable of understanding the nature, purpose and potential benefit of the intervention. The reasoning is that actions taken pursuant to the *parens patriae* authority must be in the individual's best interest and, if the individual's comprehension is adequate, generally no one else should presume to make the decision for him.

The proposed personal guardianship statute incorporates the same basic standard for determining ability to make informed decisions as is contained in the suggested civil commitment law. However, it also incorporates the additional kinds of services that a personal guardianship might entail, *e.g.*, personal-care services and medical treatment for physical ailments.

(iii) Availability of Appropriate Resources

The third criterion requires that the imposition of the guardianship will surely provide beneficial services. The essential point here is that the infringement upon personal autonomy or liberty inherent in any guardianship should not occur unless there is a corresponding benefit to the individual in the form of needed, helpful services.

(b) Individualized Guardianship Orders

As previously noted, a major fault in guardianship statutes is the guardian's unnecessarily broad authority and the ward's diminished legal ability to act for himself. Some states have recently adopted more balanced statutes. For example, a Minnesota statute directs the guardian to "exercise his supervisory authority over the ward in a manner which is least restrictive of the ward's personal freedom consistent with the need for supervision and protection."[11]

As a constitutional matter, it may be argued that the personal freedom of the ward should be infringed no further than necessary to accomplish the protection of the individual.[12] As a policy matter, guardianships should foster the ward's self-reliance rather than increase dependency.

Therefore, the proposed statute requires specific findings of fact to support each grant of authority to the guardian. It also requires the formulation and adoption of a guardianship plan which specifies how the authority is to be exercised, the ward's needs met, and services financed.

(c) Durational Limits

To prevent personal guardianships' outliving their usefulness, court appointments should be for limited periods, with reappointments or renewals based on full judicial rehearings identical to the initial hearings. Also, during the guardianship term, the ward and guardian should have the right jointly to petition the court for revocation of the appointment as no longer necessary, and the ward should have the right, upon presentation of documents

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[9] *Cal. Welf. & Inst'ns Code*, §§5008(h), 5350 (West 1972).

[10] See 2 MDLR 89-93.

[11] *Minn. Stat. Ann.* §252A.11 (Cum. Supp. 1976).

[12] *See* the discussion of the least drastic means principle at 2 MDLR 114-117.

making out a *prima facie* case of restoration to capacity, to petition the court for revocation and obtain a hearing on the issue. The proposed statute incorporates these concepts.

(d) Right to Services

Each ward should have the right to adequate care, treatment and rehabilitative services to meet the guardianship mandate and to achieve self-reliance. It can be argued that due process principles require the recognition of such a right either as the *quid pro quo* for the loss of personal freedom and autonomy or as necessary to fulfill the legitimate state purposes under a guardianship law, *i.e.*, protecting the individual and restoring him to full capacity.[13]

Implementation of this right would mean, particularly in the case of a ward whose estate is inadequate to pay for needed services, public subsidy or quality public services. To minimize state and local costs, the ward's assistance program should take advantage of all available federal and insurance funding sources. To help assure full exploration of all financial resources, the guardianship plan must include a description of possible funding sources and the manner of financing services.

(e) Mental Health Treatment

To authorize a guardian to supervise mental health services, the proposed statute requires that the ward be found incapable of making his own informed decision about treatment. With respect to most forms of treatment, the guardian would be empowered to give substitute consent on behalf of the ward. When hospitalization or particularly harsh or hazardous forms of treatment are proposed, however, additional safeguards seem warranted. Therefore, the proposed statute requires Human Rights Committee review and approval of mental health inpatient care and similar forms of treatment needing committee approval under the proposed civil commitment statute, *i.e.*, electroconvulsive therapy, certain medication practices and behavior therapy involving the use of aversive stimuli or substantial deprivations.

C. RELATIONSHIP TO CIVIL COMMITMENT STATUTE AND OTHER PERSONAL GUARDIANSHIP STATUTES

The proposed civil commitment statute does not include inability to care for oneself among the grounds for commitment. It is recognized, however, that some civil commitment statutes expressly or implicitly include this standard.[14] The reasons for making such inability a ground for personal guardianship and not for civil commitment are founded purely on policy considerations. Most importantly, many people meeting this criterion have significant needs apart from mental health treatment, *e.g.*, noninstitutional housing, personal or medical care for physical ailments. Logically a guardian is better able to handle these matters than a mental health facility. In fact, the ward's condition may make no mental health treatment advisable. Under the recommended guardianship approach, the mental health services system would generally have no direct responsibilities beyond needed diagnostic and treatment services. In some cases, however, an untreatable ward might be placed in a community residence operated by mental health authorities if a structured environment or systematic observation is needed but not available elsewhere.

To the extent other existing guardianship statutes provide for personal care, treatment or supervision on the grounds of those mental disorders commonly regarded as "mental illness," it is recommended that they be repealed. The proposed personal guardianship is intended to provide the exclusive means for meeting such needs. If other guardianship statutes use "mental illness" as a criterion without the same procedural safeguards and substantive limitations, the reformist aims of the new statute will not be served. Likewise, statutes which would provide guardianship on grounds such as old age[15] should be reconsidered.

Finally, property guardianship statutes should be reassessed for strict adherence to their stated purpose. When a prospective ward is neither able to take care of his essential physical needs nor to manage substantial financial interests, separate personal and property guardianships can be established. But the need for property guardianship alone should never result in infringements upon the individual's personal freedom. Nor should the need for personal care alone result in the loss of significant control over financial or property interests unrelated to the costs of such care.

III. PROPERTY GUARDIANSHIPS

Students of property guardianship statutes have found that they generally need extensive reform in the same respects as civil commitment and personal guardianship laws.[16]

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[13] *Cf.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). It could also be argued that treatment and other services aimed at restoring the individual's capability are mandated by least drastic means principles. Under the least-drastic means argument, treatment to restore the ward to capacity may, in many cases, be viewed as a less restrictive alternative for protection of the individual than a guardianship of indefinite or unnecessarily long duration. *Cf.* Developments in the Law, "Civil Commitment of the Mentally Ill," 87 *Harv. L. Rev.* 1190, 1245-1253, (1974).

[14] *E.g.*, *Miss. Code Ann.* §41-21-61(c) (Supp. 1976), *Wash. Rev. Code Ann.* §§71.05.020(i), 71.05.280 (1975).

[15] *E.g.*, *Cal. Prob. Code* §1751 (Deering 1974); *Ill. Ann. Stat.* ch. 3, §112 (Smith-Hurd Supp. 1976); *Minn. Stat. Ann.* §525.54 (1975).

[16] *See generally Alexander & Lewin, supra* note 2; Regan, *supra* note 2; Frachter, "Toward Uniform Guardianship Legislation," 64 *Mich. L. Rev.* 983 (1966).

In recent years, however, property guardianship law reforms have been developed and reference is made to those proposals[17] in lieu of suggesting a further model herein. However, a few suggestions seem appropriate. First, it is recommended that adequate procedures and provision for effective representation of the proposed ward by counsel are essential to implement the laws.

The criteria for property guardianship should focus on the ward's recent business and financial conduct. Thus a showing of gross mismanagement and manifest financial vulnerability should be required.

Property guardianships should also be tailored to the individual's needs. If at all capable of minor transactions, a ward should retain control over a reasonable amount to spend for his own comfort or enjoyment. Likewise, if only certain parts of his estate are of concern, *e.g.*, a business enterprise or stock holdings, the guardianship should be so defined. And, if the ward needs assistance in such specific matters as maintaining adequate books, the guardianship should not infringe upon his other activities. In all cases, the guardian should be required to consult with the ward with regard to major transactions affecting his interests.

The ward should be offered every treatment, counseling or rehabilitative service that would enhance his possibility of regaining capable management of his estate. Guardianships should be for fixed periods and renewable only after judicial review. In the same vein, the ward should be able to petition for removal of the guardianship upon presenting credible evidence of regained management ability.

Very importantly, persons with an adverse financial interest, such as state officials having claims against the proposed ward, should not be eligible for appointment as guardians.

Finally, public guardianship services should be considered for persons unable to afford private guardianship fees. Too often there are no competent guardianship services for persons with small estates or fees that would soon consume the estate.[18]

IV. PUBLIC GUARDIANSHIP AGENCIES

A public guardianship agency could provide personal and property guardianship services in the absence of other willing and capable stewards. In fact, if such an agency had a core staff capable of monitoring and coordinating personal-care and treatment services—*e.g.*, social workers and small-estate managers—designating a staff member of this type of agency might often be preferable to persons traditionally named as guardians. This would be particularly true when the court determines a significant conflict exists between the interests of the prospective guardian and ward. In the cases of persons with small estates, such an agency would fill a frequently unmet need.

In addition to assuring competence and sufficient personnel to render its workload manageable, the key issue in designing such an agency is avoiding conflict of interests between the ward and agency personnel. A guardian must be free to serve as an advocate of the ward's interests. Therefore, the guardianship agency must be independent of health, mental health, welfare and other service-providing agencies. A model for such an agency was published a few years ago.[19] California has a fairly extensive system of public guardians.[20]

V. GUARDIANSHIP FEES

One of the more ironic aspects of the operation of guardianship laws is the beggaring of the ward for payment of the costs of the guardianship itself. While it is reasonable to expect the ward's estate to be responsible for the costs of maintenance, care and treatment services which benefit him, despite his non-assent, it is patently counterproductive to destroy the ward's financial means to support himself.

To avoid this, the suggested personal guardianship statute protects the ward's estate from being unduly exhausted by guardianship costs. A provision sets out guidelines for judicial determination regarding the extent to which the ward's estate may be used to pay for the guardian's fees and other services. Rather than setting out numerical standards, those guidelines call for judicial discretion. A similar provision could be included in property guardianship statutes and in statutes establishing a public guardianship agency.

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[17] *See* the Uniform Probate Code, Article V, which is reviewed by American Bar Association Committee on Problems Relating to Persons Under Disability in "Conservatorship: Present Practice and Uniform Code Compared," 5 *Real Prop., Prob. & Trust J.* 507 (1970) [hereinafter cited as *American Bar Association Committee*]; Alexander & Lowin, *supra* note 2; Frachler, *supra* note 16.

[18] *American Bar Association Committee, supra* note 17, at 509.

[19] *Legal Research and Services for the Elderly and National Council of Senior Citizens, Legislative Approaches to the Problems of the Elderly: A Handbook of Model Statutes* 153-56 (1971).

[20] *Cal. Welf. & Inst'ns Code* §8000 *et seq.* (West 1972).

SUGGESTED STATUTE ON GUARDIANSHIP

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SUGGESTED STATUTE ON GUARDIANSHIP

§1. Definitions

For purposes of this act, the definitions set forth in [section 1 of the statute on civil commitment] shall apply, *provided* that all references to the "respondent" shall be deemed to be references to "ward" or "proposed ward"; and the following definitions shall also apply:

"Gravely disabled" means unable to meet essential requirements for one's physical health or safety as a result of severe mental disorder.

"Guardianship evaluation" means an interdisciplinary evaluation of a proposed ward's physical and mental health, living situation, and legal and financial affairs, available sources of assistance to meet his needs for medical and personal care, the proposed ward's willingness voluntarily to accept services essential to his physical well-being, and his ability to make informed decisions about such services and about treatment.

"Guardianship evaluation service" means that agency or organization designated by the [county or other appropriate political subdivision] to accomplish guardianship evaluations.

"Guardianship screening investigation" means the investigation and review by the Mental Health Review Officer of facts which have been alleged to warrant a personal guardianship, including interviews with the person making such allegations, any other significant witnesses who can readily be contacted for interview and the proposed ward. The purposes of any such interview with the respondent shall be to explain the situation to him and to provide him the opportunity to explain or rebut the allegations in the petition. If, during the interview with the proposed ward it seems advisable to the interviewer to do so, he may attempt to persuade the proposed ward to receive on a voluntary basis any evaluation, care, treatment or other services which may obviate the possible need for personal guardianship. Any witnesses identified by the respondent, or whose identity otherwise becomes known, who are reasonably accessible and purportedly have information which would contradict, rebut or discredit that provided by the petitioner shall also be interviewed.

"Personal care services" means hygiene, homemaking, nutrition and similar services necessary to protect a ward from serious injury, illness or disease.

"Lack of capacity to make informed decisions about care and treatment services" means the inability, by reason of mental condition, to achieve a rudimentary understanding, after conscientious efforts at explanation, of the purpose, nature or possible significant benefits of care and treatment services to be provided under personal guardianship; *provided that* a person shall be deemed incapable of understanding such purpose if, due to impaired mental ability to perceive reality, he cannot realize that his recent behavior has caused, or has created a clear and substantial risk of serious physical injury, illness or disease to himself; and *provided further* that a person shall be deemed to lack the capacity to make informed decisions about care and treatment services if his reason for refusing the same is expressly based on either the belief that he is unworthy of assistance or the desire to harm or punish himself.

"Unable to meet essential requirements for one's physical health or safety" means unable, through one's own efforts and through acceptance of assistance from family, friends and other available private and public sources, to meet one's needs for medical care, nutrition, clothing, shelter, hygiene and safety so that, in the absence of personal guardianship, serious physical injury, illness or disease is likely to occur in the near future. For purposes of this act, any such inability must be evidenced by recent behaviors causing such harm or creating a clear and substantial risk thereof and at least one incidence of such behavior must have occurred within twenty days of the filing of the petition for personal guardianship. The requirement of the preceding sentence shall not apply in the case of a petition for renewal of personal guardianship.

§2. Petition

(a) A petition for personal guardianship may be executed by any adult person and must be filed with the Mental Health Review Officer for the county in which the proposed ward resides or is present. The petition must:

(i) state the name, age, present address of the petitioner and his relationship to the proposed ward;

(ii) state the name, age, county of residence and present address of the proposed ward;

(iii) allege that petitioner believes the proposed ward to be gravely disabled and specify the factual information on which such belief is based and the names and addresses of all persons known to the petitioner who have knowledge of such facts through personal observations; and

(iv) request the appointment of a guardian.

(b) The petition, or amendment thereto, may also nominate a guardian and include a request for temporary guardianship in order to meet immediate, essential needs of the proposed ward which would otherwise create a clear and substantial risk of death, or serious physical injury, illness or disease during the pendency of the guardianship petition. A request for temporary guardianship must specify facts which cause the petitioner to believe that a temporary guardian is necessary.

§3. Notice of Rights

(a) Upon receipt of a petition for guardianship, the Mental Health Review Officer shall promptly:

(i) interview the proposed ward as part of the guardianship screening investigation;

(ii) explain to the proposed ward, at the beginning of the interview, the purpose of the interview and possible consequences of the proceedings;

(iii) serve a copy of the petition on the proposed ward;

(iv) explain and provide to the proposed ward a written statement of the following:

(A) that he has a right to communicate immediately with an attorney, a physician, and a mental health professional;

(B) that a Mental Health Advocacy Service attorney, whose name, address and telephone number are to be included in the statement, has been designated to advise and represent him prior to and at any judicial hearings, and that the attorney may arrange for an examination and consultation with a physician and mental health professional; and

(C) that he may, instead, employ an attorney, physician and mental examiner of his own choosing at his own expense; and

(v) offer assistance to the proposed ward in contacting an attorney.

(b) Designation of Mental Health Advocacy Service attorneys to represent proposed wards shall be accomplished in the same manner as provided at [subsection 2(g) of the proposed statute on civil commitment].

§4. Evaluation

(a) Upon receipt of a petition for guardianship, the Mental Health Review Officer shall cause a screening investigation to be completed by the end of the third day after receipt of said petition. If upon completion of such investigation he finds reasonable grounds to believe that the proposed ward is gravely disabled, he shall direct the guardianship evaluation service to conduct a guardianship evaluation. That evaluation shall be completed within fourteen days of the date of the filing of the petition.

(b) The guardianship evaluation shall be conducted with minimum interference with the proposed ward's activities. Any interviews and examinations shall take place in the proposed ward's usual residence unless the proposed ward does not object to being examined or interviewed in a medical or mental health facility or, with the approval of the Mental Health Review Officer, it is deemed necessary to conduct certain interviews or examinations in a medical or mental health facility. In cases of such necessity, the Mental Health Review Officer may cause the respondent to be taken into custody and conveyed directly to and from a medical or mental health facility for purposes of examination of interview during the normal business hours of the facility.

(c) Persons conducting guardianship evaluations shall in all cases include at least (i) a psychiatrist, or a physician and a [licensed or certified] psychologist with a doctoral degree in an accredited clinical program, (ii) an attorney, and (iii) a social worker with a graduate degree in social work with field training in a psychiatric facility from an accredited program.

§5. Evaluation Report

(a) An evaluation report shall be filed in court, together with the petition and proof of service of the report upon the proposed ward and his attorney and the petitioner, within fourteen calendar days of the date on which the petition was filed with the Mental Health Review Officer.

(b) The evaluation report shall

(i) describe medical tests and examinations performed with regard to the proposed ward's physical condition and state and interpret the results thereof;

(ii) describe the proposed ward's mental and emotional condition and specify the data on which such description is based;

(iii) specify the particular services necessary to protect the proposed ward from serious physical injury, illness or disease in the near future;

(iv) specify whether the proposed ward is in need of mental health treatment and whether there is a substantial probability that available treatment will significantly improve his mental condition;

(v) describe the terms and manner in which necessary services were explained to the proposed ward and state whether the proposed ward wishes to accept or refuse such services, what his understanding is of the nature, purpose and benefits of such services, and what his express reasons for any refusal are;

(vi) specify the financial resources of the proposed ward and his entitlements to insurance benefits and publicly operated or sponsored health, mental health and welfare assistance which might be employed in the provision of services to him;

(vii) describe the alternative arrangements to personal guardianship and to hospitalization or other supervised residence which were explored and, if relevant, why they are not considered to be feasible or in the proposed ward's best interest; and

(viii) if personal guardianship is recommended, propose a guardianship plan which includes recommendations as to:

(A) the proposed guardian and any possible alternatives;

(B) the services necessary and available to protect the proposed ward from serious injury, illness or disease and the means by which they may be financed;

(C) the specific, least restrictive authorities needed by the guardian to provide services necessary to protect the proposed ward from serious illness, injury or disease;

(D) the specific authorities needed by the guardian to control the assets and other financial interests of the proposed ward in order to pay for such necessary services; and

(E) the exemption of part or all of the proposed ward's estate and income from the fees and other costs incurred through guardianship so as to protect the proposed ward from hardship and his ability to sustain himself independent of governmental or other forms of assistance after the guardianship expires or is revoked.

(c) The petitioner and proposed ward shall have five judicial days to file responses to the evaluation report.

§6. Evaluations: Right to Remain Silent and Silent Observers; Proposed Ward's Experts

(a) A proposed ward shall have the right not to respond to any questions in the course of examinations and evaluations for the purpose of determining whether he meets the criteria for temporary or personal guardianship, provided that, after full explanation of this section 6, he may be required to submit to interviews for the purpose of ascertaining whether he lacks the capacity to make informed decisions about care and treatment services and his failure to respond to questions relevant to that issue may be introduced as evidence of a lack of such capacity.

(b) Statements of proposed wards in the course of evaluations, examinations and treatment pursuant to this act shall be deemed privileged and confidential and, therefore, not admissible without the respondent's consent in any other civil or criminal proceedings other than proceedings pursuant to this act and [the statute on civil commitment]. Proposed wards shall at all times have the right to refuse to answer questions when the answers may tend to incriminate them.

(c) During any evaluative interview or testing conducted under this act, the respondent shall have the right to be accompanied by an attorney or other Mental Health Advocacy Service member, or any attorney or mental health professional of his own choosing; and the state's attorney may also attend. Said accompanying persons and state's attorney shall be present as observers only and shall not participate in such interviews or testing through the rendering of advice, making suggestions or other actions which would impede the conduct of the interview or test.

(d) The court shall, if requested by an indigent ward or proposed ward in preparation for and in connection with any hearing provided in this act, appoint a reasonably available psychiatrist, psychologist or physician designated by the ward or proposed ward to examine him and testify on his behalf. Requests for such appointments may be filed in court at any reasonable time prior to such hearings. Reasonable fees and expenses for such expert examiner shall be borne by the [court/county].

§7. Expert Testimony

(a) Psychiatrists and psychologists testifying at hearings conducted pursuant to this act may, if appropriately qualified, give testimony:

(i) describing the present mental functioning of a ward or proposed ward whom the witness has personally examined;

(ii) stating an opinion as to what the prospects are that proposed and available treatment will improve the mental condition of the ward or proposed ward; and

(iii) stating an opinion whether the ward or proposed ward has a severe mental disorder, as defined in section 1 of this act; *provided that* any witness so testifying shall be required to provide a detailed explanation as to how any such descriptions and opinions were reached and a specification of all behaviors and other factual information on which such descriptions and opinions are based.

(b) Such witnesses shall not be permitted to give opinion testimony stating the applicable diagnostic category unless the ward or proposed ward raises the issue through cross-examination or the presentation of evidence.

§8. Psychotropic Medication Influencing Wards or Proposed Wards at Judicial Hearings

(a) It shall be the responsibility of the facility providing treatment to a ward or proposed ward to assure that he is not, without his consent, given any psychotropic medication on the day preceding, and on the day of, any judicial hearing under this act, nor given any medication with an expected effective duration of action extending into such days.

(b) Notwithstanding the provisions of subsection (a) of this section, the ward or proposed ward may be subjected to the influence of psychotropic medication on the day preceding and on the day of a judicial hearing upon the written order of a treatment facility physician who finds it necessary to protect the ward or proposed ward or others from serious bodily harm, and, if he is to be kept under medication for a period exceeding twenty-four hours, the procedures described at [subsection 5(d) of the proposed statute on civil commitment] are followed.

(c) If, for any reason, the treating facility fails to comply with subsection (a) of this section 8, the ward or proposed ward shall be entitled to a postponement until compliance is attained.

(d) The ward or proposed ward shall be entitled, upon his request at any judicial hearing conducted pursuant to this act while he is under the influence of medication, to have the court and the jury, if any, informed regarding such medication and its effect on his actions, demeanor and participation at the hearing.

§9. Hearing

(a) Upon the expiration of the period provided at subsection 5(c) of this act for the filing of responses to the evaluation report, the court shall either dismiss the petition on the grounds that no substantial grounds for a personal guardianship appear or order the matter to be scheduled for a hearing.

(b) A hearing pursuant to this section 9 shall be conducted within thirty-five days of the filing of the petition.

(c) At the hearing the proposed ward shall have the following rights:

(i) to be represented by a staff attorney from the Mental Health Advocacy Service or, if he prefers, an attorney of his own choosing;

(ii) to present evidence on his own behalf;

(iii) to cross-examine witnesses who testify against him;

(iv) to remain silent;

(v) to have the hearing open or closed to the public as he elects;

(vi) to be present unless the court determines that his conduct in the courtroom is so disruptive that the proceedings cannot reasonably continue with him present; and

(vii) to be proceeded against according to the rules of evidence applicable to civil judicial proceedings; and

(viii) to a trial by jury on the issue of whether he is gravely disabled.

(d) The hearing shall in all respects be in accord with constitutional guarantees of due process and the burden of proof by clear and convincing evidence shall be upon the petitioner.

(e) If the proposed ward is found by the jury or, if a jury trial has been waived, by the court to be

gravely disabled, the court shall promptly resume the hearing without a jury, for the purpose of determining any disputes regarding

(i) content of the guardianship plan;

(ii) who should be named guardian;

(iii) the availability of services necessary to protect the proposed ward from serious injury, illness or disease;

(iv) whether the proposed ward lacks the capacity to make informed decisions about care and treatment services which the guardian would provide; and

(v) what assets and sources of income of the proposed ward should be exempt from charges to pay the costs and fees involved in the guardianship.

(f) Petitioners, temporary and personal guardians and the guardianship evaluation service shall be represented at all hearings under this act by a state's attorney, *provided that* the state's attorney's office may agree with the petitioner or temporary or personal guardian for representation to be provided by another person licensed to practice law in this state.

§10. Guardianship Order

(a) If, pursuant to section 9 of this act, it is determined that the proposed ward is gravely disabled, and lacks the capacity to make informed decisions about proposed care and treatment services and that necessary services are available to protect the proposed ward from serious injury, illness or disease, the court shall enter an order which

(i) names the guardian and establishes a guardian-ward relationship;

(ii) makes findings of fact on the basis of clear and convincing evidence which support each grant of authority to the guardian;

(iii) exempts from charges for the costs and fees of the guardianship so much of the estate and income of the ward as is necessary to prevent hardship and to ensure that the guardianship will not cause the ward to become financially dependent upon any governmental agencies or private agencies or persons; and

(iv) adopts a guardianship plan.

(b) The guardianship plan shall specify those authorities which the guardian will have with regard to

(i) medical care for the ward's physical condition;

(ii) mental health treatment which the guardian may deem to be in the ward's best interests; *provided that* [sections 39 and 40 of the proposed statute on civil commitment] shall govern with respect to those forms of treatment for which Human Rights Committee approval is required in the case of civilly committed persons;

(iii) deciding where the ward shall live and placing the ward in a hospital or other supervised residential facility; *provided that* the ward shall not be placed in a hospital or other supervised residential facility for any period exceeding ten days unless the Human Rights Committee, following a review hearing conforming to [section 39 of the proposed statute on civil commitment] approves such placement as being in the ward's best interest and in accordance with least drastic means principles;

(iv) personal care services necessary for the physical welfare of the ward;

(v) application for health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health or related services provided to the ward;

(vi) physical and mental examinations as necessary to determine the ward's medical and mental health treatment needs; and

(vii) the estate and income of the ward, consistent with subsection (a)(iii) of this section 10, necessary to pay for the cost of services which the guardian is authorized to obtain on behalf of the ward.

(b) The guardianship plan shall be no more restrictive upon the liberty of the ward than is reasonably necessary to protect the ward from serious physical injury, illness or disease and to provide him with medical care and mental health treatment for his physical and mental health.

(c) An initial guardianship order shall be for no longer than six months and any renewals thereof pursuant to section 13 of this act shall be for no longer than one year.

§11. Temporary Guardianship

(a) If during the pendency of an initial petition for guardianship it appears that services are needed immediately to prevent serious injury, illness, or disease, the petitioner or guardianship evaluation service may request the appointment of a temporary guardian to authorize such ser-

vices. Such request shall state the reasons and factual basis for the request and shall immediately be filed with the court and copies immediately served on the proposed ward and his attorney.

A hearing shall be conducted within seventy-two hours of the filing.

(b) At the temporary guardianship hearing, the proposed ward shall have the rights set forth at subsections 9(c)(i) through (vii) of this act.

(c) The burden of proof at the hearing shall be by a preponderance of the evidence and shall be upon the party requesting that a temporary guardian be appointed.

(d) If the court determines that a temporary guardian should be appointed, it shall make the appointment and grant authorities that are least restrictive upon the liberty of the proposed ward consistent with ensuring that emergency services necessary to protect the proposed ward from serious injury, illness or disease.

(e) The temporary guardianship shall expire at the time of the appointment of a guardian under section 7 of this act or upon the dismissal of the petition for guardianship.

(f) If emergency life-saving services are needed during the pendency of a request for temporary guardianship, the Mental Health Review Officer may authorize them if, after assessing the situation and, if possible, providing the proposed ward and his attorney the opportunity to present a rebuttal, he determines that the services are necessary and that a delay until the temporary guardianship hearing would entail a life-threatening risk to the proposed ward.

§12. Revocation and Modification of Guardianship Orders

(a) At any time the guardian and ward may jointly petition the court for revocation or modification of the guardianship. A copy of such petition must be served upon the guardianship evaluation service, which shall have ten days to file a response thereto, together with proof of service thereof upon the guardian, the ward and the ward's attorney. If the service files a response not objecting to the modification or revocation or fails to file a response within ten days, the court shall order the modification or revocation. Any response by the service objecting to the proposed modification or revocation, or any part thereof, shall specify the reasons and factual bases for objection. Upon receipt of such an objection from the service, the court shall determine whether it raises a substantial issue as to whether the modification or revocation is in the ward's best interest. If the court determines that no substantial issue has been raised, it shall order the modification or revocation. If, however, the court determines that the service response raises a substantial issue, it shall immediately cause to be served upon the service, the guardian, the ward and the ward's attorney notice of a hearing to be conducted within five to fifteen judicial days from the date of such notice.

(b) If at any time the guardian deems it necessary to seek a modification of the guardianship order to increase his authorities, he may file with the court, together with proof of service upon the guardianship evaluation service, the ward and the ward's attorney a petition specifying the requested modification and the supporting reasons and factual bases. The service and the ward shall have five judicial days to file a response thereto, together with proof of service upon the guardian. In the absence of a response, the court may order any requested modification which it finds supported by the petition. If, upon receipt of a response, the court finds that there is clearly no substantial basis for a modification, it may dismiss the petition. Otherwise, the court shall cause to be served upon the service, the guardian, the ward and the ward's attorney notice of a hearing to be conducted within five to fifteen judicial days from the date of such notice. The hearing shall be in accordance with subsection 9(c) of this act except that the right to a jury shall not apply and the burden of proof by clear and convincing evidence shall be upon the guardian.

(c) The ward may file a petition for modification or revocation together with proof of service upon the guardian and guardianship evaluation service, no more than once during any ninety-day period and no later than sixty days prior to the expiration date of the guardianship order. Such petition must state the supporting reasons and factual bases and shall include as attachments summaries of the expected testimony of persons who testify for the ward. The service and guardian shall have ten judicial days to file a response, together with proof of service upon the ward, the ward's attorney, and the service or guardian. Thereafter, the court shall determine whether any substantial disputed factual issues exist and, if none exists, the court may dismiss the petition, or modify or revoke the guardianship, as warranted. If such issues do exist, the court shall cause to be served upon the service, the guardian, the ward and the ward's attorney notice of a hearing to be conducted within five to fifteen days after such notice. At the hearing, the ward shall have the burden of going forward with the evidence, but, if the ward presents a *prima facie* case for modification or revocation of the guardianship, the burden

of proof by clear and convincing evidence shall be upon the party or parties opposing the modification or revocation. Otherwise, the hearing shall be in accordance with subsection 9(c) of this act except the right to a jury shall not apply.

§13. Expiration and Renewal of Guardianship Orders

(a) An initial guardianship order shall expire six months from the date of the order unless the guardian files a petition for renewal, together with proof of service upon the guardianship evaluation service, the ward and the ward's attorney, twenty or more days prior to the expiration date.

(b) If a renewal petition is filed in a timely manner, the then current period of guardianship shall not expire until the court takes final action thereon. Upon receipt of a petition for renewal, the court shall direct a guardianship evaluation and report to be accomplished in accordance with subsections 4(b) and (c) and 5(b) and (c) of this act. The evaluation report shall be filed, together with proof of service thereof upon the guardian, the ward and his attorney within fourteen days of the date on which the renewal petition was filed with the court. Hearings on renewal petitions shall comply with section 9 of this act.

(c) The first renewal of guardianship shall be for a period of one year from the date on which the initial order would have expired in the absence of a timely petition for renewal. All subsequent renewal periods shall be for no longer than one year from the date on which the preceding renewal would have expired in the absence of a timely petition for renewal.

(d) Second and subsequent petitions for renewal must be filed twenty or more days prior to the expiration date of the then current period of guardianship.

§14. Emergency Powers

(a) Notwithstanding the limits of any temporary guardianship or guardianship order, temporary guardians and guardians shall at all times have the right to authorize the provision of emergency life-saving services. This shall include the power to authorize hospitalization without advance court approval.

(b) In the event of the exercise of emergency powers under subsection (a) of this section 14, the temporary guardian or guardian shall provide immediate notice thereof to the court, the ward and the ward's attorney. If hospitalization is involved, the court shall, upon receipt of such notice, schedule a hearing on the continuing need for and appropriateness of hospitalization within seventy-two hours unless it clearly appears that the ward is to be discharged from the hospital within seven days of admission.

§15. Right to Services

(a) Each ward shall have the right to prompt and adequate personal and medical care, treatment and rehabilitative services for the purposes both of meeting his needs for protection from physical injury, illness or disease and restoring him to the abilities to care for himself and to make his own informed decisions about care and treatment services.

(b) In the event that the guardian is unable to provide such services out of funds available from the ward's estate and income and other private and governmental benefits to which the ward is entitled, the guardian or ward may petition the court for an order requiring the [state and/or county] to provide such funds as are necessary to provide services that would implement the ward's right to services. Such petition shall provide complete details with regard to funds and other benefits at the guardian's disposal and justification for the necessity and appropriateness of the services for which finances are unavailable. Upon receipt of the petition, the court shall schedule the matter for a hearing within twenty days and cause the petition and notice of the hearing to be served upon the guardian, the ward and the ward's attorney, the guardianship evaluation service and [appropriate state and/or local officials]. In preparation for the hearing, the guardianship evaluation service and [appropriate state and/or local officials] shall have access to relevant care and treatment records of the ward.

(c) At the hearing conducted pursuant to subsection (b) of this section 15, the burden of proof by a preponderance of the evidence shall be upon the petitioning party. Otherwise the hearing shall be in accordance with subsection 9 of this act except that the right to a jury shall not apply.

(d) At the conclusion of the hearing, the court

shall enter an order dismissing the petition or requiring the [state and/or county] to provide the necessary funds for any services to which the ward has a right under subsection (a) of this section 15 and as to which there is at least a substantial probability of significant benefit to the ward.

§16. Persons Eligible for Appointment as Guardians; Priorities

(a) The court may appoint an individual or [a protective services or public guardianship agency]. No person providing substantial services to the proposed ward in a professional or business capacity and no creditor of the proposed ward may be appointed. Also, no person may be appointed who is in the employ of any person, agency or corporation providing service to the proposed ward in a professional or business capacity or likely to provide the same during the guardianship period, except that a person so employed may be appointed if he is the spouse, adult child, parent or sibling of the proposed ward and the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the proposed ward's best interest. The following priorities shall guide the court in the selection of a guardian:

(i) any person [or agency] nominated by the proposed ward prior to the filing of the guardianship petition if at the time of the nomination the proposed ward was sixteen or more years of age and had the capacity to make a reasonably intelligent choice;

(ii) the spouse of the proposed ward;

(iii) an adult child or parent of the proposed ward;

(iv) any relative of the proposed ward with whom he has resided for more than six months during the year prior to the filing of the petition;

(v) any other relative or friend who has evidenced a sincere, long-standing interest in the welfare of the proposed ward;

(vi) a protective services or public guardianship agency.

(b) The foregoing priorities shall not be binding and the court shall select that person [or agency] who is best qualified and willing to serve. The court shall also give due consideration to any nomination by persons in priorities (ii), and (iii) of this section 16 and to any nomination in the will of a deceased parent of the proposed ward.

ADMINISTRATIVE PROVISIONS

For guidance in the drafting of various administrative provisions, *e.g.*, death, resignation or removal of the guardian, sureties and accounting, reference is made to the *Uniform Probate Code*. In adapting provisions of the *Code* for purposes of personal guardianship, however, care should be taken to note that the personal guardian's authority over the estate and income of the ward is limited to include only that which is necessary to meet the care and treatment needs of the ward. See pp. 444-447, *supra*.

APPENDIX EIGHT

GUARDIANSHIP QUESTIONNAIRE

PROPOSED FEDERAL REGULATIONS

Appendix Eight. Guardianship Questionnaire
by Ray Funk
November 30, 1978

One of the difficulties that the legislature apparently had last year with the passage of HB 63 was the last minute addition of sections providing for public guardianship. The concern centered on the extent of the need for a public guardian. Those asked last year were unable to even begin to suggest to the legislature any accurate estimate of how many people are in need of a public guardian. All they could do was guess. In an effort to provide more accurate impression of the extent of this problem, an effort has been made to at least pinpoint a segment of those in need of a public guardian. This writer, with the assistance of Ron Rich of the Alaska State Hospital Association, surveyed long-term health care providers in the state to determine how many of them have or need public guardians. This is not to suggest that these are the only people who need public guardians. No doubt there are others who aren't in such facilities. However, that group was one on which data was readily accessible and allows a more accurate estimate of the entire population.

The actual questionnaires are all attached as are letters from A. Haige from Careage North and B. Tennant which further describe the problem in Alaska. Harborview is included in the survey although instead of filling out a questionnaire, the data was acquired through the attached list that gives the age and guardianship status of all patients at Harborview from which the names of the patients have been removed.

The results of the study reflect that at present there are 39 people in need of a public guardian and that at present 21 people are already under the care of some form of "public" guardian, primarily under the guardianship of Dolores Wilks, the Public Administrator in Anchorage. This suggests that the Office of Public Guardian might have an initial case load of at least 60 wards which, combined with its other responsibilities, should adequately justify state expenditure in this area.

The acuteness of the problem for long-term health care providers is suggested by recent proposed federal regulations that, if put into effect, will require that long-term health providers, in order to receive medicare and medicaid payments for patients in need of guardians, petition the court for appointment of a guardian. If this regulation is enacted, the courts will be flooded with petitions and forced to take action.

RESULTS OF GUARDIANSHIP QUESTIONNAIRE

Facility	# of patients	# with guardian	# of these with public or disinterested guardian	# without guardians	Of these, how many need guardians	And of these, how many need public guardians
Harborview	90	37	11	53	?	?
Carriage North	73	8	2	65	27	6
Hope Cottages	126	3	2	123	12	6
Home South Peninsula	1	1	0	0	0	0
Ketchikan Island View Manor	43	43	0	0	0	0
Valley	6	2	0	4	1	1
Wrangell General	14	4	4	10	7	5
Wesleyan	61	2	2	59	56	21
Kodiak	-	-	-	-	-	-
TOTALS	414	100	21	314	103	39

AGE	GUARDIAN STATUS
15	Bertha Akitalinok-Legal Guardian
14	No Guardian
16	No Guardian
24	Parents to be appointed 2/17/78? Pettyjohn, Ad Litem
19	Michael Beck-Legal Guardian
27	Pettyjohn, Ad Litem
26	Martha Benzel-Legal Guardian
19	Wayne Bouwens-Legal Guardian (From Records)
22	Dolores Wilks-Legal Guardian
17	No Guardian
30	Marion McCoy-Legal Guardian
21	No Guardian
17	No Guardian
18	No Guardian
27	Anna Britta Flerchinger-Leg. Guard.
26	Pettyjohn, Ad Litem
34	Pettyjohn, Ad Litem?
17	No Guardian
16	No Guardian
18	No Guardian
13	No Guardian
43	Thomas Griese-Legal Guardian
19	No Guardian
22	Dolores Hawkins-Legal Guardian
21	No Guardian

AGE	GUARDIAN STATUS
17	Custody F&C Services ?
28	Dolores Wilks, Guardian
18	No Guardian
23	Pettyjohn, Ad Litem
1 yr. 4 mos.	No Guardian
25	Pettyjohn-Guardian Ad Litem
28	Dolores Wilks, Guardian
20	No Guardian
27	Dolores Wilks-Guardian
17	?
21	No Guardian
17	No Guardian
22	Dolores Wilks-Guardian
13	No Guardian
22	Gil Johnson-Guardian
25	Pettyjohn, Ad Litem
12	No Guardian
25	Charles R. Linsacum-Guardian
24	No Guardian
26	Dolores Wilks-Guardian
16	No Guardian
23	Pettyjohn, Ad Litem
30	Pettyjohn, Ad Litem
25	Pettyjohn, Ad Litem
16	No Guardian
14	No Guardian

AGE	GUARDIAN STATUS
19	No Guardian
21	No Guardian
19	No Guardian
29	Pettyjohn, Ad Litem
19	No Guardian
8 mos.	No Guardian
16	No Guardian
18	No Guardian
15	No Guardian
11	No Guardian
20	No Guardian
30	Victor Paal-Guardian
17	No Guardian
20	No Guardian
24	Pettyjohn-Ad Litem
11	No Guardian
16	No Guardian
25	Dolores Wilks-Guardian
23	Dolores Wilks-Guardian
23	No Guardian
16	No Guardian
17	No Guardian
22	Cyril Barner-Guardian
17	No Guardian
17	No Guardian
22	Maeve Ryan-Guardian

AGE	GUARDIAN STATUS
19	No Guardian
27	Dolores Wilks-Guardian
16	No Guardian
19	No Guardian
24	Michael Swetzof-Guardian
17	No Guardian
16	No Guardian
23	John Tower-Guardian
15	No Guardian
13	No Guardian
22	Dolores Wilks-Guardian
25	Dolores Wilks-Guardian
33	Pettyjohn-Ad Litem

GUARDIANSHIP QUESTIONNAIRE

OCTOBER 1978 Facility Name: Cove Manor

1) Total patients in your facility: 11/1/78 - 73 patients

2) How many have guardians?: 8
and/or conservators?

3) How many of those guardians are public bodies?, i.e., public administrator or court system or are by court appointment, disinterested attorneys:

1 - public administrator

1 - bank trust fund officer

the remaining patients have parents, sister, or close friend as guardian

4) How many are without guardians? 65

5) Of that group (#4), how many need guardians? 27

6) And of those needing guardians how many are without relatives or friends able to fill that role?

6 are without friends or relatives to fill that role.

In addition; please document the problems the LTC provider has had in finding guardians or getting assistance from the Attorney General's office in finding guardians. Please attach letters or reports if possible.

① family or friends unwilling to take on the responsibility

② family or friends living out of state and thinking that they are too far away to make appropriate decisions

③ question has been raised about the appropriateness of utilizing the A. G.'s office vs. the "private bar."

④ In general, no definite guidelines as to proper procedure for obtaining a guardian.

Please add your suggestions on what role a good guardian plays in regards to their residents and what role a public guardian could play in regards to your institution.

Guardian should check on a patient monthly to determine needs evaluate acceptance of placement in the facility. Preferably the guardian should visit not contact patient over the telephone. Guardian should become familiar with the facility and the key staff members. Of course, the above would depend on the condition of the patient and the location of the guardian.

Return this questionnaire to Ron Rich, ASHA.

→ over

Guardian would need to be willing to ask questions! Often family members may notice that something is bothering the patient but unless they speak up and communicate with staff, the problem may go unresolved. A good guardian serves as a patient advocate.

A public guardian could be helpful in giving permission for surgery, assist in making decisions about transfer, assist in making decisions about necessary expenditures for clothes, equipment personal items, etc. A public guardian would need to establish a good rapport with at least one staff member who could serve as the contact person. A public guardian should be located in the same city as the facility to allow easy access to the patient, staff, business records, medical records, physician, etc.

Angie Hage, Social Worker
Carriage North
Fairbanks

11-6-10

GUARDIANSHIP QUESTIONNAIRE

OCTOBER 1978 Facility Name: Hopo Cottage

1) Total patients in your facility: 126

2) How many have guardians?: 3

3) How many of those guardians are public bodies?, i.e., public administrator or court system or are by court appointment, disinterested attorneys: 2

4) How many are without guardians? 123

5) Of that group (#4), how many need guardians? 12

6) And of those needing guardians how many are without relatives or friends able to fill that role? 6

In addition; please document the problems the LTC provider has had in finding guardians or getting assistance from the Attorney General's office in finding guardians. Please attach letters or reports if possible.

A.G. (Bruce Lenant) has informed us that if a relative is not available to serve as a guardian, then it is impossible to have one appointed.

Please add your suggestions on what role a good guardian plays in regards to their residents and what role a public guardian could play in regards to your institution.

1.) advocate for resident needs
2) quality control of programs
3) assist in financial management
4) sign appropriate releases on clients behalf

Return this questionnaire to Ron Rich, ASHA.

Ron,

I hope this helps and if we can do any thing else let Roger or I know.

Lloyd

Homer

GUARDIANSHIP QUESTIONNAIRE

OCTOBER 1978 Facility Name: South Penin... LTC

1) Total patients in your facility: 1

2) How many have guardians?: 1

3) How many of those guardians are public bodies?; i.e., public administrator or court system or are by court appointment, disinterested attorneys: none

4) How many are without guardians? 0

5) Of that group (#4), how many need guardians? _____

6) And of those needing guardians how many are without relatives or friends able to fill that role? 0

In addition; please document the problems the LTC provider has had in finding guardians or getting assistance from the Attorney General's office in finding guardians. Please attach letters or reports if possible.

Please add your suggestions on what role a good guardian plays in regards to their residents and what role a public guardian could play in regards to your institution.

(1) To help meet the needs of the Patient.
(2) To become enough involved they can anticipate needs.

Return this questionnaire to Ron Rich, ASHA.

Ketchikan

GUARDIANSHIP QUESTIONNAIRE

OCTOBER 1978 Facility Name: *Island View Manor*

1) Total patients in your facility: *43*

2) How many have guardians?: *43*

3) How many of those guardians are public bodies?, i.e., public administrator or court system or are by court appointment, disinterested attorneys:

None

4) How many are without guardians? *None*

5) Of that group (#4), how many need guardians?

6) And of those needing guardians how many are without relatives or friends able to fill that role?

In addition; please document the problems the LTC provider has had in finding guardians or getting assistance from the Attorney General's office in finding guardians. Please attach letters or reports if possible.

N/A at this time

Please add your suggestions on what role a good guardian plays in regards to their residents and what role a public guardian could play in regards to your institution.

Good guardian has a general interest in her or his charge's welfare, both spiritually and materially; shows this by action. Public guardian could act as an ombudsman, only if needed.

Return this questionnaire to Ron Rich, ASHA.

GUARDIANSHIP QUESTIONNAIRE

OCTOBER 1978 Facility Name: Valley

1) Total patients in your facility: 6

2) How many have guardians?: ~~6~~ 2

3) How many of those guardians are public bodies?, i.e., public administrator or court system or are by court appointment, disinterested attorneys: None.

4) How many are without guardians? None

5) Of that group (#4), how many need guardians? One

6) And of those needing guardians how many are without relatives or friends able to fill that role? One

In addition; please document the problems the LTC provider has had in finding guardians or getting assistance from the Attorney General's office in finding guardians. Please attach letters or reports if possible.

We have not had a problem yet. Probably because our patient turnover has been minimal.

Please add your suggestions on what role a good guardian plays in regards to their residents and what role a public guardian could play in regards to your institution.

Return this questionnaire to Ron Rich, ASHA.

GUARDIANSHIP QUESTIONNAIRE

OCTOBER 1978 Facility Name: WRANGELL GENERAL HOSPITAL AND LONG TERM CARE FACILITY

1) Total patients in your facility: 14

2) How many have guardians?: 4

3) How many of those guardians are public bodies?, i.e., public administrator or court system or are by court appointment, disinterested attorneys: 2 ARE DISINTERESTED ATTORNEYS

THE ADMINISTRATOR OF OUR FACILITY IS GUARDIAN FOR 2

4) How many are without guardians? 10

5) Of that group (#4), how many need guardians? 7

6) And of those needing guardians how many are without relatives or friends able to fill that role? 5

In addition; please document the problems the LTC provider has had in finding guardians or getting assistance from the Attorney General's office in finding guardians. Please attach letters or reports if possible.

THERE IS VIRTUALLY NO-ONE WILLING TO TAKE THE RESPONSIBILITY AND WE RECEIVE NO HELP FROM THE ATTORNEY GENERAL'S OFFICE IN FINDING GUARDIANS.

Please add your suggestions on what role a good guardian plays in regards to their residents and what role a public guardian could play in regards to your institution.

BASICALLY, THE KIND OF GUARDIANSHIP OUR RESIDENTS NEED IS SIMPLY SOMEONE WHO WILL TAKE CARE OF THEIR PERSONAL SPENDING MONEY. THE HOSPITAL HAS TAKEN ON THIS TASK FOR MOST OF THEM SIMPLY BECAUSE THERE'S NO-ONE ELSE TO DO IT. IT WOULD BE HELPFUL IF THEY

Return this questionnaire to Ron Rich, ASHA.

(OVER)

Memo:

Wisconsin
10-17-78

To: Ron Rich

From: Ray Funk
5950 Margarido
Oakland, CA. 94618
(415) 653-3515

Please inform the long term care providers that the Governors Council is now undertaking drafting of lefislation in the area of guardianship for the incapacitated. Specifically, the areas to be considered are limited guardianship and public guardianship.

We realize that one of the areas of greatest need for public guardians is the large number of patients in long term care facilities who are incapacitated and without relatives or close friends.

I have been contracted to do initial drafting in this area and shall1 provide Ron Rich with copies of all proposals when written. Further, to be able to convince the legislature of the size of the problem, I need data on how many people are involved state-wide.

I'd like to request that each facility send to Ron Rich, and he send to me letters that provide the following information:

1) The number of patients: 61

2) How many have guardians: 2

3) How many of those guardians are public bodies, i.e., public administrator or court system or are by court appointment, disinterested attorneys:

1- Public administrator

1- Court appointment

4) How many are without guardians: 59

5) Of that group (#4), how many need guardians: 56

and of those needing guardians how many are without relatives or friends able to fill that role: 21

In addition to this data, I need letters documenting the problems the care providers have had in finding guardians or getting assistance from the Attorney General's office in finding guardians.

Finally, I need suggestions from the providers on what role a good guardian plays in regards to their residents and thus, what optimal role a public guardian could play in regards to that institution.

MEASURE SRES, DO THEIR ORDERING FOR THEM. SEVERAL HAVE A HARD TIME SPENDING THEIR LONGEVITY BONUS CHECKS, AND WE END UP WITH TOO MUCH MONEY AND IT HAS TO BE USED TO PAY PART OF THEIR LTC BILLS.

FOR ANY FURTHER INFO NEEDED ON THIS, CONTACT ME — TERRY RILATOS AND ILL TRY TO HELP.

Terry

CAREAGE NORTH HEALTH CARE CENTER
A Division Of HEALTH CARE SERVICES - ALASKA, INC.
P.O. BOX 847 • FAIRBANKS, ALASKA 99707 • (907) 452-1921

September 26, 1978

RECEIVED
OCT 04 1978
ALASKA D. D. COUNCIL

Patricia Senner, Health Planner
Governors Council for the Handicapped and Gifted
University Plaza Offices - West
600 University Avenue - Suite C
Fairbanks, Alaska 99701

Dear Patricia Senner,

Thank you for your letter of August 16, 1978 regarding the need for guardianship for patient's at Careage North. Guardianship has been a long neglected issue that needs to be addressed by the legislature.

Nursing homes such as Careage North, are often placed in a position of having to make decisions on behalf of the patient, especially when there are no relatives available. Yet, the nursing home has no legal power to do so. For example, in cases where surgery needs to be performed on an incompetent patient with no relatives, we have to turn to the attorney general's office and to the court system for a decision to be made. When issues of less important nature need to be resolved, for example, purchasing of needed items for patients, patient's transferring to another facility, etc., such decisions are made by the nursing home. It seems that a more appropriate method of dealing with these issues is needed. It appears to be a conflict of interest for the nursing home to be making decisions on such issues with no outside assistance or consultation.

Currently we have:

35 patients who appear capable of making their own decisions regarding personal and financial matters. Many of these patients request assistance from family and staff in making decisions.

25 patients who do not appear capable of making their own decisions regarding personal and financial matters. These patients have at least one relative who is at times available to assist in making decisions, however, no guardians have been appointed.

5 patients who are not capable of making decisions regarding their personal or financial matters; but have had guardians appointed. Four of these five patients have family members acting as guardians. The other guardian is Delores Wilkes, the Public Administrator in Anchorage.

6 patients who are not capable of making their own decisions regarding personal and financial matters. These six patients do not have any family members whatsoever. No guardians have been appointed for them.

The group of patients that I am most concerned with, are those who have no family, and no guardians appointed. Their disabilities range from mentally retarded to severe senility. Ages renge from 38 to 94 years of age. The second group of patients most in need of guardians are the 25 patients who have at lease one relative to assist them. Once again, the disabilities include mental retardation, severe senility, victims of brain damage in accidents, severe psychiatric disability, etc. Their ages range from 23 to 110.

In your letter you indicated that your group would be attempting to determine what type of mechanism would best meet these patients' guardianship needs, whether public guardians, or incentives for private guardians. It seems to me that both mechanisms would need to be utilized. In the cases where family members are available and are very concerned, it would not be appropriate for a public guardian to be appointed in charge of their relative. At Careage North many family members would possibly be interested in assuming guardianship but are held back by monetary problems, or be fear of assuming the responsibility for the relative. For those patients whose relatives are only minimally involved it would appear most appropriate for a public guardian to be appointed. I am concerned also that a public guardian should be limited in the number of guardianships he or she can assume. When one public guardian assumes responsibility for over 100 patients, the public guardian would become merely a rubber stamp for the nursing home, and would obviously not have sufficient time or energy to understand the needs of the patients.

Thank you for your interest in this important matter. Please keep me posted of any guardianship legislation introduced into the legislature.

Sincerely,

Angie Hage

Angie Hage, Social Worker
Careage North

1-23-78

GUARDIANSHIP:

Bruce Tennant, Assistant AG
303 "K" Street
Room 224
274-8611 Ext. 133

The AG is handling 53 guardianship cases at the present time. Their role is to represent the department of Health and Social Services. They must comply with title 13, give notice and prepare the visitors reports. Compiaint is that this is too cumbersome in most cases.

Biggest problem is that no guardian can be found or if a suited guardian is around the distance between the guardian and ward many times tender the relationship unsuitable. At the present time one person in Anchorage acts as guardian ad litem for all those needing the service and information guardian is available than the court system will take some and the public administration for the 3rd judicial district has taken on some.

The AG has stated that after they complete the people needing guardianship at the present time they plan to take a look at the situation and it is doubtful that any more will be done unless a guardian is found first.

If a willing guardian can be found the entire process takes about two months, but at the present it takes much longer.

Lack of guardians is the biggest problem. The suggestions were to have a public guardian. The AG does not feel it is their responsibility to find a guardian, but feel that it is appropriate that they handle the legal work.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
HEALTH CARE FINANCING ADMINISTRATION
WASHINGTON, D.C. 20201

PROPOSED REGULATION

ACTION TRANSMITTAL
HCFA-AT-78-87 (MB)
September 1, 1978

TO: STATE AGENCIES ADMINISTERING MEDICAL ASSISTANCE PROGRAMS

SUBJECT: Title XIX, Social Security Act: Protection of Patients' Funds

REGULATION REFERENCES: 42 CFR 449.12, 42 CFR 450.30

ATTACHMENT: Notice of proposed rule making to expand standards for protection of personal funds of Medicare and Medicaid patients in skilled nursing and intermediate care facilities.

COMMENT PERIOD: Consideration will be given to written comments received by the Administrator, Health Care Financing Administration, Department of Health, Education, and Welfare, P.O. Box 2382, Washington, D.C. 20013 by October 31, 1978.

INQUIRIES TO: Regional Medicaid Directors

for Director
Medicaid Bureau

HCFA-AT-78-87
9/1/78

[4110-35]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Health Care Financing Administration

[42 CFR Parts 405 and 449]

FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED MEDICAL ASSISTANCE PROGRAMS

Protection of Patients' Funds

AGENCY: Health Care Financing Administration (HCFA), HEW.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposal would expand the standards for protection of personal funds of medicare and medicaid patients in skilled nursing facilities and intermediate care facilities. The changes are required for skilled nursing facilities by section 21(a) of Pub. L. 95-142, the Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977 and for intermediate care facilities by section 8(a) of Pub. L. 95-292, the end stage renal disease amendments of 1978. The intent is to curtail the reported misuse of patient funds and assure that personal funds are fully accounted for and made available to patients when they need them.

DATE: Consideration will be given to written comments received by October 31, 1978.

ADDRESSEES: Please address comments to: Administrator, Health Care Financing Administration, Department of Health, Education, and Welfare, P.O. Box 2382, Washington, D.C. 20013. In commenting, please refer to file code HSQ-45-P. Comments will be available for public inspection, beginning approximately two weeks after publication, in Room 5231 of the Department's offices at 330 C Street SW., Washington, D.C., on Monday through Friday of each week from 8:30 a.m. to 5 p.m., 202-245-0950.

FOR FURTHER INFORMATION, CONTACT:

Mr. Benjamin Latt, 301-443-3346.

SUPPLEMENTARY INFORMATION:

BACKGROUND

A medicare or medicaid patient entering a long term care facility normally turns his personal funds over to the facility to hold and manage until needed for personal use. Sometimes these funds include a personal needs allowance sent to the patient monthly under the supplementary security income (SSI) program (Title XVI of the Social Security Act).

Current HCFA regulations have not provided adequate protection of these funds (see 42 CFR 449.12(a)(1)(iii) and 405.1121(k)(6).)

Investigations by the General Accounting Office, the Senate Committee on Aging, and some States have revealed serious cases in which patients' funds were misused or not properly accounted for. (See Sen. Report 95-453, page 42.)

STATUTORY AMENDMENTS

In view of the problems noted above, the Congress amended the medicare statute to require SNF's to establish and maintain a system of full and complete accounting of their patients' personal funds. (See section 21(a) of the Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977 (Pub. L. 95-142).) It also amended the medicaid statute to place the same requirements on ICF's. (See section 8(a) of the End Stage Renal Disease Program Amendments (Pub. L. 95-292) enacted June 13, 1978.) These amendments also preclude commingling of patients' funds with facility funds or with those of any persons except other patients in the facility.

In addition, sections 21(b) of Pub. L. 95-142 and 8(c) of Pub. L. 95-292 require that HEW define the costs that may be charged to the personal funds of the patients in long term care facilities.

PROPOSED RULE

This proposal, which implements sections 21(a) and 8(a), would establish the requirements for protecting the personal funds of medicare patients in SNF's and medicaid patients in SNF's and ICF's. Since medicare standards for SNF's are applicable to medicaid (see sec. 1902(a)(28) of the act) the pertinent medicare regulations would be incorporated by reference in medicaid regulations. Since services provided by ICF's are covered under medicaid but not under medicare rules applicable to ICF's appear only in the medicaid regulations.

The proposed rule would impose several requirements on SNF's and ICF's, designed to inform patients of their rights, to prevent misuse of patients' funds given to the facility for safekeeping or management, and to provide documentation that adequate measures have been taken to protect patients' funds.

A long-term care facility's initial obligation would be to provide an incoming patient with an explanation of the patient's rights regarding personal funds. The facility would also have to provide the patient with a list of the services which are included in the basic per diem rate, or otherwise provided by the facility, for which no charge may be assessed against the patient or his personal account.

A patient is not required to give his funds to a long-term care facility for safekeeping, but if he requested this of the facility, and provided a written authorization, the facility would be required to accept this responsibility. The facility would have to deposit all funds in excess of $50 in an interest bearing account. Lesser amounts could be maintained in a noninterest bearing account, or in a petty cash fund, to keep them more readily available for the day-to-day use of the patient. The facility would be required to keep a written record of all financial arrangements and transactions involving the patient's funds and allow the patient access to that record. In addition, the facility would be required to provide the patient with an itemized statement of his account at least quarterly.

The proposed rule would require the facility to obtain a surety bond, in order to protect the patients from any misuse of their funds. It would also preclude the facility from making any unauthorized use of any personal needs allowance which a patient might receive under the supplemental security income program or from any other source. It also contains measures to protect the account of a patient who dies or becomes incapable of managing his own affairs.

A facility would be required to notify the patient and the State medicaid agency if the account of a medicaid patient grows to the extent that it appears a question might be raised about the patient's continued eligibility for medicaid. This provision is designed to deal with a problem that has frequently arisen when a patient's monthly needs allowance is routinely placed in his personal account and the accumulated savings eventually reaches the point at which the patient's eligibility for medicaid is jeopardized. The regulation would not prescribe any further action to be taken by the patient, the facility, or the medicaid agency. Although this provision is not directly related to protecting the patient's funds, it is an important matter that seems best dealt with in this regulation.

The proposed rule would also require that the State medicaid plan provide for an audit to make sure that a long-term care facility is meeting its obligations for safekeeping and managing patient funds. This would be done simply by amending the existing audit provisions in § 450.30(a)(3)(ii) of the medicaid regulations.

IMPLEMENTATION OF SECTIONS 21(b) AND 8(c)

In our view, our current regulations adequately implement the requirements of sections 21(b) and 8(c) that we define what costs can be charged to patient funds. The medicare regulations specify the items that may not be charged to a SNF patient (42 CFR 405.607-405.612). The medicaid regulations set forth the items that are covered by the medicaid payment to an ICF and specify that the facility must accept the medicaid payment as payment in full (42 CFR 450.30(a) (3) and (8)). Therefore, we are not proposing any regulation on this point. Under the proposed rule implementing sections 21(a) and 8(a), SNF's and ICF's would be required to inform patients what services may not be charged to their personal accounts. (See § 405.1121(m)(1) and § 449.12(1)(iii)(A).)

APPENDIX NINE

MODEL GUARDIANSHIP AND CONSERVATORSHIP ACT

DRAFT - 9/10/78, AMERICAN BAR ASSOCIATION

AMERICAN BAR ASSOCIATION

DRAFT

MODEL GUARDIANSHIP AND CONSERVATORSHIP ACT

Draft - 9/10/78

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DRAFT

MODEL STATUTE

A BILL FOR

AN ACT TO REVISE THE METHODS, CRITERIA AND PROCEDURES FOR PROTECTING PARTIALLY DISABLED AND DISABLED PERSONS AND MINORS AND THE PROPERTY OF SUCH PERSONS AND MINORS; TO ESTABLISH THE CRITERIA FOR APPOINTING LIMITED PERSONAL GUARDIANS, PERSONAL GUARDIANS, LIMITED CONSERVATORS AND CONSERVATORS AND THE RESPONSIBILITIES, DUTIES AND POWERS OF THESE INDIVIDUALS; AND TO SPECIFY THE RIGHTS OF INDIVIDUALS SUBJECT TO PROTECTIVE PROCEEDINGS AND DISPOSITIONAL ORDERS.

CHAPTER 1. INTRODUCTORY PROVISIONS

DRAFT

SECTION 1. TITLE

THIS ACT SHALL BE KNOWN AS THE GUARDIANSHIP AND CONSERVATORSHIP ACT.

SECTION 2. PURPOSE

THE (name of legislature) DECLARES THAT IT IS THE PURPOSE OF THIS ACT TO PROMOTE THE GENERAL WELFARE OF ALL CITIZENS BY ESTABLISHING A SYSTEM WHICH FOR ASSISTING AND PROTECTING PARTIALLY DISABLED AND DISABLED PERSONS AND MINORS, WHICH RECOGNIZES THAT EVERY INDIVIDUAL HAS UNIQUE NEEDS AND DIFFERING ABILITIES; WHICH WILL PERMIT PARTIALLY DISABLED AND DISABLED PERSONS AND MINORS TO PARTICIPATE AS FULLY AS POSSIBLE IN ALL DECISIONS WHICH AFFECT THEM; AND WHICH ~~WILL~~ ASSIST PARTIALLY DISABLED AND DISABLED PERSONS AND MINORS TO MEET THE ESSENTIAL REQUIREMENTS FOR THEIR PHYSICAL HEALTH AND SAFETY, PROTECT THEIR RIGHTS, MANAGE THEIR FINANCIAL RESOURCES, AND DEVELOP OR REGAIN THEIR ABILITIES TO THE MAXIMUM EXTENT POSSIBLE.

SECTION 3. DEFINITIONS

AS USED IN THIS ACT:

(1) "PARTIALLY DISABLED PERSONS" MEANS ADULTS WHOSE ABILITY TO RECEIVE AND EVALUATE INFORMATION EFFECTIVELY AND/OR COMMUNICATE DECISIONS IS IMPAIRED TO THE EXTENT THAT THEY ~~HAVE BEEN ADJUDGED TO REQUIRE ASSISTANCE IN MANAGING~~ LACK THE ABILITY TO AT LEAST SOME OF THEIR FINANCIAL RESOURCES, AND/OR IN MEETING AT LEAST SOME OF THE ESSENTIAL REQUIREMENTS FOR THEIR PHYSICAL HEALTH OR SAFETY, WITHOUT COURT ORDERED ASSISTANCE. ~~AND/OR IN PROTECTING SOME OF THEIR RIGHTS.~~

(2) "DISABLED PERSONS" MEANS ADULTS WHOSE ABILITY TO RECEIVE AND EVALUATE INFORMATION EFFECTIVELY AND/OR TO COMMUNICATE DECISIONS IS IMPAIRED TO SUCH AN EXTENT THAT THEY ~~HAVE BEEN ADJUDGED TO~~ LACK THE CAPACITY TO MANAGE THEIR FINANCIAL RESOURCES, AND/OR TO MEET ESSENTIAL REQUIREMENTS FOR THEIR PHYSICAL HEALTH OR SAFETY, EVEN WITH COURT ORDERED ASSISTANCE. ~~AND/OR TO PROTECT THEIR RIGHTS.~~

DRAFT

(3) "MANAGE FINANCIAL RESOURCES" MEANS THOSE ACTIONS NECESSARY TO OBTAIN, ADMINISTER, AND DISPOSE OF REAL AND PERSONAL PROPERTY, INTANGIBLE PROPERTY, BUSINESS PROPERTY, BENEFITS AND INCOME.

(4) "MEET ESSENTIAL REQUIREMENTS FOR PHYSICAL HEALTH OR SAFETY" MEANS THOSE ACTIONS NECESSARY TO PROVIDE THE HEALTH CARE, FOOD, SHELTER, CLOTHING, PERSONAL HYGIENE AND PROTECTION WITHOUT WHICH SERIOUS PHYSICAL INJURY OR ILLNESS IS MORE LIKELY THAN NOT TO OCCUR.

(5) "COURT ORDERED ASSISTANCE" MEANS DISPOSITIONAL ALTERNATIVES AVAILABLE UNDER SECTION ~~4~~ OF THIS ACT OTHER THAN THE APPOINTMENT OF A PERSONAL GUARDIAN AND/OR CONSERVATOR.

(5) "PROTECT RIGHTS" MEANS THOSE ACTIONS NECESSARY TO SECURE AND DEFEND THE PERSONAL, CIVIL, AND HUMAN RIGHTS TO WHICH RESIDENTS AND CITIZENS OF THIS STATE ARE ENTITLED.

(6) "MINOR" MEANS AN INDIVIDUAL [AGE SEVENTEEN [17] OR LESS/UNDER THE AGE OF MAJORITY].

(7) "RESPONDENT" MEANS AN INDIVIDUAL ALLEGED TO BE PARTIALLY DISABLED OR DISABLED.

(8) "SUBJECT OF A ~~PROTECTIVE~~ INTERVENTION PROCEEDING" MEANS THE RESPONDENT, AN INDIVIDUAL FOUND TO BE A PARTIALLY DISABLED OR DISABLED PERSON, OR A MINOR FOR WHOM A PROCEEDING HAS BEEN INITIATED UNDER CHAPTER 3 OF THIS ACT OR WHO HAS A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR.

(9) "PARTIES" MEANS THE INDIVIDUAL FILING A PETITION, APPLICATION, MOTION OR OBJECTION, THE SUBJECT OF A PROTECTIVE PROCEEDING, AND THE LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR, IF ANY.

DRAFT

10) "COURT" MEANS THE (name of the court(s) or divisions of a court of general jurisdiction which hear ~~in~~ protective proceedings).

(11) "PROTECTIVE PROCEEDING" MEANS ANY INTERVENTION PROCEEDING UNDER THIS ACT.

(12) "LIMITED CONSERVATOR" MEANS AN INDIVIDUAL, OR A CORPORATION WITH GENERAL POWER TO SERVE AS TRUSTEE, OR THE DIRECTOR OF THE PUBLIC GUARDIAN SERVICE APPOINTED BY THE COURT TO ASSIST IN MANAGING THE FINANCIAL RESOURCES OF A PARTIALLY DISABLED PERSON OR OF A MINOR.

(13) "CONSERVATOR" MEANS AN INDIVIDUAL, OR A CORPORATION WITH GENERAL POWER TO SERVE AS TRUSTEE, OR THE DIRECTOR OF THE PUBLIC GUARDIAN SERVICE APPOINTED BY THE COURT TO MANAGE THE FINANCIAL RESOURCES OF A DISABLED PERSON OR ~~OF~~ A MINOR.

(14) "CONSERVATORSHIP" INCLUDES APPOINTMENT OF A LIMITED CONSERVATOR OR ~~OF~~ A CONSERVATOR.

(15) "LIMITED PERSONAL GUARDIAN" MEANS AN INDIVIDUAL ~~OR THE DIRECTOR OF THE PUBLIC GUARDIAN SERVICE~~ APPOINTED BY THE COURT TO ASSIST A PARTIALLY DISABLED PERSON OR A MINOR IN MEETING THE ESSENTIAL REQUIREMENTS FOR THE PARTIALLY DISABLED PERSON'S OR THE MINOR'S PHYSICAL HEALTH AND SAFETY, ~~AND PROTECTING HIS OR HER RIGHTS.~~

(16) "PERSONAL GUARDIAN" MEANS AN INDIVIDUAL OR THE DIRECTOR OF THE PUBLIC GUARDIAN SERVICE APPOINTED BY THE COURT TO ACT ON BEHALF OF A DISABLED PERSON OR A MINOR TO ASSURE THAT THE ESSENTIAL REQUIREMENTS FOR THE PHYSICAL HEALTH AND SAFETY OF THE DISABLED PERSON OR MINOR ARE MET AND THAT THE RIGHTS OF THE DISABLED PERSON OR MINOR ARE PROTECTED.

DRAFT

(17) "GUARDIANSHIP" INCLUDES APPOINTMENT OF A LIMITED PERSONAL GUARDIAN OR OF A PERSONAL GUARDIAN.

(18) "PUBLIC GUARDIAN SERVICE" MEANS THE AGENCY ESTABLISHED BY THE PUBLIC GUARDIAN SERVICE ACT.

(19) "GUARDIANS AD LITEM" MEANS INDIVIDUALS APPOINTED BY THE COURT TO ASSIST THE SUBJECT OF A PROTECTIVE PROCEEDING TO DETERMINE HIS OR HER INTERESTS IN REGARD TO THE PROTECTIVE PROCEEDING, OR TO MAKE THAT DETERMINATION IF THE SUBJECT OF THE PROTECTIVE PROCEEDING IS UNCONSCIOUS OR OTHERWISE WHOLLY INCAPABLE OF DETERMINING HIS OR HER INTERESTS IN THAT PROCEEDING EVEN WITH ASSISTANCE.

(20) "COUNSEL" MEANS AN ATTORNEY ADMITTED TO THE PRACTICE OF LAW IN THIS STATE.

(21) "RESTRICTIONS ON THE LEGAL CAPACITY OF A PERSON TO ACT IN HIS OR HER OWN BEHALF" MEANS POWERS OF A PARTIALLY DISABLED OR DISABLED PERSON OR A MINOR WHICH ARE ASSIGNED TO A LIMITED PERSONAL GUARDIAN,

(27) "DEVELOPMENTAL DISABILITY" MEANS A DISABILITY OF A PERSON WHICH:

(a) (i) IS ATTRIBUTABLE TO AUTISM, CEREBRAL PALSY, EPILEPSY, OR MENTAL RETARDATION;

(ii) IS ATTRIBUTABLE TO ANY OTHER CONDITION FOUND TO BE CLOSELY RELATED TO AUTISM, CEREBRAL PALSY, EPILEPSY OR MENTAL RETARDATION OR REQUIRES TREATMENT AND SERVICES SIMILAR TO THOSE REQUIRED FOR SUCH PERSONS; OR

(iii) IS ATTRIBUTABLE TO DYSLEXIA RESULTING FROM A DISABILITY DESCRIBED IN CLAUSE (i) OR (ii) OF THIS PARAGRAPH; AND

(b) HAS CONTINUED OR CAN BE EXPECTED TO CONTINUE INDEFINITELY.

(28) "ADMINISTRATOR OF VETERAN'S AFFAIRS" MEANS THE HEAD OF THE VETERAN'S ADMINISTRATION OR HIS OR HER SUCCESSOR.

(29) "VETERAN'S ADMINISTRATION" MEANS THE VETERAN'S ADMINISTRATION OF THE UNITED STATES OF AMERICA, ITS PREDECESSORS AND SUCCESORS.

(30) "IDENTIFIABLE INFORMATION" MEANS INFORMATION WHICH IS INDEXED OR ABLE TO BE RETRIEVED BY NAME, IDENTIFYING CODE OR NUMBER, ADDRESS OR OTHER PERSONAL CHARACTERISTIC.

SECTION 4. APPOINTMENT OF DISABILITIES RESOURCES OFFICERS

(1) THE HEAD OF THE (State/local agency responsibility for providing services to partially disabled or disabled persons) SHALL EMPLOY INDIVIDUALS ON A FULL-TIME OR PART-TIME BASIS TO SERVE AS DISABILITIES RESOURCES OFFICERS IN ACCORDANCE WITH(citation to State Civil Service Act/or statute, if any, authorizing local jurisdictions to hire personnel). THE NUMBER OF INDIVIDUALS HIRED TO BE OR ASSIGNED THE DUTIES OF DISABILITIES RESOURCES OFFICERS SHALL BE COMMENSURATE WITH THE VOLUME OF PROTECTIVE PROCEEDINGS INITIATED AND THE NUMBER OF GUARDIANSHIPS AND CONSERVATORSHIPS FOR PARTIALLY DISABLED OR DISABLED PERSONS ESTABLISHED IN THE (State/county/parish/city), BUT SHALL BE SUFFICIENT TO PERMIT

PERSONAL GUARDIAN, LIMITED CONSERVATOR, CONSERVATOR OR TRUSTEE.

(22) "DISABILITIES RESOURCE OFFICERS" MEANS EMPLOYEES OF THE (name of state/local agency responsible for providing services to partially disabled and disabled persons) WHO HAVE CURRENT KNOWLEDGE OF THE FULL RANGE OF PUBLIC AND PRIVATE MEDICAL, MENTAL HEALTH, SOCIAL, ADVOCACY, EDUCATIONAL, REHABILITATIVE, COUNSELING, THERAPEUTIC, HOMEMAKING, RECREATIONAL AND FINANCIAL SERVICES AND PROGRAMS AVAILABLE TO ASSIST PARTIALLY DISABLED AND DISABLED PERSONS AND THEIR FAMILIES AND WHO ARE ASSIGNED THE DUTIES SET FORTH IN THIS ACT.

(23) "MULTI-DISCIPLINARY EVALUATION TEAM" MEANS A GROUP OF AT LEAST FOUR [4] INDIVIDUALS WHICH IS APPOINTED BY THE COURT FROM A PANEL OF EXPERTS APPROVED BY THE (state name) EVALUATION OVERSIGHT BOARD, TO EVALUATE AN INDIVIDUAL SUBJECT TO A ~~PROTECTIVE~~ PROCEEDING PURSUANT TO CHAPTER 2 OF THIS ACT. EACH MULTIDISCIPLINARY EVALUATION TEAM SHALL INCLUDE A PHYSICIAN, A PSYCHIATRIST, OR LICENSED CLINICAL PSYCHOLOGIST, A SOCIAL WORKER WITH A GRADUATE DEGREE IN SOCIAL WORK AND FIELD TRAINING OR EXPERIENCE IN WORKING WITH PARTIALLY DISABLED OR DISABLED PERSONS, AND ~~AT LEAST ONE ADDITIONAL~~ AND/OR OTHER EXPERT WITH KNOWLEDGE OF THE PARTICULAR DISABILITY WHICH AN INDIVIDUAL IS ALLEGED OR HAS BEEN FOUND TO HAVE.

(24) "EVALUATION" MEANS AN ASSESSMENT OF THE ABILITY OF AN INDIVIDUAL TO RECEIVE AND EVALUATE INFORMATION EFFECTIVELY AND/OR TO COMMUNICATE DECISIONS AND THE IMPACT OF ANY IMPAIRMENT OF THESE SKILLS ON THE INDIVIDUAL'S CAPACITY TO MANAGE HIS OR HER FINANCIAL RESOURCES, AND TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY AND TO PROTECT HIS OR HER RIGHTS.

(25) "(State name) EVALUATION OVERSIGHT BOARD" MEANS THE AGENCY ESTABLISHED BY SECTION 5 OF THIS ACT.

(26) "LEAST RESTRICTIVE DISPOSITIONAL ALTERNATIVE" MEANS THE FORM OF ASSISTANCE THAT LEAST INTERFERES WITH THE LEGAL CAPACITY OF A RESPONDENT TO ACT IN HIS OR HER OWN BEHALF.

EASY ACCESS FOR THOSE INDIVIDUALS REQUIRING THE SERVICES OF A DISABILITY RESOURCES OFFICER.

(2) DISABILITIES RESOURCES OFFICERS SHALL:

(a)(i) DEVELOP AND MAINTAIN A CURRENT KNOWLEDGE OF THE FULL RANGE OF PUBLIC AND PRIVATE MEDICAL, MENTAL HEALTH, SOCIAL ADVOCACY, EDUCATIONAL, REHABILITATIVE, COUNSELING, THERAPEUTIC, HOMEMAKING, RECREATIONAL AND FINANCIAL SERVICES AND PROGRAMS AVAILABLE TO ASSIST PARTIALLY DISABLED AND DISABLED PERSONS AND THEIR FAMILIES;

(b)(ii) DISCUSS PERSONALLY WITH INDIVIDUALS SEEKING TO FILE A PETITION PURSUANT TO SECTION 6 OF THIS ACT:

(i) THE MATTERS WHICH THE INDIVIDUAL WISHES TO ALLEGE IN THE PETITION;

(ii) THE EFFECTS OF THE APPOINTMENT OF A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR AND/OR CONSERVATOR; AND

(iii) THE LESS RESTRICTIVE ALTERNATIVES WHICH ARE AVAILABLE;

(c) ASSIST PARTIALLY DISABLED AND DISABLED PERSONS, AND INDIVIDUALS APPOINTED TO SERVE AS A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR, AND/OR CONSERVATOR TO DEVELOP AND UPDATE INDIVIDUAL GUARDIANSHIP PLANS AND INDIVIDUAL CONSERVATORSHIP PLANS.

(d) PROVIDE INFORMATION, GUIDANCE, COUNSELING AND REFERRAL SERVICES TO INDIVIDUALS REGARDING THE ALTERNATIVES WHICH ARE AVAILABLE TO ASSIST PARTIALLY DISABLED AND DISABLED PERSONS TO MEET THE ESSENTIAL REQUIREMENTS FOR THEIR PHYSICAL HEALTH OR SAFETY, AND/OR MANAGE THEIR FINANCIAL RESOURCES, AND/OR PROTECT THEIR RIGHTS, AND DEVELOP OR REGAIN THEIR ABILITIES TO THE MAXIMUM EXTENT POSSIBLE. NO REFERRALS SHALL BE MADE UNLESS THE DISABILITIES RESOURCES OFFICER HAS CONTACTED THE INDIVIDUAL OR PUBLIC OR PRIVATE AGENCY TO WHICH THE REFERRAL IS BEING MADE, AND DETERMINED THAT THE INDIVIDUAL TO BE REFERRED MEETS THE ELIGIBILITY REQUIREMENTS AND THAT THE NECESSARY SERVICES ARE AVAILABLE.

(b) IN ADDITION, DISABILITIES RESOURCES OFFICERS MAY FILE A MOTION TO DISMISS A PETITION PURSUANT TO SECTION 7.

SECTION 5. ESTABLISHMENT OF THE (state name) EVALUATION OVERSIGHT BOARD

(1) THERE IS HEREBY ESTABLISHED THE (state name) EVALUATION OVERSIGHT BOARD (HEREINAFTER REFERRED TO AS THE BOARD).

(2) THE BOARD SHALL CONSIST OF THE DIRECTOR OF THE (name of the state developmental disabilities advocacy office) WHO SHALL SERVE AS CHAIRPERSON, THE (Director/Administrator/Secretary) OF THE (name of the department or agency responsible for providing services to partially disabled and disabled persons), AND THE DIRECTOR OF THE PUBLIC GUARDIANSHIP SERVICE.

(3) THE BOARD SHALL:

(a) ESTABLISH AND ANNUALLY PUBLISH THE PROCEDURES AND CRITERIA FOR IDENTIFYING INDIVIDUALS WHO ARE QUALIFIED TO SERVE ON MULTIDISCIPLINARY EVALUATION TEAMS;

(b) PREPARE AND PUBLISH, ANNUALLY, A LIST OF INDIVIDUALS FROM ALL SECTIONS OF THE STATE WHO ARE QUALIFIED TO SERVE ON MULTIDISCIPLINARY EVALUATION TEAMS, INCLUDING:

(i) PHYSICIANS;

(ii) PSYCHIATRISTS;

(iii) LICENSED CLINICAL PSYCHOLOGISTS;

(iv) SOCIAL WORKERS WITH A GRADUATE DEGREE AND FIELD TRAINING OR EXPERIENCE IN WORKING WITH PARTIALLY DISABLED OR DISABLED PERSONS; AND

(v) OTHER EXPERTS ON DISABILITIES WHICH CAN AFFECT AN INDIVIDUAL'S ABILITY TO RECEIVE AND EVALUATE INFORMATION EFFECTIVELY AND/OR TO COMMUNICATE DECISIONS TO SUCH AN EXTENT THAT THE INDIVIDUAL REQUIRES ASSISTANCE OR WHOLLY LACKS THE CAPACITY TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY, AND/OR PROTECT HIS OR HER RIGHTS, AND/OR MANAGE HIS OR HER FINANCIAL RESOURCES.

(c) ESTABLISH AND ANNUALLY PUBLISH THE PROCEDURES AND CRITERIA FOR REMOVING INDIVIDUALS FROM THE LIST OF THOSE QUALIFIED TO SERVE ON MULTIDISCIPLINARY EVALUATION TEAMS;

(d) EMPLOY, IN ACCORDANCE WITH THE (state civil service code), AN ADMINISTRATIVE DIRECTOR AND SUCH PROFESSIONAL, TECHNICAL, CLERICAL, AND ADMINISTRATIVE PERSONNEL AND MAKE THE NECESSARY EXPENDITURES THEREFOR WITHIN THE APPROPRIATIONS PROVIDED, AS MAY BE NECESSARY TO CARRY OUT THE RESPONSIBILITIES, DUTIES AND POWERS SET FORTH IN THIS ACT;

(e) DELEGATE TO THE ADMINISTRATIVE DIRECTOR SUCH POWERS AS ARE NECESSARY TO CARRY OUT THE DUTIES OF THE BOARD SET FORTH IN THIS ACT, INCLUDING THE POWER TO REDELEGATE AUTHORITY WHEN NECESSARY AND TO DESIGNATE A MEMBER OF THE STAFF TO SERVE AS ACTING ADMINISTRATIVE DIRECTOR DURING THE ABSENCE OR DISABILITY OF THE ADMINISTRATIVE DIRECTOR OR IN THE EVENT OF A VACANCY IN THE OFFICE OF ADMINISTRATIVE DIRECTOR;

(f) CONTRACT WITH INDIVIDUALS, BUSINESSES, WHETHER FOR PROFIT OR NOT FOR PROFIT, AND OTHER PUBLIC OR PRIVATE ORGANIZATIONS OR AGENCIES TO CARRY OUT THE RESPONSIBILITIES, DUTIES AND POWERS SET FORTH IN THIS ACT;

(g) PROMULGATE SUCH POLICIES, RULES, REGULATIONS AND PROCEDURES, IN ADDITION TO THOSE REQUIRED ABOVE, AS ARE NECESSARY FOR THE EFFECTIVE OPERATION OF THE BOARD.

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CHAPTER 2 ~~PROTECTIVE~~ INTERVENTION PROCEEDINGS FOR PARTIALLY DISABLED AND DISABLED PERSONS

SECTION 6. INITIATION OF ~~PROTECTIVE~~ INTERVENTION PROCEEDINGS

(1) (a) A ~~PROTECTIVE~~ INTERVENTION PROCEEDING SHALL BE INITIATED BY THE FILING OF A PETITION WITH THE COURT BY A PARTIALLY DISABLED PERSON, AN INDIVIDUAL INTERESTED IN THE WELFARE OF A PARTIALLY DISABLED OR DISABLED PERSON, BY A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR OF SUCH A PERSON, OR BY THE PUBLIC GUARDIAN SERVICE.

(b) THE PETITION SHALL BE VERIFIED UNDER OATH AND SHALL SPECIFY:

(i) THE NAME, AGE, AND ADDRESS OF THE RESPONDENT;

(ii) THE NATURE AND DEGREE OF THE ALLEGED DISABILITY;

(iii) THE PARTICULAR TYPE OF APPOINTMENT, AND THE PROTECTION AND ASSISTANCE BEING SOUGHT;

(iv) THE DURATION OF THE APPOINTMENT, PROTECTION AND ASSISTANCE BEING SOUGHT;

(v) ANY EXISTING RESTRICTIONS ON THE LEGAL CAPACITY OF THE RESPONDENT TO ACT IN HIS OR HER OWN BEHALF;

(vi) THE NAMES AND ADDRESSES, UNLESS THEY ARE UNKNOWN AND CANNOT BE REASONABLY ASCERTAINED, OF THE INDIVIDUALS MOST CLOSELY RELATED TO THE RESPONDENT BY BLOOD OR MARRIAGE;

(vii) THE NAME AND ADDRESS OF THE INDIVIDUAL OR FACILITY, IF ANY, HAVING CUSTODY OF THE RESPONDENT;

(viii) THE NAME, ADDRESS, QUALIFICATIONS AND RELATIONSHIP TO THE RESPONDENT OF THE INDIVIDUAL, IF ANY, PROPOSED FOR APPOINTMENT AS LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR, OR CONSERVATOR;

(ix) THE APPROXIMATE VALUE AND DESCRIPTION OF THE RESPONDENT'S FINANCIAL RESOURCES, IF THE PETITION REQUESTS APPOINTMENT OF A LIMITED CONSERVATOR OR A CONSERVATOR;

(x) THE BENEFITS, COMPENSATION, PENSION OR INSURANCE PAYABLE BY THE VETERAN'S ADMINISTRATION TO WHICH THE RESPONDENT IS ENTITLED;

(xi) THE REASONS WHY THE APPOINTMENT OF A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, OR LIMITED CONSERVATOR OR CONSERVATOR IS BEING SOUGHT;

(xii) THE FACTS SUPPORTING THE ALLEGATIONS;

(xiii) THE NAME, ADDRESS, AND INTEREST OF THE PETITIONER; AND

(xiv) THAT THE PETITIONER HAS DISCUSSED WITH THE DISABILITIES RESOURCES OFFICER THE FACTS ALLEGED IN THE PETITION, THE EFFECT OF THE APPOINTMENT OF A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR, AND THE ALTERNATIVE SERVICES AND PROCEDURES WHICH ARE AVAILABLE; AND THAT THE REQUESTED TYPE(S) OF APPOINTMENT AND THE PROTECTIONS AND ASSISTANCE ARE THE LEAST RESTRICTIVE DISPOSITIONAL ALTERNATIVE WHICH WILL MEET THE NEEDS OF THE RESPONDENT.

(c) NO MORE THAN FIVE [5] DAYS AFTER THE FILING OF A PETITION, THE COURT SHALL SET A DATE FOR A HEARING AND SHALL HAVE NOTICE SERVED ON THE INDIVIDUALS AND ENTITIES SPECIFIED IN SECTION 27(1)(a) OF THIS ACT [illegible] IN THE FORM AND MANNER PRESCRIBED IN SECTIONS 27(1)(a) AND 27(2).

(2) A PARENT, SPOUSE, OR CHILD OF A PARTIALLY DISABLED OR DISABLED PERSON WHO IS SERVING AS LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR OF THAT PERSON MAY, BY WILL, DESIGNATE AN INDIVIDUAL TO SERVE IN THAT CAPACITY UPON THE DEATH OF THE TESTATOR. SUCH A DESIGNATION SHALL NOT BECOME EFFECTIVE IF ANOTHER PERSON IS SERVING AS THE LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR AT THE TIME OF DEATH, NOR UNTIL THE WILL HAS BEEN FILED FOR PROBATE AND THE COURT HAS APPOINTED THE DESIGNEE FOLLOWING A HEARING PURSUANT TO SECTION 14(2) OF THIS ACT. PENDING SUCH APPOINTMENT, THE DESIGNEE MAY FILE FOR APPOINTMENT ON AN EMERGENCY BASIS PURSUANT TO SECTION 30(1) OF THIS ACT.

New Section on Motion to Dismiss by parties or disabilities resources officer

SECTION 7. EVALUATION

WITHIN THE TIME PRESCRIBED IN SECTION 25(1)(c) OF THIS ACT, THE COURT SHALL APPOINT A MULTIDISCIPLINARY EVALUATION TEAM TO EVALUATE THE RESPONDENT. THE MULTIDISCIPLINARY EVALUATION TEAM MAY, WITH THE APPROVAL OF THE COURT, EMPLOY SUCH ASSISTANTS AND INCUR SUCH EXPENSES AS ARE REASONABLE AND NECESSARY FOR CONDUCTING THE EVALUATION. HOWEVER, THE MEMBERS OF THE MULTIDISCIPLINARY TEAM SHALL BE RESPONSIBLE FOR THE CONTENTS OF AND CONCLUSIONS IN THE TEAM'S REPORT.

(2) THE EVALUATION SHALL BE CONDUCTED SO AS TO MINIMIZE INTERFERENCE WITH THE RESPONDENT'S ACTIVITES AND INTRUSION INTO THE RESPONDENT'S PRIVACY.

(3) THE REPORT OF THE MULTDISCIPLINARY EVALUATION TEAM SHALL INCLUDE:

(a) A DESCRIPTION OF THE NATURE AND EXTENT OF THE RESPONDENT'S DISABILITIES, IF ANY;

(b) A DESCRIPTION OF THE RESPONDENT'S MENTAL, EMOTIONAL, PHYSICAL, AND EDUCATIONAL CONDITION, ADAPTIVE BEHAVIOR AND SOCIAL SKILLS;

(c) AN OPINION REGARDING THE TYPE(S) AND EXTENT OF ASSISTANCE, IF ANY, REQUIRED BY THE RESPONDENT TO MANAGE HIS OR HER FINANCIAL RESOURCES, TO PROTECT HIS OR HER RIGHTS, AND/OR TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY, AND WHY NO LESS RESTRICTIVE ALTERNATE WOULD BE APPROPRIATE;

(d) AN OPINION REGARDING THE PROBABILITY THAT THE EXTENT OF THE RESPONDENT'S DISABILITIES, IF ANY, MAY SIGNIFICANTLY LESSEN, AND THE TYPE OF SERVICES OR TREATMENT WHICH WILL FACILITATE IMPROVEMENT IN THE RESPONDENT'S CONDITION OR SKILLS;

(e) THE NAMES AND ADDRESSES OF ALL INDIVIDUALS WHO EXAMINED, INTERVIEWED OR INVESTIGATED THE RESPONDENT IN CONJUNCTION WITH THE EVALUATION;

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(f) THE SIGNATURES OF EACH MEMBER OF THE MULTIDISCIPLINARY EVALUATION TEAM TOGETHER WITH A STATEMENT OF CONCURRENCE OR NONCONCURRENCE WITH THE EVALUATION FINDINGS; AND

(g) ANY DISSENTING OPINIONS OR OTHER COMMENTS BY MEMBERS OF THE MULTI DISCIPLINARY EVALUATION TEAM.

(4) THE REPORT OF THE MULTIDISCIPLINARY EVALUATION TEAM SHALL BE SUBMITTED TO THE COURT WITHIN THE TIME PRESCRIBED IN SECTION 25(1)(d) OF THIS ACT AND SHALL BE DISTRIBUTED IN THE MANNER AND TO THE INDIVIDUALS SPECIFIED IN SECTION 27(3)(a).

SECTION 8. PREHEARING CONFERENCE

WITHIN THE TIME LIMIT PRESCRIBED IN SCTION 25(1)(e) OF THIS ACT, THE PARTIES SHALL MEET, TOGETHER WITH THE DISABILITIES RESOURCES OFFICER, TO DISCUSS WHETHER IN LIGHT OF THE REPORT OF THE MULTIDISCIPLINARY EVALUATION TEAM, THE RESPONDENT IS IN NEED OF PROTECTION AND ASSISTANCE AND,

IF SO, WHETHER NON-CUSTODIAL TREATMENT OR SERVICES AVAILABLE ON A VOLUNTARY BASIS MAY OBVIATE THE NEED FOR REQUESTING THE APPOINTMENT OF A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR, AND/OR CONSERVATOR. IF THERE IS AGREEMENT THAT THE APPOINTMENT OF A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR AND/OR CONSERVATOR ARE NOT REQUIRED, THE PETITION SHALL BE WITHDRAWN IMMEDIATELY. IF THERE IS AGREEMENT THAT VOLUNTARY, NON-CUSTODIAL TREATMENT OR SERVICES MAY BE AVAILABLE WHICH MAY OBVIATE THE NEED FOR SUBMISSION OF THE MATTER TO THE COURT, THE PARTIES MAY STIPULATE TO A CONTINUANCE OF UP TO NINETY [90] DAYS. IF THE PARTIES DO NOT AGREE TO WITHDRAW THE PETITION OR STIPULATE TO A CONTINUANCE, THE MATTER SHALL PROCEED TO HEARING.

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SECTION 9. HEARING

WITHIN THE TIME LIMIT PRESCRIBED IN SECTION 25(1)(f) OF THIS ACT, THE COURT SHALL HOLD A HEARING.

(1) IF THE PETITION REQUESTS APPOINTMENT OF A LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN, THE FOLLOWING MATTERS SHALL BE DETERMINED AT THE HEARING:

(a) THE RIGHTS NEEDING PROTECTION;

(b) THE ESSENTIAL REQUIREMENTS FOR THE RESPONDENT'S PHYSICAL HEALTH AND SAFETY;

(c) THE NATURE AND EXTENT OF THE RESPONDENT'S DISABILITIES, IF ANY; AND

(d) WHETHER THE RESPONDENT IS A PARTIALLY DISABLED OR DISABLED PERSON AS DEFINED IN SECTION 3(1) AND (2) OF THIS ACT.

(2) IF THE PETITION REQUESTS THE APPOINTMENT OF A LIMITED CONSERVATOR OR ~~A LIMITED~~ CONSERVATOR, THE FOLLOWING MATTERS SHALL BE DETERMINED AT THE HEARING:

(a) THE TYPE AND AMOUNT OF THE RESPONDENT'S FINANCIAL RESOURCES;

(b) THE SKILLS AND KNOWLEDGE NECESSARY TO MANAGE THOSE FINANCIAL RESOURCES;

(c) THE NATURE AND EXTENT OF THE RESPONDENT'S DISABILITIES, IF ANY; AND

(d) WHETHER THE RESPONDENT IS A PARTIALLY DISABLED OR DISABLED PERSON, AS DEFINED IN SECTION 3(1)(c) AND (d) OF THIS ACT.

SECTION 10. DISPOSITIONAL ALTERNATIVES

(1) IF A RESPONDENT IS FOUND NOT TO BE A PARTIALLY DISABLED OR DISABLED PERSON THE PETITION SHALL BE DISMISSED.

(2) AMONG THE DISPOSITIONAL ALTERNATIVES AVAILABLE TO THE COURT FOLLOWING A FINDING THAT THE RESPONDENT IS A PARTIALLY DISABLED OR DISABLED PERSON, ARE:

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(a) DIRECTING THE PROVISION OF NECESSARY MEDICAL, MENTAL HEALTH, COUNSELING, SOCIAL, ADVOCACY, EDUCATIONAL, THERAPEUTIC, REHABILITATIVE, HOMEMAKING, RECREATIONAL, FINANCIAL OR OTHER SERVICES TO THE RESPONDENT ON A NONCUSTODIAL BASIS;

(b) DIRECTING ESTABLISHMENT OF A TRUST OF WHICH THE RESPONDENT AND ANY INDIVIDUALS LEGALLY DEPENDENT ON THE RESPONDENT ARE THE BENEFICIARIES;

(c) AUTHORIZING OR RATIFYING A CONTRACT OR TRANSACTION ENTERED INTO BY A PARTIALLY DISABLED OR DISABLED PERSON TO MEET HIS OR HER ESSENTIAL REQUIREMENTS FOR PHYSICAL HEALTH OR SAFETY, TO PROTECT HIS OR HER RIGHTS, TO MANAGE HIS OR HER FINANCIAL RESOURCES AND/OR TO DEVELOP OR REGAIN HIS OR HER ABILITIES TO THE MAXIMUM EXTENT POSSIBLE.

(d) APPOINTING A LIMITED CONSERVATOR OR CONSERVATOR; AND

(e) APPOINTING A LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN.

SECTION 11 DISPOSITIONAL HEARING, AND DISPOSITIONAL PRINCIPLES AND CRITERIA

(1) FOLLOWING A FINDING THAT THE RESPONDENT IS A PARTIALLY DISABLED OR DISABLED PERSON, THE PARTIES SHALL HAVE AN OPPORTUNITY WITHIN THE

TIME LIMITS PRESCRIBED IN SECTION 25(1)(9) OF THIS ACT TO PRESENT EVIDENCE AND TESTIMONY REGARDING THE TYPES OF ASSISTANCE AND PROTECTIONS REQUIRED, THE SERVICES AVAILABLE FOR CONSIDERATION BY THE COURT IN MAKING THE DISPOSITIONAL DECISION, AND THE SELECTION, IF ANY, OF A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR.

(2) THE COURT SHALL IMPOSE THE LEAST RESTRICTIVE DISPOSITIONAL ALTERNATIVE WHICH IN LIGHT OF THE DETERMINATIONS MADE AT THE HEARING HELD PURSUANT TO SECTION 9 OF THIS ACT AND THE EVIDENCE AND TESTIMONY PRESENTED AT THE DISPOSITIONAL HEARING WILL ASSIST THE RESPONDENT TO:

(a) MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY; AND/OR

(b) PROTECT HIS OR HER RIGHTS; AND/OR

(c) MANAGE HIS OR HER FINANCIAL RESOURCES; AND

(d) DEVELOP OR REGAIN TO THE MAXIMUM EXTENT POSSIBLE THE SKILLS NEEDED TO PERFORM THE FUNCTIONS LISTED IN SUB-PARAGRAPHS (2)(a)-(2)(c) OF THIS SECTION WITHOUT COURT-ORDERED ASSISTANCE.

DISPOSITIONS SHALL BE DESIGNED TO ENCOURAGE RESPONDENTS TO PARTICIPATE IN ALL DECISIONS WHICH AFFECT THEM AND TO ACT ON THEIR OWN BEHALF TO THE MAXIMUM EXTENT POSSIBLE.

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(3) IN SELECTING AMONG THE AVAILABLE DISPOSITIONAL ALTERNATIVES IN ACCORDANCE WITH THE PRINCIPLES SET FORTH IN PARAGRAPH (2) OF THIS SECTION, THE COURT SHALL NOT:

(a) ORDER THAT A SERVICE BE PROVIDED UNLESS THE RESPONDENT'S NEED FOR THAT PARTICULAR SERVICE HAS BEEN PROVEN;

(b) AUTHORIZE OR RATIFY A CONTRACT OR TRANSACTION UNLESS THE NEED FOR AUTHORIZATION OR RATIFICATION HAS BEEN PROVEN;

(c) ORDER THE ESTABLISHMENT OF A TRUST OR OF A GUARDIANSHIP OR CONSERVATORSHIP UNLESS THE NEED THEREFOR HAS BEEN PROVEN AND NO LESS RESTRICTIVE DISPOSITIONAL ALTERNATIVE OR COMBINATION OF ALTERNATIVES WILL BE SUFFICIENT TO SATISFY THAT NEED;

(d) ASSIGN A DUTY OR POWER TO A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR, OR CONSERVATOR APPOINTED IN

ACCORDANCE WITH SUBPARAGRAPH 3(c) OF THIS SECTION, UNLESS THE NEED THEREFOR HAS BEEN PROVEN AND NO LESS RESTRICTIVE DISPOSITIONAL ALTERNATIVE OR COMBINATION OF ALTERNATIVES WILL BE SUFFICIENT TO SATISFY THAT NEED;

(e) APPOINT A LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN IF THE RESPONDENT'S PARTIAL DISABILITY OR DISABILITY AFFECTS ONLY THE CAPACITY TO MANAGE HIS OR HER FINANCIAL RESOURCES; AND

(f) APPOINT A LIMITED CONSERVATOR OR CONSERVATOR IF THE RESPONDENT'S PARTIAL DISABILITY OR DISABILITY AFFECTS ONLY THE CAPACITY TO MEET THE ESSENTIAL REQUIREMENTS OF HIS OR HER PHYSICAL HEALTH OR SAFETY OR TO PROTECT HIS OR HER RIGHTS.

SECTION 12. SELECTION OF A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR

(1) ELIGIBILITY

THE COURT MAY APPOINT ANY NON-DISABLED ADULT OR THE DIRECTOR OF THE PUBLIC GUARDIAN SERVICE TO SERVE AS A LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN, AND ANY NON-DISABLED ADULT, ANY CORPORATION WITH GENERAL POWER TO SERVE AS TRUSTEE, OR THE DIRECTOR OF THE PUBLIC GUARDIAN SERVICE TO SERVE AS A LIMITED CONSERVATOR OR CONSERVATOR UNLESS THAT INDIVIDUAL, CORPORATION, OR THE PUBLIC GUARDIAN SERVICE:

(a) IS PERFORMING OR IS RESPONSIBLE FOR PERFORMING SOME SERVICE OTHER THAN A GUARDIANSHIP OR CONSERVATORSHIP SERVICE FOR THE RESPONDENT;

(b) IS PROVIDING SOME FORM OF TREATMENT OR IS RESPONSIBLE FOR PROVIDING SUCH TREATMENT TO THE RESPONDENT;

(c) IS ENTITLED TO RECEIVE FINANCIAL REIMBURSEMENT FOR THE CARE OF THE RESPONDENT;

(d) IS A CREDITOR OF THE RESPONDENT; OR

(e) HAS INTERESTS WHICH MAY OTHERWISE CONFLICT WITH THOSE OF THE RESPONDENT.

NOTHING IN THIS PROVISION SHALL EXCLUDE THE APPOINTMENT OF THE RESPONDENT'S PARENT, SPOUSE, CHILD OR SIBLING WHEN THE CONFLICT OF INTEREST

IS DETERMINED TO BE INSUBSTANTIAL AND SUCH AN APPOINTMENT WOULD CLEARLY BE THE MOST BENEFICIAL TO THE RESPONDENT.

(2) PRIORITY OF SELECTION

THE FOLLOWING PRIORITIES SHALL GUIDE THE COURT'S SELECTION OF A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR, OR CONSERVATOR FROM AMONG THOSE ELIGIBLE:

(a) THE INDIVIDUAL, CORPORATION OR ENTITY NOMINATED BY THE RESPONDENT;

(b) THE CURRENT LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR, OR CONSERVATOR APPOINTED OR RECOGNIZED BY THE APPROPRIATE COURT OF ANY OTHER JURISDICTION IN WHICH THE PROTECTED PERSON RESIDES;

(c) THE RESPONDENT'S SPOUSE:

(d) AN ADULT CHILD OF THE RESPONDENT;

(e) A PARENT OF THE RESPONDENT;

(f) A PERSON NOMINATED BY THE WILL OF A DECEASED PARENT;

(g) ANY PERSON WITH WHOM THE RESPONDENT HAS BEEN LIVING FOR MORE THAN 6 MONTHS PRIOR TO THE FILING OF THE PETITION;

(h) A SIBLING OF THE RESPONDENT;

(i) ~~THE DIRECTOR OF THE PUBLIC GUARDIAN SERVICE.~~

THE COURT MAY SELECT THE INDIVIDUAL OR CORPORATION BEST QUALIFIED AND MOST WILLING TO SERVE FROM AMONG THOSE OF EQUAL PRIORITY. THE COURT MAY PASS OVER A PERSON OR CORPORATION HAVING PRIORITY AND APPOINT A PERSON HAVING LESS PRIORITY OR NO PRIORITY WHEN IT IS DEMONSTRATED THAT THE SELECTION WILL BE OF GREATER BENEFIT TO THE PARTIALLY DISABLED PERSON OR DISABLED PERSON.

Add provision re: selection of ~ volunteer public guardian or conservator

SECTION 13. DISPOSITIONAL ORDER

(1) THE DISPOSITIONAL ORDER SHALL SET FORTH:

(a) THE SERVICES, IF ANY, TO BE PROVIDED TO THE RESPONDENT;

(b) THE TERMS OR CONDITIONS UNDER WHICH A CONTRACT OR TRANSACTION, IF ANY, IS AUTHORIZED OR RATIFIED;

(c) THE TERMS OF ANY TRUST TO BE ESTABLISHED;

(d) THE NAME AND ADDRESS OF THE INDIVIDUAL, IF ANY, APPOINTED TO SERVE AS THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN AND/OR THE INDIVIDUAL OR CORPORATION, IF ANY, APPOINTED TO SERVE AS LIMITED CONSERVATOR OR CONSERVATOR;

(e) THE DUTIES AND POWERS OF THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN, IF ANY;

(f) THE DUTIES AND POWERS OF THE LIMITED CONSERVATOR OR CONSERVATOR, IF ANY, AND THE PARTICULAR FINANCIAL RESOURCES PLACED UNDER SUPERVISION OR CONTROL OF THE LIMITED CONSERVATOR OR CONSERVATOR; AND

(g) THE DATE OF THE INITIAL REVIEW HEARING.

(2) IN ISSUING THE DISPOSITIONAL ORDER, THE COURT SHALL EXPLAIN ON THE RECORD THE TERMS AND CONDITIONS CONTAINED THEREIN, THE FACTS AND REASONS WHICH SUPPORT THE DECISION NOT TO IMPOSE ANY LESS RESTRICTIVE ALTERNATIVE, IN ACCORDANCE WITH THE PRINCIPLES AND CRITERIA SET FORTH IN SECTION 11(2) AND (3) OF THIS ACT, AND IF A GUARDIANSHIP OR CONSERVATORSHIP HAS BEEN ESTABLISHED, THE FACTS AND REASONS SUPPORTING THE SELECTION OF THE INDIVIDUAL AND/OR CORPORATION APPOINTED. THE COURT SHALL ALSO EXPLAIN TO THE RESPONDENT THE PROCEDURES SET FORTH IN SECTION 14 FOR TERMINATING OR MODIFYING THE DISPOSITIONAL ORDER.

SECTION 14 REVIEW, MODIFICATION AND TERMINATION

(1) (a) THE COURT SHALL HOLD A REVIEW HEARING FOLLOWING THE APPOINTMENT OF A LIMITED PERSONAL GUARDIAN AND/OR LIMITED CONSERVATOR WITHIN THE TIME LIMIT PRESCRIBED IN SECTION 25(1)(j) OF THIS ACT.

(b) THE COURT SHALL HOLD A REVIEW HEARING FOLLOWING THE APPOINTMENT OF A PERSONAL GUARDIAN AND/OR CONSERVATOR WITHIN THE TIME LIMITS PRESCRIBED IN SECTION 25(1)(k) OF THIS ACT.

(c) AT A REVIEW HEARING THE COURT SHALL:

(i) DETERMINE WHY THE APPOINTMENT SHOULD NOT BE TERMINATED OR WHY NO LESS RESTRICTIVE ALTERNATIVE WILL SATISFY THE DISPOSITIONAL PRINCIPLES AND CRITERIA SET FORTH IN SECTIONS 11(2) AND (3) OF THIS ACT;

(ii) APPROVE THE PAYMENT OF COMPENSATION AND REIMBURSEMENT OF EXPENSES, IF ANY, FROM THE FINANCIAL RESOURCES OF THE DISABLED PERSON TO THE LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR AND/OR CONSERVATOR, AND

(iii) RESOLVE ANY OTHER RELEVANT MATTERS WHICH THE PARTIES RAISE.

(d) IN CONJUNCTION WITH A REVIEW HEARING, THE COURT MAY ORDER AN EVALUTION OF THE PARTIALLY DISABLED OR DISABLED PERSON UPON A SHOWING THAT THERE HAS BEEN A SIGNIFICANT IMPROVEMENT OR DETERIORATION OF THAT PERSON'S ABILITY TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY, AND/OR TO PROTECT HIS OR HER RIGHTS, AND/OR TO MANAGE HIS OR HER FINANCIAL RESOURCES.

(e) ~~FAILURE TO HOLD A REVIEW HEARING FOR APPOINTMENTS MADE PRIOR TO THE EFFECTIVE DATE OF THIS ACT WITHIN TWO YEARS OF THAT DATE, AND~~ FAILURE TO HOLD A REVIEW HEARING FOR APPOINTMENTS MADE PURSUANT TO THIS ACT WITHIN THE TIME PRESCRIBED IN SUBPARAGRAPHS 25(1)(j) AND 25(1)(k) OF THIS ACT, SHALL RESULT IN THE TERMINATION OF THE GUARDIANSHIP AND/OR CONSERVATORSHIP.

(2) (a) IN ADDITION TO THE REVIEW PROCEDURES PRESCRIBED UNDER PARAGRAPH (1) OF THIS SECTION, A PARTIALLY DISABLED OR DISABLED PERSON, THE LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR, AND/OR CONSERVATOR OF THAT PERSON, OR ANY OTHER INTERESTED INDIVIDUAL MAY APPLY TO THE COURT FOR TERMINATION OR MODIFICATION OF A DISPOSITIONAL ORDER, APPROVAL OR DISAPPROVAL OF THE COMPENSATION FOR EXPENSES REQUESTED BY ~~OR THE~~ REPLACEMENT OF THE LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR, OR RESOLUTION OF A DISPUTE OVER THE INDIVIDUAL GUARDIANSHIP OR CONSERVATORSHIP PLAN. SUCH APPLICATIONS MAY BE FILED NO MORE THAN ONCE DURING ANY SIXTY [60] DAY PERIOD AND NO LESS THAN THIRTY [30] DAYS BEFORE OR SIXTY [60] DAYS AFTER A REVIEW HEARING HELD UNDER PARAGRAPH (1) OF THIS SECTION. EXCEPT WHEN THEY RESULT FROM THE DEATH OR RESIGNATION OF THE LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR, APPLI-

CATIONS WHICH DO NOT REQUEST THE IMPOSITION OF ADDITIONAL RESTRICTIONS ON THE LEGAL CAPACITY OF A PARTIALLY DISABLED OR DISABLED PERSON TO ACT IN HIS OR HER OWN BEHALF, OR OTHER MEASURES THAT DO NOT RAISE A SUBSTANTIAL QUESTION OR WOULD NOT ADVERSELY AFFECT THE PARTIALLY DISABLED OR DISABLED PERSON, MAY BE GRANTED BY THE COURT WITHOUT A HEARING UNLESS AN OBJECTION IS FILED.

(b) AN APPLICATION FROM A PARTIALLY DISABLED OR DISABLED PERSON MAY BE COMMUNICATED TO THE COURT BY ANY MEANS, INCLUDING BUT NOT LIMITED TO, ORAL COMMUNICATION OR INFORMAL LETTER. UPON RECEIPT OF SUCH AN INFORMAL REQUEST THE COURT SHALL CONTACT THE PARTIALLY DISABLED OR DISABLED PERSON'S ATTORNEY OF RECORD OR APPOINT NEW COUNSEL TO PREPARE A FORMAL APPLICATION.

(c) APPLICATIONS NOT FILED BY A PARTIALLY DISABLED OR DISABLED PERSON AND FORMAL APPLICATIONS FILED PURSUANT TO SUBPARAGRAPH (2)(b) OF THIS SECTION SHALL SET FORTH:

(i) THE NAME AND ADDRESS OF THE PARTIALLY DISABLED OR DISABLED PERSON;

(ii) THE NAME AND ADDRESS OF THAT PERSON'S ATTORNEY OF RECORD AND LIMITED PERSONAL GUARDIAN, PERSONAL GUARIAN, LIMITED CONSERVATOR, CONSERVATOR, AND/OR GUARDIAN AD LITEM, IF ANY;

(iii) THE NAME AND ADDRESS OF THE INDIVIDUALS MOST CLOSELY RELATED TO THE PARTIALLY DISABLED OR DISABLED PERSON UNLESS THEY ARE UNKNOWN AND CANNOT BE REASONABLY ASCERTAINED;

(iv) THE NAME AND ADDRESS OF THE INDIVIDUAL OR FACILITY, IF ANY, HAVING CUSTODY OF THE PARTIALLY DISABLED OR DISABLED PERSON;

(v) THE NAME AND ADDRESS OF AND INTEREST OF THE APPLICANT;

(vi) THE SURETY FOR THE BOND ON THE LIMITED CONSERVATOR OR CONSERVATOR, IF ANY.

(vii) THE RELIEF REQUESTED; AND

(viii) THE FACTS SUPPORTING THE REQUEST.

(d) UPON THE FILING OF AN APPLICATION, THE COURT SHALL SET A DATE FOR A HEARING AND SHALL HAVE NOTICE SERVED WITHIN THE TIME LIMIT PRESCRIBED IN SECTION 25(1)(1).

(i) IF THE APPLICATION REQUESTS TERMINATION OF ANY OR ALL OF THE RESTRICTIONS ON THE CAPACITY OF A PARTIALLY DISABLED OR DISABLED PERSON TO ACT ON HIS OR HER OWN BEHALF, OR THE REPLACEMENT OF A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR, AND/OR CONSERVATOR, THEN THE NOTICE SHALL BE SERVED ON THE INDIVIDUALS AND ENTITIES ENUMERATED IN SECTION 27(1)(a) OF THIS ACT IN THE FORM AND MANNER PRESCRIBED IN SECTIONS 27(1)(b) AND 27(2).

(ii) IF THE APPLICATION REQUESTS IMPOSITION OF ADDITIONAL RESTRICTIONS UPON THE CAPACITY OF THE PARTIALLY DISABLED OR DISABLED PERSON TO ACT ON HIS OR HER OWN BEHALF, OR RESOLUTION OF A DISPUTE OVER THE INDIVIDUAL GUARDIANSHIP AND/OR CONSERVATORSHIP PLAN, THEN THE NOTICE SHALL BE SERVED ON THE PERSONS AND ENTITIES SPECIFIED IN SECTION 27(1)(a) IN THE FORM AND MANNER PRESCRIBED IN SECTIONS 27(1)(a) AND 27(2).

(e) AT THE REQUEST OF ANY PARTY OR ON ITS OWN INITIATIVE, THE COURT MAY ORDER AN EVALUATION OF THE PARTIALLY DISABLED OR DISABLED PERSON IDENTIFIED IN THE APPLICATION UPON A SHOWING THAT THERE HAS BEEN A SIGNIFICANT IMPROVEMENT OR DETERIORATION OF THAT PERSON'S ABILITY TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY, AND/OR TO PROTECT HIS OR HER RIGHTS, AND/OR TO MANAGE HIS OR HER FINANCIAL RESOURCES. IF THE APPLICATION REQUESTS IMPOSITION OF ADDITIONAL RESTRICTIONS ON THE AUTHORITY OF A PARTIALLY DISABLED OR DISABLED PERSON TO ACT ON HIS OR HER OWN BEHALF, THE COURT SHALL ORDER AN EVALUATION OF THAT PERSON.

(f) AFTER NOTICE TO THE INDIVIDUALS AND ENTITIES ENUMERATED IN SECTION 27(1)(a) OF THIS ACT, IN THE FORM AND MANNER PRESCRIBED IN SECTIONS 27(1)(c) AND 27(2), THE COURT MAY JOIN THE ISSUES RAISED IN SEPARATE APPLICATIONS AND/OR SEPARATE OBJECTIONS FOR DETERMINATION AT A SINGLE HEARING, UNLESS JOINDER WOULD BE PREJUDICIAL TO THE INTERESTS OF THE PARTIALLY DISABLED OR DISABLED PERSON.

(3) WHEN THE COURT ISSUES AN ORDER PURSUANT TO PARAGRAPHS (1) OR (2) OF THIS SECTION, IT MAY:

(a) TERMINATE A GUARDIANSHIP OR CONSERVATORSHIP

(b) MODIFY ANY OR ALL DUTIES AND POWERS ASSIGNED TO A LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR;

(c) DISCHARGE AND/OR APPOINT INDIVIDUALS TO SERVE AS LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR AND/OR CONSERVATOR;

(d) MODIFY THE INDIVIDUAL GUARDIANSHIP AND/OR CONSERVATORSHIP PLANS; AND

(e) CONTINUE THE CURRENT LIMITATIONS UPON CAPACITY AND/OR APPOINTMENTS UNTIL THE NEXT REVIEW HEARING.

ALL ORDERS SHALL FOLLOW THE PRINCIPLES, CRITERIA, AND PRIORITIES SET FORTH IN SECTIONS 11 AND 12 OF THIS ACT, AND THE FORM AND PROCEDURES PRESCRIBED BY SECTION 13.

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SECTION 15. DUTIES AND POWERS OF LIMITED PERSONAL GUARDIANS AND PERSONAL GUARDIANS

(1) IT IS THE GENERAL DUTY OF INDIVIDUALS APPOINTED TO SERVE AS A LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN TO CARRY OUT THE SPECIFIC DUTIES AND POWERS ASSIGNED BY THE COURT DILIGENTLY AND IN GOOD FAITH. IN CARRYING OUT THESE DUTIES AND POWERS, SUCH INDIVIDUALS SHALL ENCOURAGE THE PARTIALLY DISABLED OR DISABLED PERSONS WHOM THEY ARE SERVING TO PARTICIPATE TO THE MAXIMUM EXTENT OF THEIR CAPABILITIES IN ALL DECISIONS WHICH AFFECT THEM, TO ACT ON THEIR OWN BEHALF ON ALL MATTERS IN WHICH THEY ARE ABLE TO DO SO, AND TO DEVELOP OR REGAIN, TO THE MAXIMUM EXTENT POSSIBLE, THEIR CAPACITY TO MEET THE ESSENTIAL REQUIREMENTS FOR THEIR PHYSICAL HEALTH OR SAFETY, AND/OR PROTECT THEIR RIGHTS AND, IF IMPAIRED, THEIR CAPACITY TO MANAGE THEIR FINANCIAL RESOURCES.

(2) (a) UPON APPOINTMENT, A LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN SHALL DEVELOP AN INDIVIDUAL GUARDIANSHIP PLAN TOGETHER WITH THE DISABILITIES RESOURCES OFFICER AND, TO THE MAXIMUM EXTENT POSSIBLE, THE PARTIALLY DISABLED OR DISABLED PERSON. THE PLAN SHALL SPECIFY THE

SERVICES WHICH ARE NECESSARY TO MEET THE ESSENTIAL REQUIREMENTS FOR THE PARTIALLY DISABLED OR DISABLED PERSON'S PHYSICAL HEALTH OR SAFETY AND THE MEANS FOR OBTAINING THESE SERVICES. IT SHALL ALSO SPECIFY THE MANNER IN WHICH THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN AND THE PARTIALLY DISABLED OR DISABLED PERSON, AND THE LIMITED CONSERVATOR OR CONSERVATOR, IF A CORPORATION OR ANOTHER INDIVIDUAL HAS BEEN APPOINTED TO SERVE IN THAT CAPACITY, WILL EXERCISE AND SHARE DECISION-MAKING AUTHORITY, AND SUCH OTHER ITEMS AS WILL ASSIST IN FULFILLING THE NEEDS OF THE PARTIALLY DISABLED OR DISABLED PERSON, THE TERMS OF THE DISPOSITIONAL ORDER, AND THE DUTIES OF THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN.

(b) THE INDIVIDUAL GUARDIANSHIP PLAN SHALL BE SUBMITTED TO THE COURT BY THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN WITHIN THE TIME LIMIT PRESCRIBED BY SECTION 25(1)(h). THE COURT SHALL HAVE COPIES SENT TO THE INDIVIDUALS AND ENTITIES PRESCRIBED BY SECTION 27(3)(b).

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(3) (a) THE COURT MAY ASSIGN TO A LIMITED PERSONAL GUARDIAN ANY PORTION OF THE DUTIES AND POWERS LISTED IN SUBPARAGRAPHS (4)(a)(ii)-(vii) OF THIS SECTION FOR THOSE PARTICULAR AREAS IN WHICH THE PARTIALLY DISABLED PERSON LACKS THE CAPACITY TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY AND/OR TO PROTECT HIS OR HER RIGHTS.

(b) A LIMITED PERSONAL GUARDIAN MAY ALSO BE ASSIGNED THE DUTY TO ASSIST THE PARTIALLY DISABLED PERSON IN THOSE PARTICULAR AREAS IN WHICH THAT PERSON'S CAPACITY TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY AND/OR TO PROTECT HIS OR HER RIGHTS, AND/OR TO OBTAIN NECESSARY SERVICES, AND/OR TO FULFILL HIS OR HER CIVIL DUTIES IS IMPAIRED, AS WELL AS IN OTHER WAYS NOT SPECIFICALLY PROHIBITED BY PARAGRAPH (5) OF THIS SECTION.

(c) IF A SEPARATE LIMITED CONSERVATOR OR CONSERVATOR HAS BEEN APPOINTED FOR THE PARTIALLY DISABLED PERSON, THE EXPENDITURE OF FUNDS BY THE LIMITED PERSONAL GUARDIAN SHALL BE CONSISTENT WITH THE PROCEDURES AND POLICIES ESTABLISHED BY THE LIMITED CONSERVATOR OR CONSERVATOR.

(4) (a) THE COURT SHALL ASSIGN TO A PERSONAL GUARDIAN THE DUTY AND/OR POWER TO:

(i) TAKE CUSTODY OF THE DISABLED PERSON;

(ii) ASSURE THAT THE DISABLED PERSON HAS A PLACE OF ABODE IN THE LEAST RESTRICTIVE, MOST NORMAL SETTING CONSISTENT WITH THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY;

(iii) ASSURE THE CARE, COMFORT AND MAINTENANCE OF THE DISABLED PERSON;

(iv) ASSURE THAT THE DISABLED PERSON RECEIVES THE SERVICES NECESSARY TO MEET THE ESSENTIAL REQUIREMENTS FOR THAT PERSON'S PHYSICAL HEALTH AND SAFETY AND TO DEVELOP OR REGAIN, TO THE MAXIMUM EXTENT POSSIBLE, THE CAPACITY TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY AND/OR TO PROTECT HIS OR HER RIGHTS;

(v) ASSURE THROUGH THE INITIATION OF COURT ACTIONS AND OTHER MEANS THAT THE DISABLED PERSON RECEIVES THE PERSONAL, CIVIL AND HUMAN RIGHTS TO WHICH THAT PERSON IS ENTITLED;

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(vi) PROVIDE ANY REQUIRED CONSENTS OR APPROVALS ON BEHALF OF THE DISABLED PERSON; AND

(vii) EXPEND SUMS FROM THE FINANCIAL RESOURCES OF THE DISABLED PERSON TO COVER THE REASONABLE COSTS INCURRED ON BEHALF OF THAT PERSON. IF A SEPARATE LIMITED CONSERVATOR OR CONSERVATOR HAS BEEN APPOINTED FOR THE DISABLED PERSON, THE EXPENDITURE OF FUNDS BY THE PERSONAL GUARDIAN SHALL BE CONSISTENT WITH THE DUTIES ASSIGNED TO AND PROCEDURES AND POLICIES ESTABLISHED BY THE LIMITED CONSERVATOR OR CONSERVATOR.

(b) A PERSONAL GUARDIAN MAY ALSO BE ASSIGNED THE DUTY TO ASSIST THE DISABLED PERSON TO FULFILL THAT PERSON'S CIVIL DUTIES AND IN OTHER WAYS NOT SPECIFICALLY PROHIBITED BY PARAGRAPH (5) OF THIS SECTION.

(5) A LIMITED PERSONAL GUARDIAN OR A PERSONAL GUARDIAN SHALL NOT HAVE THE POWER:

(a) TO PLACE A PARTIALLY DISABLED OR DISABLED PERSON IN A FACILITY OR INSTITUTION TO WHICH AN INDIVIDUAL WITHOUT A GUARDIAN WOULD

HAVE TO BE COMMITED UNDER (Citation to State Civil Commitment Law) OTHER THAN THROUGH A FORMAL COMMITMENT PROCEEDING IN WHICH THE PARTIALLY DISABLED OR DISABLED PERSON HAS INDEPENDENT COUNSEL AND A SEPARATE GUARDIAN AD LITEM.

(b) TO CONSENT ON BEHALF OF A PARTIALLY DISABLED OR DISABLED PERSON TO AN ABORTION, STERILIZATION, PSYCHOSURGERY, OR DONATION OF BODILY ORGANS, EXCEPT AS PROVIDED IN (Citation to Protective Services Statute) OR WHEN NECESSARY TO PRESERVE THE LIFE OR PREVENT SERIOUS IMPAIRMENT OF THE PHYSICAL HEALTH OF THAT PERSON.

(c) TO CONSENT ON BEHALF OF THE PARTIALLY DISABLED OR DISABLED PERSON TO THE WITHHOLDING OF NON-HEROIC LIFE-SAVING MEDICAL PROCEDURES;

(d) TO CONSENT ON BEHALF OF A PARTIALLY DISABLED OR DISABLED PERSON TO THE PERFORMANCE OF ANY EXPERIMENTAL MEDICAL PROCEDURE OR PARTICIPATION IN ANY MEDICAL EXPERIMENT NOT INTENDED TO PRESERVE THE LIFE OR PREVENT SERIOUS IMPAIRMENT OF THE PHYSICAL HEALTH OF THE PARTIALLY DISABLED OR DISABLED PERSON;

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(e) TO PROHIBIT THE MARRIAGE OR DIVORCE OF A PARTIALLY DISABLED OR DISABLED PERSON;

(f) TO CONSENT ON BEHALF OF A PARTIALLY DISABLED OR DISABLED PERSON TO TERMINATION OF THAT PERSON'S PARENTAL RIGHTS; AND

(g) TO ASSIST IN MANAGING OR TO MANAGE THE FINANCIAL RESOURCES OF THE PARTIALLY DISABLED OR DISABLED PERSON UNLESS THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN HAS ALSO BEEN APPOINTED AS THE LIMITED CONSERVATOR OR CONSERVATOR FOR THAT PERSON.

(6) (a) A LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN SHALL SUBMIT A REPORT TO THE COURT AT LEAST ANNUALLY AND WHEN:

(i) THE COURT ORDERS ADDITIONAL REPORTS TO BE FILED;

(ii) THERE IS A SIGNIFICANT CHANGE IN THE CAPACITY OF THE PARTIALLY DISABLED OR DISABLED PERSON TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY AND/OR TO PROTECT HIS OR HER RIGHTS;

(iii) THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN RESIGNS OR IS REMOVED; AND

(iv) THE GUARDIANSHIP IS TERMINATED.

(b) SUCH REPORTS SHALL SET FORTH:

(i) THE NAME AND ADDRESS OF THE PARTIALLY DISABLED OR DISABLED PERSON, AND OF THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN;

(ii) CHANGES IN THE CAPACITY OF A PARTIALLY DISABLED OR DISABLED PERSON TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY AND/OR TO PROTECT HIS OR HER RIGHTS;

(iii) THE SERVICES BEING PROVIDED TO THE PARTIALLY DISABLED OR DISABLED PERSON AND THE RELATIONSHIP OF THOSE SERVICES TO THE INDIVIDUAL GUARDIANSHIP PLAN;

(iv) THE SIGNIFICANT ACTIONS TAKEN BY THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN DURING THE REPORTING PERIOD;

(v) THE COMPENSATION REQUESTED AND REASONABLE AND NECESSARY EXPENSES INCURRED BY THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN;

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(vi) ANY SIGNIFICANT PROBLEMS RELATING TO THE GUARDIANSHIP WHICH HAVE ARISEN DURING THE REPORTING PERIOD; AND

(vii) THE REASONS, IF ANY, WHY THE APPOINTMENT SHOULD NOT BE TERMINATED OR WHY NO LESS RESTRICTIVE ALTERNATIVE WILL PERMIT THE PARTIALLY DISABLED OR DISABLED PERSON TO MEET THE ESSENTIAL REQUIREMENTS FOR HIS OR HER PHYSICAL HEALTH OR SAFETY AND/OR TO PROTECT HIS OR HER RIGHTS.

ATTACHED TO THE REPORT SHALL BE AN ACCOUNTING OF ANY EXPENDITURES MADE BY THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN, AND AN UPDATE OF THE INDIVIDUAL GUARDIANSHIP PLAN DEVELOPED BY THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN, THE DISABILITIES RESOURCES OFFICER, AND TO THE MAXIMUM EXTENT POSSIBLE THE DISABLED OR PARTIALLY DISABLED PERSON.

(c) THE COURT SHALL HAVE COPIES SENT TO THE INDIVIDUALS AND ENTITIES SPECIFIED IN SECTION 27(3)(b).

SECTION 16. DUTIES, RESPONSIBILITIES, AND POWERS OF LIMITED CONSERVATORS AND CONSERVATORS

(1) IT IS THE GENERAL DUTY OF AN INDIVIDUAL OR CORPORATION APPOINTED TO SERVE AS A LIMITED CONSERVATOR OR CONSERVATOR FOR A PARTIALLY DISABLED OR DISABLED PERSON TO CARRY OUT THE SPECIFIC DUTIES AND POWERS ASSIGNED BY THE COURT DILIGENTLY AND IN GOOD FAITH. IN CARRYING OUT THESE DUTIES AND POWERS SUCH INDIVIDUALS OR CORPORATIONS SHALL MANAGE OR ASSIST IN MANAGING THOSE FINANCIAL RESOURCES PLACED UNDER THEIR SUPERVISION AND/OR CONTROL, AS WOULD A PRUDENT PERSON MANAGE HIS OR HER OWN FINANIAL RESOURCES, AND SHALL ENCOURAGE THE DISABLED OR PARTIALLY DISABLED PERSONS WHOM THEY ARE SERVING TO PARTICIPATE, TO THE MAXIMUM EXTENT OF THEIR CAPABILITIES, IN ALL DECISIONS WHICH AFFECT THEM, TO ACT ON THEIR OWN BEHALF ON ALL MATTERS IN WHICH THEY ARE ABLE TO DO SO, AND TO DEVELOP OR REGAIN, TO THE MAXIMUM EXTENT POSSIBLE, THEIR CAPACITY TO MANAGE THEIR FINANCIAL RESOURCES AND, IF IMPAIRED, THEIR CAPACITY TO MEET THE ESSENTIAL REQUIREMENTS FOR THEIR PHYSICAL HEALTH OR SAFETY AND/OR TO PROTECT THEIR RIGHTS.

(2) (a) UPON APPOINTMENT, A LIMITED CONSERVATOR OR CONSERVATOR SHALL DEVELOP AN INDIVIDUAL CONSERVATORSHIP PLAN TOGETHER WITH THE DISABILITIES RESOURCES OFFICER AND, TO THE MAXIMUM EXTENT POSSIBLE, THE PARTIALLY DISABLED OR DISABLED PERSON. THE PLAN SHALL SPECIFY THE SERVICES WHICH ARE NECESSARY TO MANAGE THOSE FINANCIAL RESOURCES DESIGNATED BY THE COURT IN THE DISPOSITIONAL ORDER AND THE MEANS THROUGH WHICH THESE SERVICES WILL BE PROVIDED. THE PLAN SHALL ALSO SPECIFY THE MANNER IN WHICH THE LIMITED CONSERVATOR OR CONSERVATOR, THE PARTIALLY DISABLED OR DISABLED PERSON AND THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN, IF ANOTHER INDIVIDUAL HAS BEEN APPOINTED TO SERVE IN THAT CAPACITY, WILL EXERCISE AND SHARE THEIR DECISION-MAKING AUTHORITY, THE POLICIES AND PROCEDURES GOVERNING THE EXPENDITURE OF FUNDS, AND SUCH OTHER ITEMS AS WILL ASSIST IN THE MANAGEMENT OF THE DESIGNATED FINANCIAL RESOURCES, AND IN FULFILLING THE TERMS OF THE DISPOSITIONAL ORDER AND THE DUTIES OF THE LIMITED CONSERVATOR OR CONSERVATOR.

(b) THE INDIVIDUAL CONSERVATORSHIP PLAN SHALL BE SUBMITTED TO THE COURT WITHIN THE TIME LIMIT PRESCRIBED IN SECTION 25(1)(i), TOGETHER WITH A COMPLETE INVENTORY OF THE DESIGNATED FINANCIAL RESOURCES. THE INVENTORY SHALL INCLUDE AN OATH OR AFFIRMATION THAT, TO THE BEST OF THE LIMITED CONSERVATOR'S OR CONSERVATOR'S KNOWLEDGE, IT IS COMPLETE AND ACCURATE.

(c) THE COURT SHALL HAVE A COPY OF THE INDIVIDUAL CONSERVATORSHIP PLAN AND THE INVENTORY SENT TO THE INDIVIDUALS AND ENTITIES SPECIFIED IN SECTION 27(3)(b).

(3) (a) A LIMITED CONSERVATOR OR CONSERVATOR SHALL EXPEND OR DISTRIBUTE, AND/OR AUTHORIZE THE EXPENDITURE OR DISTRIBUTION OF, AND/OR ASSIST IN THE EXPENDITURE OR DISTRIBUTION OF THE PRINCIPLE OF OR INCOME FROM THOSE FINANCIAL RESOURCES PLACED UNDER HIS OR HER SUPERVISION AND CONTROL TO ASSURE THAT:

(i) THE ESSENTIAL REQUIREMENTS FOR THE PHYSICAL HEALTH OR SAFETY OF THE PARTIALLY DISABLED OR DISABLED PERSON, WHOM HE OR SHE IS SERVING, ARE MET;

(ii) THE RIGHTS OF THAT PERSON ARE PROTECTED;

(iii) THE FINANCIAL RESOURCES OF THAT PERSON WHICH HAVE BEEN PLACED UNDER THE CONTROL OF THE LIMITED CONSERVATOR OR CONSERVATOR ARE PRUDENTLY MANAGED;

(iv) THE PARTIALLY DISABLED OR DISABLED PERSON HAS THE OPPORTUNITY TO DEVELOP OR REGAIN THE CAPACITY TO PERFORM THE FUNCTIONS LISTED IN SUBPARAGRAPHS (3)(a)(i)-(iii) OF THIS SECTION, TO THE MAXIMUM EXTENT POSSIBLE; AND

(v) THE LIMITED PERSONAL GUARDIAN OR GUARDIAN, IF ANY, IS ABLE TO CARRY OUT DUTIES AND POWERS ASSIGNED BY THE COURT.

(b) IN SO DOING THE LIMITED CONSERVATOR OR CONSERVATOR SHALL CONSIDER IN ADDITION TO THE REQUESTS OF THE PARTIALLY DISABLED OR DISABLED PERSON AND THAT PERSON'S LIMITED PERSONAL GUARDIAN OR GUARDIAN, IF ANY:

(i) THE SIZE OF THE FINANCIAL RESOURCES;

(ii) THE PROBABLE DURATION OF THE CONSERVATORSHIP;

(iii) THE LIKELIHOOD THAT THE PARTIALLY DISABLED OR DISABLED PERSON MAY BE ABLE TO MANAGE THE FINANCIAL RESOURCES IN THE FUTURE; AND

(iv) THE ACCUSTOMED STANDARD OF LIVING OF THE PARTIALLY DISABLED OR DISABLED PERSON AND THE INDIVIDUALS LEGALLY DEPENDENT ON THAT PERSON.

IN ADDITION, LIMITED CONSERVATORS SHALL CONSIDER THE SIZE OF THE FINANCIAL RESOURCES OF A PARTIALLY DISABLED OR DISABLED PERSON WHICH HAVE NOT BEEN PLACED UNDER THEIR SUPERVISION OR CONTROL.

(c) FUNDS UNDER THIS PARAGRAPH MAY BE PAID BY THE CONSERVATOR TO ANY PERSON, INCLUDING THE PARTIALLY DISABLED OR DISABLED PERSON.

(d) LIMITED CONSERVATORS AND CONSERVATORS SHALL ESTABLISH POLICIES AND PROCEDURES FOR THE EXPENDITURE OF THE FUNDS UNDER THE LIMITED CONSERVATOR'S OR CONSERVATOR'S SUPERVISION AND CONTROL, BY THE PARTIALLY DISABLED OR DISABLED PERSON, OR BY A LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN FOR THAT PERSON IF ANOTHER INDIVIDUAL HAS BEEN APPOINTED TO SERVE IN THAT CAPACITY.

(4) (a) THE COURT MAY ASSIGN TO A LIMITED CONSERVATOR THE DUTY OF ASSISTING A PARTIALLY DISABLED PERSON TO PERFORM ANY OF THE FUNCTIONS LISTED IN SUBPARAGRAPH (5)(a) OF THIS SECTION WITH REGARD TO ANY FINANCIAL RESOURCE OF THE PARTIALLY DISABLED PERSON.

(b) THE COURT MAY ASSIGN TO A LIMITED CONSERVATOR ANY, OF THE DUTIES AND POWERS LISTED IN SUBPARAGRAPH (5)(a) OF THIS SECTION WHICH THE PARTIALLY DISABLED PERSON LACKS THE CAPACITY TO PERFORM, AND/OR THE POWER TO VOID PARTICULAR TYPES OF CONTRACTS, CONVEYANCES OR DISPOSITIONS MADE BY THE PARTIALLY DISABLED PERSON NO MORE THAN FIFTEEN [15] DAYS AFTER THE TRANSACTION. SUCH ASSIGNMENTS SHALL SPECIFY THE FINANCIAL RESOURCES TO WHICH THEY APPLY.

(c) UPON THE DEATH OF A PARTIALLY DISABLED PERSON, THE LIMITED CONSERVATOR FOR THAT PERSON SHALL HAVE THE DUTIES AND POWERS PRESCRIBED IN SUB-PARAGRAPH (5)(b) OF THIS SECTION.

(5) (a) THE COURT SHALL ASSIGN TO A CONSERVATOR THE DUTY AND/OR POWER TO:

(i) ACQUIRE, COLLECT, HOLD, DEPOSIT, RETAIN, OPERATE, DEVELOP, REPAIR, IMPROVE, INSURE, SUBDIVIDE, EXCHANGE, PARTITION, ALTER, LEASE, CONVERT OR DISPOSE OF THE FINANCIAL RESOURCES OF THE DISABLED PERSON;

(ii) PAY, CONTEST, SETTLE OR RELEASE CLAIMS AGAINST THE DISABLED PERSON OR THE FINANCIAL RESOURCES OF THE DISABLED PERSON;

(iii) PAY TAXES, ASSESSMENTS, COMPENSATION AND OTHER REASONABLE EXPENSES INCURRED IN THE MANAGEMENT OF THE FINANCIAL RESOURCES OF THE DISABLED PERSON;

(iv) EMPLOY PERSONS TO PERFORM, ADVISE, OR ASSIST IN PARTICULAR ASPECTS OF THE MANAGEMENT OF THE FINANCIAL RESOURCES OF THE DISABLED PERSON;

(v) BORROW MONEY TO BE REPAID FROM THE FINANCIAL RESOURCES OF THE DISABLED PERSON;

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(vi) PROSECUTE OR DEFEND ACTIONS, CLAIMS, OR PROCEEDINGS IN ANY JURISDICTION FOR THE PROTECTION OF THE FINANCIAL RESOURCES OF THE DISABLED PERSON AND OF THE CONSERVATOR IN THE PERFORMANCE OF THE CONSERVATOR'S DUTIES;

(vii) ALLOCATE ITEMS OF INCOME OR EXPENSE TO EITHER PRINCIPAL OR INCOME AS PROVIDED BY LAW, INCLUDING THE CREATION OF RESERVES OUT OF INCOME FOR DEPRECIATION, OBSOLESCENCE, AMORTIZATION, OR DEPLETION OF MINERAL OR TIMBER RESOURCES;

(viii) VOTE A SECURITY IN PERSON, OR BY GENERAL OR LIMITED PROXY;

(ix) ESTABLISH REVOCABLE OR IRREVOCABLE TRUSTS;

(x) EXERCISE OPTIONS;

(xi) EXERCISE OR RELEASE POWERS OF APPOINTMENT OF WHICH THE DISABLED PERSON IS DONOR;

(xii) RENOUNCE INTERESTS AND MAKE GIFTS;

(xiii) CHANGE BENEFICIARIES UNDER INSURANCE AND ANNUITY POLICIES; AND

(xiv) ENTER INTO CONTRACTS AND EXECUTE AND DELIVER ALL INSTRUMENTS WHICH WILL ACCOMPLISH OR FACILITATE THE EXERCISE OF THE ASSIGNED DUTIES AND POWERS.

(b) UPON THE DEATH OF A DISABLED PERSON:

(i) THE CONSERVATOR SHALL DELIVER TO THE (name of court having probate jurisdiction) ANY WILL OF THE DECEASED OF WHICH THE CONSERVATOR HAS POSSESSION AND/OR ADVISE THE COURT OF THE WHEREABOUTS OF ANY OTHER WILL OF WHICH THE CONSERVATOR IS AWARE;

(ii) INFORM THE (executor/personal representative) OR A NAMED BENEFICIARY OF THE ACTIONS TAKEN; AND

(iii) RETAIN THOSE PORTIONS OF THE ESTATE OVER WHICH THE CONSERVATOR HAS CONTROL FOR DELIVERY TO A DULY APPOINTED (executor/personal representative) OF THE DECEASED OR THE INDIVIDUALS ENTITLED THERETO.

THE CONSERVATOR MAY SEEK APPOINTMENT AS (executor/personal representative) OF THE ESTATE OF THE DISABLED PERSON IN THE MANNER PRESCRIBED IN (citation to relevant sections of the probate code).

(6) SPECIFIC PROHIBITIONS

(a) A LIMITED CONSERVATOR OR CONSERVATOR SHALL NOT HAVE THE AUTHORITY TO EXERCISE OR RELEASE POWERS OF APPOINTMENT OF WHICH THE PARTIALLY DISABLED OR DISABLED PERSON IS DONEE, TO RENOUNCE INTERESTS OR TO MAKE GIFTS EXCEEDING TWENTY [20] PERCENT OF ANY YEAR'S INCOME FROM THE FINANCIAL RESOURCES PLACED UNDER THE CONTROL OF THE LIMITED CONSERVATOR OR CONSERVATOR, NOR TO CHANGE BENFICIARIES UNDER INSURANCE OR ANNUITY POLICIES WITHOUT THE APPROVAL OF THE COURT. NO APPROVAL SHALL BE GRANTED UNLESS IT IS DEMONSTRATED AT A HEARING THAT THE PROPOSED ACTION IS CONSISTENT WITH THE GENERAL DUTY OF THE LIMITED CONSERVATOR OR CONSERVATOR SET FORTH UNDER PARAGRAPH (1) OF THIS SECTION, AND THAT THE PARTIALLY DISABLED OR DISABLED PERSON HAS CONSENTED OR IS UNABLE TO PROVIDE AN INFORMED, VOLUNTARY CONSENT. NOTICE OF THE HEARING SHALL BE SERVED ON THE INDIVIDUALS AND ENTITIES ENUMERATED IN SECTION 27(1)(a) OF THIS ACT IN THE FORM AND MANNER PRESCRIBED IN SECTIONS 27(1)(a) AND 27(2).

(b) TITLE TO ALL THE DESIGNATED FINANCIAL RESOURCES OF A PARTIALLY DISABLED PERSON OR DISABLED PERSON SHALL REMAIN IN THAT PERSON SUBJECT TO THE POSSESSION OF THE LIMITED CONSERVATOR OR CONSERVATOR AND TO THE CONTROL OF THE COURT, UNLESS THE COURT ORDERS OTHERWISE. THE PROVISION OF TITLE TO A CONSERVATOR OR LIMITED CONSERVATOR IS NOT A TRANSFER OR ALIENATION WITHIN THE MEANING OF GENERAL PROVISIONS OF ANY FEDERAL OR STATE STATUTE OR REGULATION, INSURANCE POLICY, PENSION PLAN CONTRACT, OR WILL OR TRUST INSTRUMENT, IMPOSING RESTRICTIONS UPON OR PENALTIES FOR TRANSFER OR ALIENATION BY THE PARTIALLY DISABLED OR DISABLED PERSON OF A RIGHT OR INTEREST. IF TITLE IS PROVIDED TO A LIMITED CONSERVATOR OR LIMITED CONSERVATOR, LETTERS OF CONSERVATORSHIP SHALL BE EVIDENCE OF TRANSFER OF ALL DESIGNATED FINANCIAL RESOURCES ~~TO THE CONSERVATOR OR LIMITED CONSERVATOR~~. AN ORDER TERMINATING A CONSERVATORSHIP OR THE SCOPE OR POWERS THEREOF, SHALL BE EVIDENCE OF TRANSFER OF THE DESIGNATED FINANCIAL RESOURCES TO THE PARTIALLY DISABLED OR DISABLED PERSON, THE SUCCESSOR OF THAT PERSON, OR TO A NEW LIMITED CONSERVATOR OR CONSERVATOR. SUBJECT TO (Citation to statute governing the filing or recording of documents to land or other property), LETTERS OF CONSERVATORSHIP AND ORDERS TERMINATING CONSERVATORSHIP SHALL BE FILED OR RECORDED TO GIVE RECORD NOTICE OF TITLE. SUBJECT TO

(7) (a) A LIMITED CONSERVATOR OR CONSERVATOR SHALL SUBMIT A REPORT TO THE COURT AT LEAST ANNUALLY AND WHEN:

(i) THE COURT ORDERS ADDITIONAL REPORTS TO BE FILED;

(ii) THERE IS A SIGNIFICANT CHANGE IN THE CAPACITY OF THE PARTIALLY DISABLED OR DISABLED PERSON TO MANAGE HIS OR HER FINANCIAL RESOURCES;

(iii) THE LIMITED CONSERVATOR OR CONSERVATOR RESIGNS OR IS REMOVED; AND

(iv) THE CONSERVATORSHIP IS TERMINATED.

(b) SUCH REPORTS SHALL SET FORTH:

(i) THE NAME AND ADDRESS OF THE PARTIALLY DISABLED OR DISABLED PERSON AND OF THE LIMITED CONSERVATOR OR CONSERVATOR;

(ii) CHANGES IN THE CAPACITY OF THE PARTIALLY DISABLED OR DISABLED PERSON TO MANAGE HIS OR HER FINANCIAL RESOURCES;

(iii) A COMPLETE FINANCIAL STATEMENT OF THE FINANCIAL RESOURCES UNDER THE CONTROL AND/OR SUPERVISION OF THE LIMITED CONSERVATOR OR CONSERVATOR;

(iv) THE SERVICES BEING PROVIDED TO THE PARTIALLY DISABLED OR DISABLED PERSON AND THE RELATIONSHIP OF THOSE SERVICES TO THE INDIVIDUAL CONSERVATORSHIP PLAN;

(v) THE SIGNIFICANT ACTIONS TAKEN BY THE LIMITED CONSERVATOR OR CONSERVATOR DURING THE REPORTING PERIOD;

(vi) THE COMPENSATION REQUESTED AND THE REASONABLE AND NECESSARY EXPENSES INCURRED BY THE LIMITED CONSERVATOR OR CONSERVATOR;

(vii) ANY SIGNIFICANT PROBLEMS RELATING TO THE CONSERVATORSHIP WHICH HAVE ARISEN DURING THE REPORTING PERIOD; AND

(viii) THE REASONS, IF ANY, WHY THE CONSERVATORSHIP SHOULD NOT BE TERMINATED, OR WHY NO LESS RESTRICTIVE ALTERNATIVE WOULD PERMIT THE DISABLED OR PARTIALLY DISABLED PERSON TO MANAGE HIS OR HER FINANCIAL RESOURCES.

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ATTACHED TO THE REPORT SHALL BE AN UPDATED INDIVIDUAL CONSERVATORSHIP PLAN DEVELOPED BY THE LIMITED CONSERVATOR OR CONSERVATOR, THE DISABILITIES RESOURCES OFFICER AND, TO THE MAXIMUM EXTENT POSSIBLE, THE PARTIALLY DISABLED OR DISABLED PERSON.

(c) THE COURT SHALL HAVE COPIES OF THE REPORT SENT TO THE INDIVIDUALS AND ENTITIES SPECIFIED IN SECTION 27(3)(b).

(d) FOLLOWING SUBMISSION OF A REPORT OR IN CONJUNCTION WITH A REVIEW HEARING PURSUANT TO SECTION 14(1) OR A PROCEEDING INITIATED UNDER SECTION 14(2), A CONSERVATOR SHALL SUBMIT TO A PHYSICAL INSPECTION OF THE FINANCIAL RESOURCES PLACED UNDER HIS OR HER CONTROL, IN THE MANNER SPECIFIED BY THE COURT.

SECTION 35. BONDS

(1) THE COURT MAY REQUIRE LIMITED CONSERVATORS OR CONSERVATORS TO HAVE A SURETY SATISFACTORY TO THE COURT FURNISH A BOND CONDITIONED UPON THE FAITHFUL DISCHARGE OF ALL DUTIES AND POWERS ASSIGNED IN THE DISPOSITIONAL ORDER. UNLESS OTHERWISE DIRECTED, THE BOND SHALL BE IN THE AMOUNT OF THE AGGREGATE CAPITAL VALUE OF THE PROPERTY IN THEIR CONTROL PLUS ONE YEAR'S ESTIMATED INCOME MINUS THE VALUE OF SECURITIES DEPOSITED UNDER ARRANGEMENTS REQUIRING AN ORDER OF THE COURT FOR THEIR REMOVAL AND THE VALUE OF ANY LAND WHICH THE FIDUCIARY, BY EXPRESS LIMITATION OF POWER, LACKS POWER TO SELL OR CONVEY WITHOUT COURT AUTHORIZATION. THE COURT IN LIEU OF SURETIES ON A BOND, MAY ACCEPT OTHER SECURITY FOR THE PERFORMANCE OF THE BOND, INCLUDING A PLEDGE OF SECURITIES OR A MORTGAGE OF LAND.

(2) THE FOLLOWING REQUIREMENTS AND PROVISIONS APPLY TO ANY BOND REQUIRED UNDER THIS SECTION:

(a) UNLESS OTHERWISE PROVIDED BY THE TERMS OF THE APPROVED BOND, SURETIES ARE JOINTLY AND SEVERALLY LIABLE WITH THE LIMITED CONSERVATOR OR CONSERVATOR AND WITH EACH OTHER;

(b) BY EXECUTING AN APPROVED BOND ON A LIMITED CONSERVATOR OR CONSERVATOR, THE SURETY CONSENTS TO THE JURISDICTION OF THE COURT WHICH ISSUED LETTERS TO THE PRIMARY OBLIGOR IN ANY PROCEEDING PERTAINING TO THE FIDUCIARY DUTIES OF THE LIMITED CONSERVATOR OR CONSERVATOR AND THE NAMING OF THE SURETY AS A PARTY DEFENDANT. NOTICE OF ANY PROCEEDING SHALL BE DELIVERED TO OR MAILED BY REGISTERED OR CERTIFIED MAIL TO THE SURETY AT THE ADDRESS OF THE SURETY LISTED WITH THE COURT WHERE THE BOND IS FILED AND TO THE ADDRESS OF THE SURETY THEN KNOWN TO THE PETITIONER;

(c) ON PETITION OF A SUCCESSOR LIMITED CONSERVATOR OR CONSERVATOR OR ANY INTERESTED PERSON, A PROCEEDING MAY BE INITIATED AGAINST A SURETY FOR BREACH OF THE OBLIGATION OF THE BOND OF THE LIMITED CONSERVATOR OR CONSERVATOR;

(d) THE BOND ON THE LIMITED CONSERVATOR OR CONSERVATOR IS NOT VOID AFTER THE FIRST RECOVERY BUT MAY BE PROCEEDED AGAINST AT SUBSEQUENT TIMES UNTIL THE WHOLE PENALTY IS EXHAUSTED.

NO PROCEEDING MAY BE COMMENCED AGAINST THE SURETY ON ANY MATTER AS TO WHICH AN ACTION OR PROCEEDING AGAINST THE PRIMARY OBLIGOR IS BARRED BY ADJUDICATION OR LIMITATION.

SECTION 36. LIABILITY OF A LIMITED CONSERVATOR OR CONSERVATOR AND PENALTIES FOR VIOLATIONS OF THE ACT

(1) (a) UNLESS OTHERWISE PROVIDED IN THE CONTRACT, LIMITED CONSERVATORS AND CONSERVATORS SHALL NOT BE INDIVIDUALLY LIABLE ON A CONTRACT PROPERLY ENTERED INTO IN THEIR FIDUCIARY CAPACITY IN THE COURSE OF ADMINISTRATION OF THE FINANCIAL RESOURCES OF A PARTIALLY DISABLED OR DISABLED PERSON OR A MINOR, UNLESS THEY FAIL TO REVEAL THEIR REPRESENTATIVE CAPACITY AND IDENTIFY THE PARTIALLY DISABLED OR DISABLED PERSON OR THE MINOR IN THE CONTRACT.

(b) LIMITED CONSERVATORS AND CONSERVATORS SHALL BE INDIVIDUALLY LIABLE FOR OBLIGATIONS ARISING FROM OWNERSHIP OR CONTROL OF FINANCIAL RESOURCES OF A PARTIALLY DISABLED OR DISABLED PERSON OR A MINOR FOR TORTS COMMITTED IN THE COURSE OF ADMINISTRATION OF SUCH FINANCIAL RESOURCES ONLY IF THEY ARE PERSONALLY AT FAULT.

(c) CLAIMS BASED ON CONTRACTS ENTERED INTO BY LIMITED CONSERVATORS OR CONSERVATORS IN THEIR FIDUCIARY CAPACITY, ON OBLIGATIONS ARISING FROM OWNERSHIP OR CONTROL OF THE FINANCIAL RESOURCES OF PARTIALLY DISABLED OR DISABLED PERSONS OR MINORS, OR ON TORTS COMMITTED IN THE COURSE OF ADMINISTRATION OF THE FINANCIAL RESOURCES MAY BE ASSERTED BY PROCEEDING AGAINST CONSERVATORS IN THEIR FIDUCIARY CAPACITY, WHETHER OR NOT THE LIMITED CONSERVATORS OR CONSERVATORS ARE INDIVIDUALLY LIABLE THEREFOR.

(d) ANY QUESTION OF LIABILITY BETWEEN THE FINANCIAL RESOURCES OF PARTIALLY DISABLED OR DISABLED PERSONS OR MINORS AND THE LIMITED CONSERVATORS OR CONSERVATORS INDIVIDUALLY, MAY BE DETERMINED IN A PROCEEDING FOR ACCOUNTING, SURCHARGE, OR INDEMNIFICATION, OR OTHER APPROPRIATE PROCEEDING OR ACTION.

(2) ANY LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR WHO WILLFULLY VIOLATES THE DUTIES OR MISUSES THE POWERS ASSIGNED BY COURT AND THEREBY CAUSES HARM TO THE SUBJECT OF THE GUARDIANSHIP OR CONSERVATORSHIP OR TO THE FINANCIAL RESOURCES OF THAT INDIVIDUAL SHALL BE SUBJECT TO A FINE OF UP TO $10,000 FOR EACH SUCH VIOLATION OF DUTY OR MISUSE OR POWER, IN ADDITION TO ANY CIVIL LIABILITY TO WHICH THE LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR MAY BE SUBJECT.

(3) (a) ANY INDIVIDUAL WHO WILLFULLY DISCLOSES IDENTIFIABLE INFORMATION OR WHO WILLFULLY GAINS ACCESS TO IDENTIFIABLE INFORMATION IN VIOLATION OF SECTION 34(4) OR SECTION 34(7)(b) OF THIS ACT OR WHO WILLFULLY FAILS TO DESTROY OR SEAL IDENTIFIABLE INFORMATION AFTER RECEIVING A COPY OF AN ORDER PURSUANT TO SECTION 34(6) OR SECTION 34(7)(a) SHALL BE SUBJECT TO A FINE OF UP TO $5,000.

IF A PUBLIC OFFICIAL OR PUBLIC EMPLOYEE IS CONVICTED UNDER THIS PARAGRAPH, THE CONVICTION SHALL BE GROUNDS FOR REMOVAL FROM OFFICE.

(b) THE SUBJECT OF IDENTIFIABLE INFORMATION WHICH HAS NOT BEEN DESTROYED OR SEALED IN ACCORDANCE WITH SECTION 34(6) OR SECTION 34(7)(a) OF THIS ACT, MAY INITIATE A CIVIL ACTION FOR DAMAGES OR TO RESTRAIN FURTHER DISSEMINATION. ANY INDIVIDUAL, COURT OR AGENCY PROVEN TO HAVE VIOLATED THOSE SECTIONS SHALL BE LIABLE FOR ACTUAL DAMAGES AND EXEMPLARY DAMAGES FOR EACH VIOLATION AND SHALL BE LIABLE FOR COURT COSTS, EXPENSES AND REASONABLE ATTORNEY'S FEES INCURRED BY THE SUBJECT OF THE RECORD.

SECTION 37. VENUE OF PROCEEDINGS SUBSEQUENT TO A DISPOSITIONAL ORDER OR AN UNCONTESTED ACCEPTANCE OF A TESTAMENTARY APPOINTMENT

THE COURT IN THE JURISDICTION IN WHICH THE SUBJECT OF A PROTECTIVE PROCEEDING RESIDES FOLLOWING ISSUANCE OF A DISPOSITIONAL ORDER OR AN UNCONTESTED ACCEPTANCE OF A TESTAMENTARY DESIGNATION, HAS CONCURRENT JURISDICTION WITH THE COURT WHICH ISSUED THE ORDER OR IN WHICH THE ACCEPT-

ANCE WAS FILED OVER PROCEEDINGS UNDER SECTIONS 14, 21, 29, AND 34 OF THIS ACT AND OTHER PROCEEDINGS RELATED TO THE IMPOSITION OF RESTRICTIONS ON THE CAPACITY OF A PERSON TO ACT IN HIS OR HER OWN BEHALF.

IF THE COURT IN WHICH A SUBSEQUENT PROCEEDING IS COMMENCED IS NOT THE COURT WHICH ISSUED THE DISPOSITIONAL ORDER OR IN WHICH ACCEPTANCE OF TESTAMENTARY DESIGNATION WAS FILED, IT SHALL NOTIFY THAT COURT, AND AFTER CONSULTATION WITH THE PARTIES, DETERMINE WHETHER TO RETAIN OR TRANSFER CONTROL OF THE PROCEEDINGS. VENUE SHALL BE IN THE JURISDICTION WHICH IS THE MOST CONVENIENT FOR AND BEST SERVES THE INTERESTS OF THE SUBJECT OF THE PROTECTIVE PROCEEDING. THE COURT WHICH ISSUED THE DISPOSITIONAL ORDER OR IN WHICH ACCEPTANCE OF A TESTAMENTARY DESIGNATION IS FILED SHALL BE SENT A COPY OF ANY ORDER RESULTING FROM A SUBSEQUENT PROCEEDING IN ANOTHER JURISDICTION.

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SECTION 38. BURDEN OF PROOF

(1) IN PROCEEDINGS INITIATED UNDER CHAPTER 2 OF THIS ACT BOTH THE BURDEN OF GOING FORWARD AND THE BURDEN OF PERSUASION BY CLEAR AND CONVINCING EVIDENCE SHALL BE ON THE INDIVIDUAL OR ENTITY FILING THE PETITION OR APPLICATION EXCEPT WHEN AN APPLICATION IS FILED PURSUANT TO SECTION 14(2)(a) BY A PARTIALLY DISABLED OR DISABLED PERSON. IN SUCH INSTANCES, THE BURDEN OF PERSUASION BY CLEAR AND CONVINCING EVIDENCE SHALL SHIFT TO THE PARTY OR PARTIES OPPOSING THE APPLICATION IF THE PARTIALLY DISABLED OR DISABLED PERSON PRESENTS TESTIMONY AND/OR EVIDENCE CONSTITUTING A PRIMA FACIE CASE SUPPORTING THE REQUESTED RELIEF.

(2) IN PROCEEDINGS INITIATED UNDER CHAPTER 3 OF THIS ACT, BOTH THE BURDEN OF GOING FORWARD AND THE BURDEN OF PERSUASION BY A PREPONDERANCE OF THE EVIDENCE SHALL BE ON THE INDIVIDUAL OR ENTITY FILING THE PETITION OR APPLICATION EXCEPT FOR APPLICATIONS FILED PURSUANT TO SECTIONS 21(3) AND 21(4) OF THIS ACT.

(a) FOLLOWING THE FILING OF AN APPLICATION UNDER SECTION 21(3), A LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN FOR A MINOR SHALL NOT BE REMOVED AT THE REQUEST OF AN INDIVIDUAL OTHER THAN A MINOR AGE

TEN [10] OR OVER, NOR SHALL A LIMITED CONSERVATOR OR CONSERVATOR BE REMOVED UNLESS THERE IS CLEAR AND CONVINCING EVIDENCE THAT THE LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR OR CONSERVATOR IS NOT EFFECTIVELY PERFORMING THE DUTIES AND POWERS ASSIGNED IN THE DISPOSITIONAL ORDER OR THAT THE APPOINTMENT OF ANOTHER INDIVIDUAL TO SERVE AS LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN FOR THE MINOR OR ANOTHER INDIVIDUAL OR CORPORATION TO SERVE AS LIMITED CONSERVATOR OR CONSERVATOR FOR THE MINOR WOULD BE BENEFICIAL TO THE MINOR. THE APPLICATION OF A MINOR AGE TEN [10] OR OVER TO REMOVE AND REPLACE THE INDIVIDUAL APPOINTED TO SERVE AS LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN SHALL NOT BE DENIED UNLESS THE REPLACEMENT PROPOSED BY THE MINOR IS INELIGIBLE UNDER SECTION 20 OF THIS ACT, OR THERE IS CLEAR AND CONVINCING EVIDENCE THAT REMOVAL AND REPLACEMENT OF THE LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN WOULD NOT BE BENEFICIAL TO THE MINOR.

(b) FOLLOWING THE FILING OF AN APPLICATION UNDER SECTION 21(4), MODIFICATIONS IN THE DISPOSITIONAL ORDER OTHER THAN TERMINATION OF THE GUARDIANSHIP OR CONSERVATORSHIP, WHICH ARE REQUESTED OR SUPPORTED BY A MINOR AGE TEN [10] OR OVER SHALL NOT BE DENIED UNLESS THERE IS CLEAR AND CONVINCING EVIDENCE THAT THE REQUESTED MODIFICATIONS WILL NOT BE BENEFICIAL TO THE MINOR. MODIFICATIONS OTHER THAN TERMINATION OF THE GUARDIANSHIP OR CONSERVATORSHIP WHICH ARE REQUESTED BY OTHER INDIVIDUALS AND OPPOSED BY THE MINOR AGE TEN [10] OR OVER SHALL NOT BE APPROVED WITHOUT CLEAR AND CONVINCING EVIDENCE THAT THE REQUESTED MODIFICATIONS WILL BE BENEFICIAL TO THE MINOR.

(c) FOLLOWING THE FILING OF AN APPLICATION UNDER 21(4), A GUARDIANSHIP OR CONSERVATORSHIP FOR A MINOR SHALL NOT BE TERMINATED BY ORDER OF THE COURT UNLESS THERE IS A PREPONDERANCE OF EVIDENCE THAT THE SUSPENSION OF THE PARENTAL RIGHTS OF ONE OR BOTH OF THE MINOR'S PARENTS HAS BEEN REVOKED, THE MINOR HAS BEEN ADOPTED, OR THERE IS CLEAR AND CONVINCING EVIDENCE THAT TERMINATION WOULD BE BENEFICIAL TO THE MINOR.

(3) IN PROCEEDINGS FOR APPOINTMENT OF A GUARDIAN AD LITEM, BOTH THE BURDEN OF PROOF AND THE BURDEN OF PERSUASION BY A PREPONDERANCE

OF THE EVIDENCE SHALL BE ON THE APPLICANT.

(4) IN PROCEEDINGS FOR APPOINTMENT OF A LIMITED PERSONAL GUARDIAN OR PERSONAL GUARDIAN PURSUANT TO SECTION 30(1)(e), BOTH THE BURDEN OF GOING FORWARD AND THE BURDEN OF PERSUASION BY A PREPONDERANCE OF THE EVIDENCE SHALL BE ON THE APPLICANT.

(5) IN PROCEEDINGS TO GAIN ACCESS TO RECORDS PURSUANT TO SECTION 34(4) OF THIS ACT, BOTH THE BURDEN OF GOING FORWARD AND THE BURDEN OF PERSUASION BY CLEAR AND CONVINCING EVIDENCE SHALL BE ON THE APPLICANT.

(6) IN PROCEEDINGS TO DESTROY OR LIMIT ACCESSS TO RECORDS PURSUANT TO SECTION 34(7) OF THIS ACT, BOTH THE BURDEN OF GOING FORWARD AND THE BURDEN OF PERSUASION BY A PREPONDERANCE OF THE EVIDENCE SHALL BE ON THE APPLICANT.

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SECTION 39. RULES OF PROCEDURE/RULES OF EVIDENCE

EXCEPT WHERE SPECIFIED OTHERWISE, THE RULES OF PROCEDURE AND RULES OF EVIDENCE APPLICABLE IN CIVIL MATTERS SHALL GOVERN ALL PROCEEDINGS UNDER THIS ACT.

SECTION 40. EFFECT ON EXISTING GUARDIANSHIPS AND CONSERVATORSHIPS

(1) ALL GUARDIANSHIPS AND CONSERVATORSHIPS ESTABLISHED FOR PARTIALLY DISABLED AND DISABLED PERSONS PRIOR TO THE EFFECTIVE DATE OF THIS ACT SHALL BE REVIEWED BY THE COURT PURSUANT TO SECTION 14(1) WITHIN TWO [2] YEARS. UNTIL THE REVIEW HEARING, ALL LIMITED PERSONAL GUARDIANS, PERSONAL GUARDIANS, LIMITED CONSERVATORS AND CONSERVATORS APPOINTED PRIOR TO THE EFFECTIVE DATE SHALL RETAIN THE POWERS ASSIGNED TO THEM, UNLESS AN APPLICATION HAS BEEN GRANTED UNDER SECTION 14(2) ~~AND SHALL~~, PRIOR TO THE REVIEW HEARING, THE LIMITED PERSONAL GUARDIAN, PERSONAL GUARDIAN, LIMITED CONSERVATOR, OR CO-CONSERVATOR SHALL SUBMIT AT LEAST ONE REPORT IN THE FORM PRESCRIBED IN SECTION 15(6) AND/OR 16(7), AND AN INDIVIDUAL GUARDIANSHIP AND/OR CONSERVATORSHIP PLAN DEVELOPED IN THE MANNER SET FORTH IN SECTIONS 15(2) AND/OR 16(2). FAILURE TO HOLD A REVIEW HEARING FOR APPOINTMENTS MADE PRIOR TO THE EFFECTIVE DATE OF THIS ACT WITHIN TWO YEARS OF THAT DATE, SHALL RESULT IN THE TERMINATION OF THE GUARDIANSHIP OR CONSERVATORSHIP.

(2) ALL LIMITED PERSONAL GUARDIANS, PERSONAL GUARDIANS, LIMITED CONSERVATORS OR CONSERVATORS FOR MINORS APPOINTED BY COURT ORDER OR BEGINNING THEIR SERVICE FOLLOWING A TESTAMENTARY APPOINTMENT PRIOR TO THE EFFECTIVE DATE OF THIS ACT SHALL RETAIN THE POWERS ASSIGNED TO THEM BY THE COURT OR BY WILL UNLESS AN APPLICATION HAS BEEN GRANTED UNDER SECTION 21(3) OF THIS ACT, OR ONE OF THE EVENTS SPECIFIED IN SECTION 21(2) OCCURS TERMINATING THE GUARDIANSHIP OR CONSERVATORSHIP. ALL SUCH LIMITED PERSONAL GUARIANS AND PERSONAL GUARDIANS SHALL SUBMIT A REPORT IN THE FORM PRESCRIBED IN SECTION 22(6) NO MORE THAN ONE YEAR AFTER THE EFFECTIVE DATE OF THIS ACT AND ANNUALLY THEREAFTER DURING THE DURATION OF THE GUARDIANSHIP. ALL SUCH LIMITED CONSERVATORS AND CONSERVATORS SHALL SUBMIT AN INDIVIDUAL CONSERVATORSHIP PLAN IN THE FORM SPECIFIED IN SECTION 23(2) AND A REPORT IN THE FORM SPECIFIED IN SECTION 23(7) NO MORE THAN ONE YEAR AFTER THE EFFECTIVE DATE OF THIS ACT AND AT LEAST ANNUALLY THEREAFTER FOR THE DURATION OF THE CONSERVATORSHIP.

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SECTION 41. SEVERABILITY OF SECTIONS.

IF ANY SECTION, SUBSECTION, PARAGRAPH, SENTENCE, OR ANY OTHER PART OF THIS ACT IS ADJUDGED UNCONSTITUTIONAL OR INVALID, SUCH JUDGMENT SHALL NOT AFFECT, IMPAIR OR INVALIDATE THE REMAINDER OF THIS ACT, BUT SHALL BE CONFINED TO THE SECTION, SUBSECTION, PARAGRAPH, SENTENCE OR ANY OTHER PART OF THIS ACT DIRECTLY INVOLVED IN THE CONTROVERSY IN WHICH SAID JUDGMENT SHALL HAVE BEEN RENDERED.

SECTION 42. EFFECTIVE DATE

THIS ACT TAKES EFFECT _____.

APPENDIX TEN

SUMMARY OF COMMENTS ON FIRST GUARDIANSHIP DRAFT, November 1978

SUMMARY OF COMMENTS ON FIRST GUARDIANSHIP DRAFT
November 29, 1978

PAGE 1

General Comments (Section 1 (1) - DEFINITIONS) Could this be improved as a type of functional definition? ABA definition too general. Think some disability groups should be listed, followed by functional qualities. Don't add "or other developmental disabilities" to list of specific disabilities. According to the latest federal definition, developmental disability covers most handicapping conditions. By specifically including d.d. may inadvertently be stating that persons with handicaps need guardians. (Senner)

The definition of the population is crucial. The "partially disabled" and "disabled" functional definitions are okay. (Bailey)

line 6 My first concern arose in the definition of "incapacitated person". All minors needing a surrogate parent under P.L. 94-142 are not necessarily incapacitated in terms of p.1. I think particularly of students who are learning disabled or emotionally disturbed. (Buck)

line 7 Exclude or define "mental deficiency". (Robison)

line 8 "other" - why is it necessary to add this? (Senner)

line 8-9 "physical illness or disability, advanced age" - delete from list of conditions which justify guardianship. Only in cases where an individual's judgmental abilities are impaired should a guardian (as substitute decision maker) be appointed. A physically disabled, but intellectually able person can exercise personal authority to seek necessary services, but make his or her own decisions about such services. (Lobosco)

line 10 "(except minority)" - does this mean that minors can be covered by this legislation even though they aren't incapacitated? (Buck)

line 11 Who decides whether an incapacitated person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person? What criterion is used? (Weed)

line 13 Add "and property", since there is no specific mention of private property. (Robison)

line 23 "age of 18" - Is this necessary in a guardianship context? (Van Duizend)

PAGE 2

line 15 (PURPOSE & BASIS FOR GUARDIANSHIP) Is "adaptive" enough? What about physical? (Van Duizend)

line 15-16 "mentally disabled" - why limit this? (Van Duizend)

line 19 "legal disabilities" - requires a definition. (Van Duizend)

line 24 What if parent or spouse was not appointed as guardian? (Van Duizend)

PAGE 3

line 3 (PETITION) "incapacitated person" - conflicts - not capable of making decisions according to p. 1. (Robison)

line 4 "private organization or agency" - does it modify just "organization" or "agency" as well? If it does modify both words, could a local education agency petition for appointment of a guardian? (Buck)

line 5 "his" - if begin using "his or her", it should be used throughout. (Van Duizend)

line 10 "agency status" - What does this mean? (Van Duizend)

General Comments (Subsection (5), (6)) Are there any guidelines established? (Weed)

General Comments (Subsection (6)) Question the advisability of requiring all persons with knowledge of the facts. (Tennant)

line 21 "The necessity for the appointment" - too vague (Van Duizend)

line 27 temporary guardian limited to "immediate, essential" needs of the proposed ward. If they create the risks subsequently mentioned, they must be immediate and essential. (Tennant)

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line 1-2 Do needs create risks, i.e. death? (Jacobs, Van Duizend)

line 11 (INITIAL COURT PROCEDURES) "issues of incapacity" - should be capacity. (Weed)

line 15 "guardian ad litem" - should be a separate guardian at litem; otherwise it is equivalency of an attorney representing himself. (Van Duizend)

Counsel's role differs from the role of a guardian ad litem. Counsel represents an individual's wishes after consultation with that individual while a guardian ad litem works from his own perspective as to the best interests of the individual. Since I believe it is a necessity to be represented by counsel, I would object to equating counsel's powers and duties with that of a guardian ad litem. (Soskin)

line 16-17 "qualified person...visitor" - What are the specific qualifications? Maybe cross-reference "visitor" (Weed)

PAGE 4 (Continued)

General Comments (Subsection c) I am somewhat puzzled by the role of the visitor as set out in the statute; primarily whose interests is he representing? At times he appears to be acting as a master for the court (13.26.106 (c)); at times like a guardian ad litem (13.26.108 (b)); at times like a social worker (13.26.109). (Tennant)

Considering the apparent unavailability of present personnel to perform this service, I question the advisability of creating this position with extensive bureaucratic responsibilities unless you have some source of personnel and funding to carry out the procedures. If you do not have that, wouldn't it just about preclude the filing of petitions? Another factor in the viability of your bill is the potential reluctance of the legislature to enact any program for which large personnel and financial commitments must be made. (Tennant)

line 22-23 "examined by a physician...submit his report" - If person is mentally ill or developmentally disabled, most M.D.'s will not have expertise to render the opinions required. (Van Duizend)

line 24 "visitor" - need more details (Weed)

General Comments (Subsection d) Why is guardianship and residential placement linked? This tacit presumption that partially disabled or disabled persons require residential placement can easily lead to abuse. (Van Duizend)

PAGE 5

General Comment (Subsection e) For surrogate parent purposes, couldn't the interviews and examinations take place in the proposed ward's school or other educational institution rather than residence or medical facility? (Buck)

line 6 (PETITION) On what will the visitor base this judgment? Would a visitor ever say "no"? (Van Duizend)

line 11 (NOTICE OF RIGHTS) Insert "If possible" before "explain to the proposed ward". (Robison)

line 16-17 Time sequence of 108 and 106 mixed up and therefore confusing (i.e. interview prior to the evaluation of ward? If not, all these explanation may be too late). Should there not be a section simply spelling out duties of visitor? What is the rationale of having a "visitor" coordinate the evaluation? (Van Duizend)

line 19-20 "physician", "mental health professional" - at whose expense? (Weed)

Too much expense. Incapacitated person's family has to pay for two attorneys, their own and that of the incapacitated person. Perhaps the Oversight Commission mentioned in the ABA letter could provide protection under AS 13.26.115 (b)(iii) (Jacobs)

PAGE 6

line 8 (VISITOR'S REPORT) Should not ward get the petition prior to the evaluation? This is phrased awkwardly. (Van Duizend)

line 10 I believe you will find that 30 days will be too short a time generally for the visitor to file his report, especially if he has any other duties. (Tennant)

line 16 Why not describe tests for mental emotional conditions? (Van Duizend)

line 18 How will all this relate to appointment of a conservator? (Van Duizend)

line 22 "mental health treatment" - define; all Health/Social Services? Includes dd habilitation as well? (Aronson)

line 23 "probability that available treatment will significantly improve his mental condition" - spell out more aspects, may not improve. (Robison)

line 26 Why is the burden placed on the ward? The statute does not place an affirmative duty on anyone to locate alternative services. This leaves no room for negotiations or for input by the petitioner. (Van Duizend)

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line 3 "specify the financial resources" - add "if any". (Van Duizend)

line 9 Why link guardianship and hospitalization? (Van Duizend)

line 22 "least restrictive authorities needed by the guardian" - unclear. (Senner)

line 26 put brackets around (consider to what); maybe substitute "the" for "to what". Insert "to which" between "extent" and "the". (Van Duizend)

Awkward - delete "consider to". (Tennant)

PAGE 8

line 6-7 What about during the guardianship? (Van Duizend)

line 9 "five judicial days" - This doesn't seem to be an adequate amount of time. (Weed)

Five days from when - the filing with the court, receipt by petitioner and ward? (Tennant)

General Comments (Sec. 13.26.110 EVALUATIONS: RIGHT TO REMAIN SILENT....) This whole paragraph needs clarification. (Weed)

PAGE 8 Continued

line 18 In criminal proceedings this is already provided for or at least should be. In civil proceedings, why is it necessary and, if it is necessary, why punish the exercise of the right? (Van Duizend)

line 25 "Proposed ward...them" - Person should be informed of this at the very beginning in Sec. 12.26.108. (Weed)

General Comments (Subsection c)

I believe this section is too rigid. If there are language barriers or communication barriers of any type, an attorney or mental health professional accompanying the proposed ward could possibly assist in clarifying such problems. I would recommend less strict "straight jacket" approach and more flexibility. (Van Brocklin)

PAGE 9

line 1-2 If a person doesn't have the capacity to request/choose a support person, can arrangements be made on request of health professionals, etc. working with proposed ward? (Aronson)

line 3-4 "observers only" - attorney and/or medical persons can be in attendance and allowed to participate and/or intervene to protect the proposed ward's rights. (Endicott)

line 10 "psychologist" - vague term: licensed, clinical or PhD? (Robison)

line 13-15 "Reasonable fees and expenses for such expert examiner shall be borne by the ward or the state as determined by the court". How is this determined? (Weed)

line 15 If court must appoint, why should ward pay, since if ward could pay he/she could hire the expert without court assistance? (Van Duizend)

line 27 (EXPERT TESTIMONY) "Severe mental disorder" - Should be spelled out. Unknown meaning here! Try to follow Title 47 (brings out danger to self or others). (Robison)

How does (iii) relate to guardianship criteria? (Van Duizend)

PAGE 10

General Comments (line 1-6) - Is this necessary to include in a statute? (Van Duizend)

Need reference to expert opinion and witness. (Robison)

line 7 I don't understand this section. What "diagnostic categories" are you talking about? (Tennant)

PAGE 10 Continued

line 11 (DUTIES OF PROPOSED WARD'S COUNSEL) I don't believe this needs to be in the statute. It is adequately covered by the Code of Professional Responsibility. If an attorney doesn't know what he is to be doing, he shouldn't take the case. (Tennant)

General Comments (lines 20-27, PSYCHOTROPIC MEDICATION) Generally, I don't know whether this section is appropriate in view of treatment programs. The obvious intent is laudable, but I am unable to make the judgment whether it is too all-encompassing. (Tennant)

What about being an advocate? (Van Duizend)

line 20 define "Psychotropic" (Carey)

PAGE 11

line 5-6 Too constrictive. Add "or other major health reasons" after "bodily harm". (Robison)

line 17 I question the advisability of having a jury trial in incompetency hearings. This is my own philosophical position. (Tennant)

lines 17-19 Have medical examiner submit a report on the effects of the drug to the court. Should not have to be requested by the ward. (Weed)

line 21 (HEARING) "sixty days" - probably too short a time unless you presume that many of the preliminary steps will be accomplished prior to filing the petition. Even criminal cases have 120 days under Criminal Rule 45. (Tennant)

Does "60 days" mean the process should be completed within 60 days? Is it possible to have guardianship within that period of time? (Aronson)

line 23 Do these rights need to be enumerated? If they are, does the court in each proceeding have to make a finding that they were observed? Section - superfluous. (Tennant)

line 24 legal representation of proposed ward should be automatic. It is highly problematic to expect the ward to waive this right in an intelligent fashion if the very subject of the proceeding is his competence to make important decisions (Contrast Sec. 13.26.114 (b)(1) with automatic representation by counsel Sec. 13.26.140 (c), p.21) (Herr)

PAGE 12

line 2 "he" should be "he/she". (Van Duizend)

This assumes capacity. (Robison)

PAGE 12 Continued

line 5 "him" should be "him or her". (Van Duizend)

line 9 insert "allows expert witness" after "and". Need expert witness to interpret. (Robison)

line 10 Waste of taxpayer's money. And most will be jury trials. If needed, the judge can call jury for case. (Robison)

If it is to be a jury trial, is it to be 6 or 12 persons? (Tennant)

line 11 "he" change to "he/she". (Van Duizend)

General Comments (Subsection c) Unneeded except the portion on burden of proof. (Tennant)

line 20 What does "impairment of behavior" mean? (Van Duizend)

line 22 What does "care for himself" mean? Should this not be linked in to protection from illness or injury language used earlier? (Van Duizend)

line 24 This mixes a dispositional issue with the substantive determinations. It presumes that an appointment is required. (Van Duizend)

PAGE 13

General Comments (Subsection f) What about non-guardianship alternatives? (Van Duizend)

PAGE 14

line 3 (GUARDIANSHIP ORDER) "as is necessary" - How is this determined? (Weed)

General Comments (Subsection (b)(iii)) Why isn't this under Sec. 26.116? (Senner)

Awkward construction. Expensive! Frequent placement changes are necessary in some cases. Each placement requires a hearing, a lawyer for the ward and one for the guardian. Guardians should realize that wards qualify for some land distribution benefits in Alaska. (Jacobs)

line 14-15 Shall have authority to allow admission; may authorize, but only staff may admit or place. (Robison)

line 15 "residential facility" - nursing home? (Van Duizend)

line 18 A right to a hearing is ok, but the 10 day period seems too short or perhaps the section should define, on a more restricted basis, the type of hospitalization which would trigger a hearing. It would, for instance, be a waste of a court's time to require a hearing when a ward was hospitalized on a doctor's order for more than 10 days for a broken hip. (Tennant)

PAGE 14 Continued

line 19 "hearing" - mechanics need to be established. (Senner)

line 20 Will ward still be represented? What is burden of proof? (Van Duizend)

line 21 "principles" change to "possible" (Jacobs)

PAGE 15

General Comments (Subsection vii) How does this relate to conservator? (Van Duizend)

line 11 "him" change to "him/her". (Van Duizend)

This paragraph addresses providing the ward with medical care and mental health treatment, but not with adequate educational programming and services. Shouldn't the guardianship plan address itself to educational as well as medical and mental health services? (Buck)

line 13 Can the term be extended? (Van Duizend)

Will this provision force guardians of wards who have developmental disabilities back into court unnecessarily through reluctance of judges to order guardians for indefinite periods as when there are no known cases of improvement in person with this ward's disability? (Jacobs)

line 19 (GUARDIANSHIP PLAN) What does the court do with the plan? If you are going to require it, it should be for a reason. (Tennant)

What about services to help ward become competent? This whole section seems not to take into account individuals with developmental or traumatically induced disabilities, who require more than non-mental health and medical services and who may be able to regain or develop their abilities. The link between their point in 116 and 115 needs to be stronger. (Van Duizend)

The parents aren't going to like this. Might require such a plan for only certain persons. (Senner)

line 27 "A guardian is required to report...once a year" - more often than once a year. (Carey)

PAGE 16

line 1 What about the significant actions of the guardian? (Van Duizend)

line 19 (TERMINATION OF GUARDIANSHIP) What about the ward regaining competency prior to expiration of the guardianship period? (Van Duizend)

line 23-24 Change "his" to "the guardian's". Cross out "the guardians" on following line. (Jacobs)

PAGE 17

General Comments (Subsection a & b) REMOVAL OR RESIGNATION OF GUARDIAN - Won't subsection (a) be used to circumvent the restrictions on subsection (b)? Why can't ward apply informally under (a)? Removal of a guardian is not the equivalent of terminating the guardianship. (Van Duizend)

line 6 Insert "if it" between "successor is". What about least drastic alternative - does it apply here or can the court impose all the restrictions here which it could under 115? (Van Duizend)

line 9-10 Does this mean within the 1st year no petition to re-evaluate "incapacity" can be filed? What does "special leave" refer to? (Aronson)

line 26 "rights of the ward as apply to a petition for appointment of a guardian" - more explicit, cross-reference is needed. (Van Duizend)

PAGE 18

General Comments (Subsection d) I am not convinced that this will be followed and, if it is, that it will have any effect. (Van Duizend)

line 9 (VISITOR) In the case of surrogate parents, perhaps the visitor should be a person trained in education rather than law, medical care, etc. (Buck)

PAGE 19

line 3-4 "person who performed on evaluation" - Should this person be notified forever or only for a set period (i.e. 2 yrs.)? (Van Duizend)

line 8 What about a non-appointed attorney? (Van Duizend)

line 17-19 (TEMPORARY GUARDIANS) Proof of need for services does not indicate why guardianship is necessary. Does there not have to be proof that the ward cannot or will not procure services for him/herself? (Van Duizend)

line 22 "proposed...attorney" - Will an attorney be appointed in these cases for the ward? Is there time for such an appointment? (Senner)

PAGE 20

line 6 Emergency services could also be necessary to protect a proposed ward from inappropriate or restrictive educational placement and services. (Buck)

line 13 When is visitor appointed? Why is access to visitor easier than to a judge? May there not be a need for consent to emergency services when no guardianship petition has been filed? (Van Duizend)

General Comments (Subsection f) Visitor is acting like a guardian ad litem. I see no need for a visitor to make these decisions when a guardian ad litem has been appointed. (Tennant)

PAGE 21

line 5-9 (EMERGENCY POWERS) This needs to be thought through. Don't see why this is necessary. Does this apply mostly to hospitalization for mental health care? If so it should be stated. (Senner)

Does this include a medical hospital when (for example) the ward has been hit by a car? (Van Duizend)

line 9 Why the seven day period in this section as opposed to the 10 day period in 13.26.115(b)(iii)? (Tennant)

General Comments (Sec. 13.26.142 STERILIZATION, ABORTION, DONATION OF ORGANS) - I do not believe authorizing sterilizations and abortions is appropriate in this statute but rather should be part of a general sterilization or abortion statute. If kept, there needs to be strict substantive standards governing who is to be sterilized or aborted and strict procedural safeguards. The ward's "best interest" and "medically necessary" are too vague to be proper standards. The burden of proof for an action depriving a person of such fundamental rights must be stronger than mere preponderous of evidence. (Soskin)

line 11 Insert parenthesis around "notwithstanding the provisions by law or court order". Capitalize "R" and replace "may" with "shall". (Van Duizend)

line 13-14 lumped together poorly. Would it be okay to donate organs for 3 days? (Robison)

General Comments (Subsection a) Again, a conflict between this and .115(b)(iii). (Tennant)

line 16-17 "If guardian believes such action is desirable in the best interests of his ward" - which one? (Van Duizend)

General Comments (Subsection b) This whole section could be dropped. Last hearing on these things was in 195[illegible] in California. (Robison)

line 25 "court...authorize sterilization or abortion only if medically necessary" - needs strengthening. (Senner)

General Comments (Subsection e) Should require a higher standard of proof (perhaps "clear & convincing") for decisions as serious and irreversible as sterilization and abortion. (Lobosco)

The burden of proof level seems inappropriate. (Tennant)

PAGE 22

line 1 "any commitment to a hospital" - auto accident care too? (Van Duizend)

General Comments (Subsection f) Does this section apply to hearing mandated by 13.26.115(b)(iii) and 13.26.142(b)? (Tennant)

General Comments (Sec. 13.26.143 CONSENT FOR MEDICAL CARE) I believe this section, if adopted, should limit the necessity of this report to consent in excess of the authority granted by the court in 13.26.115(b)(i). Not clear. (Tennant)

line 7 Why is 3 day written notice needed? Why do you have to report? (Jacobs)

What is court to do? What about notice to guardian at litem or attorney? (Van Duizend)

line 10-11 (WHO MAY BE GUARDIAN) "a suitable agency or institution, public or private" - This would be conflict of interest of guardian who was employed by Health & Social Services and also served as an advocate (i.e. bringing action against poor treatment in an institution). I'm against Health & Social Services being guardian. They haven't proven their concern in the past. Maybe guardian from Attorney General's office. (Carey)

line 19 Will this preclude state hospital employees from being guardians for a patient? It should. (Van Duizend)

line 29 Retain "agency". (L. Bosco)

PAGE 23

line 2 Legal age in Alaska is 18. (Robison)

If child has sufficient capacity at age 10 criminal meno nea, why raise the age for proposing a guardian to age 16; 2 years over even the common law age? (Van Duizend)

line 6 In light of parents concern, might add "person nominated in will of deceased parent" after "ward". (Senner)

General Comment (Subsection c) Might state that priority should always be given to individuals over agencies. Think a restriction should be placed on how many wards an individual may have. Give priority to persons residing near the ward. (Senner)

PAGE 24

line 14 Insert "adequate" before "training" and "education". (Bailey)

line 21 including education? (Aronson)

PAGE 24 Continued

line 25 delete "to" after "or". (Lobosco)

PAGE 25

line 1-3 How does this fit with Article 4? (Van Duizend)

line 10 Question the use of "all". "If a conservator has been appointed, all of the ward's estate...in excess of those funds expended...must be paid to the conservator for management..." (Robison)

line 17-18 Would a limited guardian control custody and care? Does this imply that a conservator would control custody and care if no guardian were appointed? (Van Duizend)

line 21-23 strike "of the amounts...circumstances". (The sums to be agreed upon are previously characterized as "reasonable" in that sentence. Insert "that" after "guardian may request". Consider replacing "request" with "direct". (Lobosco)

PAGE 26

line 6-7 (RIGHT TO SERVICES) This should incorporate language from definition of "incapacitated person". (Van Duizend)

line 14-17 The duties of a guardian should have a cross reference to this provision. (Van Duizend)

line 18 Why not apply to public agency first. If application refused, then go to court. (Van Duizend)

line 19 Sounds like an extra hearing. Should have been part of original hearing. (Robison)

General Comment (Subsection c) What is being proven? (Van Duizend)

PAGE 27

General Comment (Subsection b) AS 13.26.170(b) repeats 13.26.010 (Jacobs)

line 9-10 Only one "shall" necessary in first sentence. (Lobosco)

line 11 Why not one general bond for the public guardian? (Van Duizend)

Insert "to be" after "required" (Lobosco)

PAGE 27 Continued

Line 11 What is meant by the Public Bond section? At the October Council meeting, bonding was mentioned particularly in relationship to surrogate parents. (Buck)

PAGE 28

General Comments (Sec. 13.26.510 - OFFICE OF PUBLIC GUARDIAN) It is most important that this office work independently from the agency providing the direct services. (Carey)

There should be a professional office of Public Guardian. (Robison)

I would prefer to see an Office of Public Guardian in the court system which would avoid potential conflicts of interest which would arise within Office of the Governor. (Soskin)

line 1 Change "this" to "there". (Van Duizend)

line 10-11 (WHEN PUBLIC GUARDIAN APPOINTED) What if willing, but would bankrupt the ward? (Van Duizend)

"or private institution or agency is willing and qualified to act as guardian" - put in brackets. (Weed)

General Comments (Sec. 13.26.525 - INTERVENTION) What about F & A Office? (Van Duizend)

line 27 Can public guardian intervene to remove incapacitated person from state hospital? (Van Duizend)

PAGE 29

line 2 "subject to disproportionate waste" - what does this mean? (Carey)

line 23 (OTHER POWERS & DUTIES OF PUBLIC GUARDIAN) "regular visitation" - should make unannounced visits, also to check on what really is happening. (Carey)

"visits" substituted for "visitation" (has rather a mystical religious connotation, doesn't it?) (Lobosco)

line 28 The idea of paid volunteers is not a good alternative and we would not want to rely entirely on volunteers. The Guardianship Oversight Commission is not viable, especially with the use of volunteers. (Robison)

PAGE 30

line 17 "services" - pay expenses for NARC volunteer to come give workshop to volunteers on their role and what model residential and work facilities should be like. (Carey)

line 18-21 (ALLOCATION OF COSTS) How is this determined? (Weed)

PAGE 31

line 8 Replace "the" with "such an" before "appointment". End sentence with "appointment" - delete "of". Capitalize "the" on next line. (Van Duizend)

line 9 The whole paragraph appears to be one long run-on sentence. Perhaps in the middle of the fifth line a new sentence should begin. (Buck)

line 11 If ward is incapacitated, how can he/she execute a valid consent? (Van Duizend)

General Comments (Subsection d) Third party payments of any sort be applied to cost of service or would they be included in estate of prson (i.e. savings of SSI, etc.?) (Aronson)

GENERAL COMMENTS ON FIRST GUARDIANSHIP DRAFT
November 29, 1978

I don't think the question of commitment procedures for wards was adequately addressed,...particularly since there are no commitment procedures for mentally retarded or senile persons. (Senner)

Need to reduce the amount of court involvement required. (Senner)

Need to address the point - appointment of guardians may be slow because of the requirement that relatives be contacted and Max Gruenberg's point that guardianship procedures requires too many outside individuals. (Senner)

The substantive grounds for guardianship should be as narrowly drawn as possible and explicitly require a judgment finding that less restrictive non-guardianship alternatives are not suitable. (Herr)

I think the ABA approach on the definitional issue is preferable; focusing the court's attention on the individual's functional abilities, rather than the "cause" of the disability, would reduce the likelihood that the court would operate on unconscious stereotypes (i.e. "a retarded person can't take care of himself", etc.). As between the terms "disabled" and "incapacitated", there seems little difference in either case. A separate category of "partial disability" or "partial incapacity" may be another useful signal to the court that disability/incapacity status is one of incremental gradations, and not merely binary. (Lobosco)

As to public guardianship, I doubt that a system dependent on recruiting many volunteers for the long-term involvement which a guardian should have would be successful. The conflict of interest issues regarding public guardianship are substantial, however, and need to be considered. One compromise might be to allow private agencies to contract with the state to provide such services. While the service would not be financially independent of the state, it would be in a better position to make noise about abuse/denial of services than a governmental agency would. A strong state ARC might work well in such a role. (Lobosco)

No provision for both parent's signatures. Always talk about one guardian. If there is a husband and wife guardian, are they considered one? What if the other parent disagrees? Would divorced couple need both parent's signatures? (Jacobs)

In reading the statute, it was somewhat unclear as to the guardian's power to commit the ward to an institution. The visitor's report in Sec. 13.26.109 (b)(vii) discusses why alternatives to hospitalization or guardianship were rejected thus leaving the implication that hospitalization may become part of the guardianship recommendation. However, reading Sec. 13.26.115(b)(iii), which limits commitment by the guardian to ten days, and Sec. 13.26.142(f), requiring commitment by a court to follow statutory involuntary commitment procedures, it appears that commitment is not a power of the guardian. This should be clarified and clearly stated as to prevent the guardianship statute being used for commitment purposes. In addition, the ten day temporary commitment (which may be to an institution) solely on the guardian's application must be viewed in light of Bartley v. Kremens, requiring a probable cause hearing within 72 hours subsequent to a substituted voluntary consent admission. (Soskin)

My review was done with particular attention to the issue of partial or limited guardians to serve as surrogate parents as required under state regulations and P.L. 94-142. Does this legislation adequately cover partial guardianship for educational purposes only, for appointment of a surrogate parent to oversee appropriate (special education placement in the least restrictive setting) alternative and appropriate services according to an Individualized Education Program? (Buck)

Throughout pages 8, 9, and 10 the requirements were too stringent for partial guardians or wards in a surrogate parent-student relationship. Again, I am thinking of lesser handicaps than complete incapacitation. (Buck)

The general focus has correctly moved to the adequacy and appropriateness of education programs. This should be reflected in the bill. (Bailey)

Is the guardian financially responsible for the ward like a parent is? This question is of great concern to parents and potential guardians. (Bailey)

In reference to the target population and definition. Might be better to use term "grave disability" and define it: "inability to provide self with food, clothing, or shelter". (Robison)

I have some problem with the length and complexity of the proposed legislation. Some of this problem stems from a dislike of over-regulation and denial of the discretionary function of the court which is implicit in the length and complexity...It is more difficut to get a long complex bill through the legislature intact. There is much more room for someone with an ax to grind or some personal hang-up to give vent, thereby possibly affecting the whole piece of legislation. (Tennant)

I have four general concerns regarding the proposed legislation. First, although the bill would provide for an alternative to plenary guardianship, it does not explicitly provide the court with less intrusive means of protecting the health and safety of a partially incapacitated person. While Sec. 13.26.109 (b)(vii) requires the visitor to document what other courses have been explored, there does not appear to be a provision requiring the visitor to explore alternatives or authorizing the court to order that alternatives be explored. Without such provisions, I fear that the need for guardianship will remain an implicit presumption whenever a petition is filed. (Van Duizend)

Second, I am disturbed by the pattern of linking guardianship and hospitalization. The misuse of guardianship as a means of circumventing civil commitment procedures has been documented by a number of commentators. While the draft does propose a number of safeguards, I fear that provision like 13.26.109(b)(vii) and 13.26.115 (b)(iii) will contribute to the assumption that individuals for whom a guardian has been appointed require hospitalization or placement in a supervised facility. (Van Duizend)

Third, as noted in the draft, I am unclear about the relationship between the provisions regarding personal guardianship and those already in the Alaska Code on conservatorship. The draft muddles the distinctions between guardianship and conservatorship duties and would establish different criteria and procedures for imposing restrictions on a person's legal capacity to act in non-financial areas from those applicable to imposing a conservatorship. This distinction, in my opinion, is not warranted. (Van Duizend)

Finally, as I have indicated previously to Ms. Truran, a public guardianship agency has a high potential for becoming yet another overworked, understaffed and unresponsive social services department that can easily be subverted into becoming a rubber stamp for directors of residential facilities. Obviously this may be too bleak a portrait, and I am not familiar with Alaska's experience, but I urge you to consider other alternatives. The model act which this project is preparing provides for use of the funds which would have been allocated to the public guardian agency to compensate citizen volunteers appointed by the court. Recruitment of a pool of volunteers would be the duty of a state Guardianship/ Conservatorship Oversight Commission. To diminish the likelihood that appointment as a guardian or conservator may become a patronage plum and to assure an individualized relationship between the volunteer and the partially disabled or disabled person whom the volunteer is serving, no individual may be appointed to serve as limited personal guardian, personal guardian, limited conservator or conservator for more than two persons, and no corporation may be appointed as volunteer public conservator or volunteer public trustee in more than 10 cases. In addition, the Oversight Commission would be responsible for assuring the fairness of the appointment process and for providing training programs for public and private guardians and conservators. (Van Duizend)

CONTRIBUTORS OF COMMENTS ON FIRST GUARDIANSHIP DRAFT

Aronson, Mary, Ad Hoc Member, Legislative Committee

Bailey, Helen. President, P.A.D.D., Inc.

Buck, Marsha, Director of Special Education, Ketchikan Gateway Borough School District, Council member

Carey, Carol & Omer, consumers, members of ASARC

Endicott, Marion, Council member, consumer

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Weed, Roger O., Executive Director, Hope Cottages

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K–STATE CAPITOL
JUNEAU, ALASKA 99811

February 9, 1979

Dorothy Truran
Governor's Council on the Handicapped
and Gifted
University Plaza Offices West
Suite C
600 University Avenue
Fairbanks, Alaska 99701

Re: Guardianship legislation

Dear Dorothy:

Attached is a series of comments on the final draft of the legislation that you have proposed relating to guardianships. The comments are largely technical in nature and do not address significant questions of policy in much detail.

The immediate problem with this draft is its obvious cost. I might add that the creation of a public guardian, in which we are most interested, could be effectively accomplished without many of the ancillary services provided in this draft.

I am sure we will be discussing this matter in the near future.

Very truly yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Thomas H. Robertson
Assistant Attorney General

THR:vr

Attachment

03-C5LH

Sec. 13.26.005(2): The language "more likely than not to occur. . ." would appear to prescribe a lesser burden of proof than the clear and convincing standard set forth later in the bill.

Sec. 13.26.005(8): The definition of visitor requires an individual with, perhaps, full-time expertise. See my comments at sec. 13.26.106.

Sec. 13.26.090: It is not clear to me why "adaptive" does not fall within "mental" or "physical" limitations.

Sec. 12.36.095(e): This language would appear to eliminate the possibility of appointing a partial guardian by will. The phrase "subject to the authority of the court to modify the scope of guardianship or to be removed . . ." lacks parallelism. right -

Sec. 13.26.105(a): Why not refer to "the person alleged to be incapacitated" rather than to the "alleged incapacitated person".

Sec. 13.26.105(b): Why require the age of the petitioner in subsection (1)? Subsections (3) and (6) might be combined. The reference to "protection and assistance" is addressed at AS 13.26.160(b). Is subsection (a) intended to mandate the listing of all persons who might be helpful? no problem useful deleted 160

Sec. 13.26.105(c): The present wording of this subsection implies that a temporary guardian may not be sought by motion. The reference to amendment of the petition seems unnecessary at this point. Perhaps another provision should state the general rule that petitions may be amended as a matter of course. changed not needed

Sec. 13.26.106: This section leaves me somewhat confused about the roles of the various appointed persons; the attorney (sec. 13.26.106(b)), the visitor (sec. 13.26.106(c)), and the guardian ad litem (sec. 13.26.113). In the past the positions of guardian ad litem and visitor have often been combined. This would no longer be possible. The visitor is given what appears to be inappropriate authority to consent to examination in a medical facility. This should be the responsibility of the guardian ad litem whose job it is to represent the best interests of the proposed ward. It should also be recognized that the visitor will have to be a qualified medical practitioner in order to give the opinion testimony referred to in subsecs. 13.26.109(c)(5) & (7). changed

Sec. 13.26.108(a): Subsection (a)(1) appears to largely restate sec. 13.26.106(d). What does "immediately" mean in sec. 13.26.108(a)(4)(A)? Is sec. 13.26.108(a)(4)(B) intended to require the naming of an attorney whenever the visitor is not aware of representation? ok

Sec. 13.26.108(b): My immediate reaction is to ask why the visitor cannot be trusted. The reference to subsection one should be to subsection (a)(4). ok deleted

Sec. 13.26.109(a): The visitor's report must be filed within 45 days from the filing of the petition yet sec. 13.26.106 does not set forth any time limitation within which the court must appoint the visitor. Even 45 days may be inadequate given the necessity to schedule, conduct, and prepare the reports required by the proposed bill. changed to 90 days

Sec. 13.26.109(c): I am a little unsure of who has consented to the various tests referred to in subsection (c)(1). This subsection appears to demand a great measure of professionalism. Subsection (c)(12) gives rise the question of what are the "costs incurred through guardianships"? who does now? expert to examine if that is a problem w person refusing to have tests

re diff. from probate rules { questions answered on an ad hoc basis

Sec. 13.26.110(b): It might be helpful to further describe this privilege. Might it be waived by the court in, for example, children's proceedings relating to the wards child. Such proceedings are also confidential.

Sec. 13.26.110(c): What is an "evaluative" interview? I would think any interview by the visitor would be evaluative. I would also think this modifier could be stricken if the right is to be conferred. deleted "evaluative"

Sec. 13.26.110(d): Such requests should be required, say, five days before the hearing to obviate the scheduling difficulties associated with professional witnesses. changed

Sec. 13.26.111. This section merely restates the common law of evidence and is therefore unnecessary. The (a) does not appear to be needed. deleted

Sec. 13.26.112: The duties of an attorney are, in my view, adequately addressed in the Code of Professional Responsibility. If it is necessary to tell an attorney in a statute what his duties are toward his client then the profession is indeed in a sorry state. This section creates confusion, moreover, by dictating that the attorney must pursue the proposed wards "interests' since the "best interests" of the proposed ward as opposed to his wishes, would ordinarily be represented by the guardian ad litem.

Sec. 13.26.113(a): It is not clear who, other than the attorney, may request a guardian ad litem.

Sec. 13.26.113(b): The requirement that the guardian ad litem "advise counsel accordingly" should, perhaps, be changed to require advice of the situation to the court and counsel of all of the parties. changed

Sec. 13.26.113(c): If this section does not create a conflict of interest for the attorney than why do we need a separate guardian ad litem at all? Since an attorney shall be appointed pursuant to sec. 13.26.106(b), why not leave it up to the attorney to act as guardian ad litem until he, the court, or some other party determines that a conflict exists.

don't want this all the time but if necessary to appoint that way to do it

Sec. 13.26.114(a). This subsection should be changed to add ". . . unless the time is extended by the court for good cause shown." When you consider that the visitor has 45 days, and the petitioner and ward have 10 days, 3 days each for mailing equals 61 days. Also the possibility of more than 10 days to respond per sec. 13.26.109(d) may take the time past 60 days.

agree

Sec. 13.26.114(b)(7): If this means that the Rules of Civil Procedure shall apply then it should say so. Otherwise it is difficult to understand what it means or why it was included.

OK

Sec. 13.26.114(b)(8): I have not, frankly, researched the question of whether a jury trial is constitutionally mandated. If it is not then many would prefer these cases to be decided by the court.

all handicapped attorneys like it

Sec. 13.26.114(c): The reference to constitutional guarantees is unnecessary surplusage. The clause relating to the burden of proof may be in conflict with sec. 13.26.005(2).

OK

Sec. 13.26.114(d): The proposed statute should be more specific as to which determinations are to be made by the jury, and which are to be made by the court if sec. 13.26.-114(b)(8) is to be retained. This subsection places authority in the judge and begs the question of what authority remains with the jury.

laid out + clear in 8 - only issue of incapacity because they question

Sec. 13.26.115(b): What happens if the court is informed at the time of the hearing?

so what does what's necessary

Sec. 13.26.115(c): Should the court talk to the treating physician on an ex parte basis? No what does Rick think? Ex parte no - not a rule

Sec. 13.26.116(a)(2): The quantum of proof is redundant if the second clause of sec. 13.26.114(c) remains in the statute.

OK

Sec. 13.26.118: The requirements of this section will prove burdensome to many potential guardians, and will make it more difficult to gain their services. Perhaps the court could be given discretion to impose those controls which seem most appropriate under the circumstances.

shortened and streamlined

Sec. 13.26.125: The word contempt is misspelled on line 12.

corrected

Sec. 13.26.130: Which agency of the state is to bear these costs?

not specified

Sec. 13.26.135(c): Is this intended to require a listing of all rights of the various parties? no

Sec. 13.26.145(b): At line 15 "service" should be modified by "substantial" to conform to line 12. ok changed

Sec. 13.26.150(c)(2), (3), & (4): Are these sections intended to impose liability if the guardian fails to "assure" comfort, maximum possible growth, and other rights. Perhaps the guardian should be required to diligently pursue these goals. no

Sec. 13.26.150(c)(b)(6): At line 24 "incompetant" should be changed to "incapacitated" to conform to Sec. 13.26.090. OK

Sec. 13.26.150(d): The section concerning the reasonableness of expenditures is redundant. language same as existing statute

Sec. 13.26.160: This section obviously involves a significant policy decision. It seems to create a section of state government devoted to adult rehabilitative services. If this does not now exist, the requirement that these services be provided is meaningless. Are there good reasons for limiting the right to services to persons committed under this section? What about others in similar circumstances for whom court invervention proved unnecessary? section deleted

Sec. 13.26.195(d): At line 3, "special guardian" should be, I believe, "special conservator." OK changed

Sec. 13.26.200(b): The first clause of this subsection is largely unintelligible.

Sec. 13.26.218: Why not look to the ward's estate for payment of the bond. It would make little sense in many cases to look first to the state. no protection at all if you do this?

Sec. 13.26.505: This section goes beyond what is immediately necessary in the State of Alaska. The assistance referred to in this section would be necessary, however, if the remainder of this proposal is enacted. The problem here is financial. The word "guardianship" is misspelled on line 15. streamlined and deleted some of the responsibilities

Sec. 13.25.510: The Alaska Court System, of course, opposes this section. It is doing its best to divert itself of comperable responsibilities. until it does. This is appropriate placement

Sec. 13.26.535(1): If this is a reference to the power to adopt regulations under AS 44.62 then that grant of authority should be stated. If the reference is to the adoption of internal operating procedures than the section is unnecessary. deleted(1)

HB 572 file

Alaska State Legislature

SENATOR
ROBERT H. ZIEGLER, SR.
307 BAWDEN STREET
KETCHIKAN, ALASKA 99901

POUCH V
JUNEAU, ALASKA 99811

Senate

CHAIRMAN
SENATE JUDICIARY COMMITTEE
IMMEDIATE PAST CHAIRMAN
WESTERN CONFERENCE - COUNCIL OF STATE GOVERNMENTS

VICE CHAIRMAN
SENATE RULES COMMITTEE

MEMBER
SENATE STATE AFFAIRS COMMITTEE
SENATE COMMITTEE ON COMMITTEES
LEGISLATIVE COUNCIL
WESTERN STATES LEGISLATIVE FORESTRY TASK FORCE

February 22, 1980

Ms. Joyce Rolloff
Code Revision Commission
Pouch Y
Juneau, Alaska 99811

Re: SB 54 and SB 58

Dear Ms. Rolloff:

Notwithstanding the Chairman's lack of enthusiasm for the captioned bills, they will nonetheless be called up for a hearing on Tuedsay, March 4, at 1:30 in the Beltz Committee Room.

The limited guardianship bills (SB 339 and HB 572) are great in terms of concept but lousy in terms of form. I had suggested to Representative Parr that he could save his Judiciary Committee and himself one helluva lot of work were we to enlist the aid of the Code Revision Commission ab initio. He fee's he is committed to bringing out a bill this year. Therefore, at such time as he has done his homework, I think, if your commission is willing, that I'll ask you to get into the act prior to the time Senate Judiciary goes to work on the bill.

This is one of those bills that needs all the help it can get.

Thank you for lunch.

Here is a copy of the International Will Act letter (SB 54), which I spoke about the other day.

Regards,

RHZ

Robert H. Ziegler, Sr.

RHZ:lk

cc: Senator Rodey
Representative Parr

POSITION PAPER/Department of Health & Social Servic

POSITION PAPER

HOUSE BILL NO. 572
(Identical to SB 339)

"An act related to Guardians and Conservators and providing for an effective date."

Public Need

The Department currently has a significant number of clients in institutions or in other custodial care arrangements for whom guardians are needed but cannot be found. HB 572 would be effective in improving the availability of guardianship services for handicapped individuals. This is particularly relevant for persons for whom a partial guardian is most appropriate so that an individual's rights are limited only in areas of incapacity. This is consistent with the Department's overall goal of providing human services support to Alaskans who have long-term dependency needs.

Suggestions for Improvement

Page 1: On line 28, the addition of "pastoral care" would enable the court to appoint a minister to serve as a visitor. This would be especially useful with regard to rural Alaska.

Page 11: On line 18, after determination add "shall consult with appropriate medical experts and". This addition will assure that the health aspects are adequately considered with regard to psychotropic medications.

Page 19: Removal of the word "solely" from line 26 would increase the number of private associations that could be appointed as guardian.

Page 20: Adding on line 28 a new priority "(6) a private association with an active guardianship program" would enable fraternal organizations or churches to take on a guardianship responsibility. "Public guardians" would become priority (7).

Other Discussions

1) COMPENSATION The concept of compensation for day to day expenses of a private guardian for his/her services should be addressed. Such compensation is addressed on page 22 for a "full guardian for whom a conservator has also been appointed" and is addressed on page 28 for the "public guardian". It seems this issue should be addressed for the private guardian in other circumstances as well.

2) INFORMATION AND REFERRAL The task on page 26, lines 12-16 is an information and referral service. A statewide service of this type is needed by many aspects of Alaska's service network. If the responsibility for this were assigned to and funded through a more generic agency, the public guardian, as well as dozens of other agencies, could take advantage of it. Removal of "develop and" from line 12 would seem appropriate.

The Department supports passage of this bill.

Approved by: Helen O. Beirne
Commissioner
Department of Health and Social Services

Date: 2/5/82

Introduced: 1/18/80
Referred: Judiciary

IN THE HOUSE BY PARR

HOUSE BILL NO. 572

IN THE LEGISLATURE OF THE STATE OF ALASKA

ELEVENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to guardians and conservators; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 13.26.005(1) is repealed and re-enacted to read:

(1) "incapacitated person" means a person whose ability to receive and evaluate information or to communicate decisions is impaired for reasons other than minority to the extent that he lacks the ability to provide for himself the essential requirements for his physical health or safety without court-ordered assistance;

* Sec. 2. AS 13.26.005 is amended by adding new paragraphs to read:

(5) "essential requirements for physical health or safety" means the health care, food, shelter, clothing, personal hygiene and protection without which serious physical injury or illness is more likely than not to occur,

(6) "partial guardian" means a guardian who possesses fewer than all of the legal duties and powers of a full guardian, and whose rights, powers, and duties have been specifically enumerated by court order;

(7) "full guardian" means a guardian who possesses the legal duties and powers enumerated in AS 13.26.150(c);

(8) "visitor" means a person trained or experienced in law, medical care, mental health care, education, rehabilitation, or social work who is an officer, employee, or special appointee of the court with no personal interest in the proceedings; personal care

(9) "guardian" includes full guardian and partial guardian;

(10) "respondent" means a person who, in a guardianship proceeding under this chapter, is alleged to be incapacitated and for whom the appointment of a guardian or alternative assistance is sought; "respondent" includes a person seeking the appointment of a guardian or alternative assistance for himself.

* Sec. 3. AS 13.26 is amended by adding a new section to article 3 to read:

Sec. 13.26.090. PURPOSE AND BASIS FOR GUARDIANSHIP. Guardianship for an incapacitated person shall be used only as is necessary to promote and protect the well-being of the person, shall be designed to encourage the development of maximum self-reliance and independence of the person, and shall be ordered only to the extent necessitated by the person's actual mental and physical limitations. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.

* Sec. 4. AS 13.26.095 is amended by adding a new subsection to read:

(e) A testamentary appointment of a guardian by the parent of an incapacitated person, or by the spouse of a married incapacitated person, may grant all guardianship powers and duties which the deceased parent or spouse held, subject to modification by the court under AS 13.26.125.

* Sec. 5. AS 13.26.105 is repealed and re-enacted to read:

Sec. 13.26.105. PETITION. (a) Any person may petition the court for a finding of incapacity and the appointment of a guardian for himself or for another person.

(b) The petition for appointment of a guardian shall state

(1) the name, age, and address of the petitioner and his

relationship to the respondent;

(2) the name, age, and present address of the respondent;

(3) the name and address of the person or facility presently having care, custody, guardianship, or conservatorship of the respondent, if any, and the existence of any other restrictions on the legal capacity of the respondent to act in his own behalf;

(4) the nature and degree of the alleged incapacity;

(5) the particular type and duration of appointment and the protection and assistance being sought;

(6) the names and addresses, unless they are unknown and cannot reasonably be ascertained, of the individuals most closely related to the respondent by blood or marriage;

(7) the facts supporting the allegations of incapacity and the need for appointment of a guardian;

(8) the names and addresses of persons known to the petitioner who have knowledge that might prove helpful in determining the capacity and needs of the respondent.

(c) The petition may also nominate a guardian and include a request for temporary guardianship as provided in AS 13.26.140 if the petitioner believes there is an imminent danger that the physical health or safety of the respondent will be seriously impaired during the pendency of the guardianship proceeding. A request for temporary guardianship shall specify facts which cause the petitioner to believe that a temporary guardian is necessary.

* Sec. 6. AS 13.26 is amended by adding new sections to read:

Sec. 13.26.106. INITIAL COURT PROCEDURES. (a) Upon the filing of a petition, the court shall schedule a hearing on the issue of incapacity. The hearing shall be conducted within 120 days from the filing of the petition unless the court postpones the hearing for cause.

and compensate

(b) If the respondent does not have an attorney of his own choice, the court shall appoint an attorney to represent him in the proceeding.

(c) The court shall appoint a visitor as defined in AS 13.26.-005(8). The visitor shall arrange for evaluations to be performed and prepare a written report to be filed with the court. The court shall also appoint an expert who has expertise in regard to the alleged or admitted incapacity to investigate the issue of incapacity.

(d) The visitor shall interview the respondent and the person seeking appointment as guardian, if any. The visitor shall conduct the interviews and investigations necessary to prepare his report and shall arrange for the respondent to be examined by the expert appointed under (c) of this section. The expert's written report shall be ~~incorporated into~~ attached to the visitor's report.

(e) Interviews and examinations shall take place in the respondent's usual residence unless

(1) the respondent consents to being examined or interviewed in a medical or mental health facility; or

(2) the visitor considers it necessary to conduct interviews or examinations in a medical or mental health facility.

Sec. 13.26.107. NOTICE OF RIGHTS. (a) Upon appointment, the visitor shall promptly

(1) explain to the respondent, in a language or communication system he can understand, the purpose of the interview and possible consequences of the proceedings;

(2) serve a copy of the petition on the respondent in accordance with the procedure described in AS 13.06.110;

(3) explain and provide to the respondent a written statement of the following rights:

(A) he may communicate with an attorney or an expert in

the alleged incapacity before proceeding with the interview;

(B) if he does not have an attorney, an attorney, whose name, address, and telephone number shall be included in the statement, will be designated to advise and represent him before and at any judicial hearings, and the attorney may arrange for an examination and consultation with an expert; and

(C) he may, instead, employ an attorney or expert of his own choice; and

(4) offer assistance to the respondent in contacting an attorney.

(b) A substantive interview of the respondent or other investigation may not be conducted until (a) of this section has been satisfied.

Sec. 13.26.108. VISITOR'S REPORT. (a) The visitor shall file with the court his evaluation report, proof of service of the petition upon the respondent and proof of service of his report upon the respondent, his attorney, and the petitioner, within 90 days after the date on which the petition was filed.

(b) The visitor shall, as part of the evaluation report, explain alternatives to guardianship and recommend any which will safeguard the respondent's essential requirements for physical health and safety. The evaluation report may recommend personal guardianship only if the visitor determines that the needs of the respondent cannot be met by other alternatives.

(c) The evaluation report shall include

(1) the results and analyses of medical and other tests and examinations performed which describe the respondent's mental, emotional, physical, and educational condition, adaptive behavior and social skills, and which specify the data on which the description is

based;

(2) recommendations regarding the types and extent of assistance, if any, necessary to meet the essential requirements for the physical health and safety of the respondent;

(3) an evaluation of the respondent's need for mental health treatment and whether there is a substantial probability that available treatment will significantly improve his mental condition;

(4) an evaluation of the respondent's need for educational or vocational assistance or personal care and whether these can be made available to the respondent;

(5) an evaluation of the probability that the incapacity may significantly lessen, and the type of services or treatment which will facilitate improvement in the respondent's condition or skills;

(6) a list of the names and addresses of all individuals who examined, interviewed, or investigated the respondent and of the names and addresses of all persons contacted in preparation of the report;

(7) a summary of the information which

(A) was supplied by the persons described in (6) of this subsection; and

(B) supports the conclusions of the report;

(8) a description of the alternatives to guardianship which were considered and not recommended and an explanation of why they are not feasible to meet the respondent's needs;

(9) a description of the present home and living arrangement of the respondent and of any other proposed placement and a recommendation for the respondent's living arrangement that provides the least restrictive setting necessary to protect the respondent from serious illness, injury, or disease; and

(10) a specification of the financial resources of the respon-

dent and his entitlements to insurance benefits and publicly operated or sponsored health, mental health, and welfare assistance which might be employed in the provision of services to him.

(d) If personal guardianship is recommended, the evaluation report required under (c) of this section shall include a guardianship outline which identifies

(1) potential guardians;

(2) the specific services necessary and available to protect the respondent from serious injury, illness or disease, and, to the extent possible, return the respondent to full capacity in handling his own affairs;

(3) the means by which the services described in (2) of this subsection may be financed;

(4) the specific, least restrictive authority needed by the guardian to provide the services described in (2) of this subsection.

(e) The petitioner and the respondent may file responses to the evaluation report within 10 days of receiving it. The court may grant additional time if requested for cause.

Sec. 13.26.109. EVALUATIONS: RIGHT TO REMAIN SILENT; RESPONDENT'S ATTORNEY OR EXPERT. (a) A ward or respondent has the right to refuse to respond to questions in the course of examinations and evaluations. However, he may be required to submit to interviews for the purpose of ascertaining whether he lacks the capacity to make informed decisions about care and treatment services.

(b) Statements of a ward or respondent in the course of evaluations, examinations, and treatment under AS 13.26.090 - 13.26.155 are privileged and confidential and not admissible without the ward's or respondent's consent in any civil or criminal proceeding other than proceedings under AS 13.26.090 - 13.26.155. A ward or respondent at all

times has the right to refuse to answer questions if the answers may tend to incriminate him.

(c) During an interview or testing conducted under AS 13.26.090 - 13.26.155, a ward or respondent has the right to be accompanied by an attorney or expert of his own choosing.

(d) The court, if requested by a ward or respondent in preparation for and in connection with a hearing held under AS 13.26.090 - 13.26.155, shall appoint an expert having expertise in regard to the alleged or admitted incapacity to examine the respondent and testify on his behalf. The request shall be filed in court at least five days before the hearing. An expert appointed under this subsection may be the same expert appointed under AS 13.26.106(c).

Sec. 13.26.111. DUTIES AND POWERS OF RESPONDENT'S ATTORNEY. (a) The principal duty of an attorney representing a ward or respondent is to represent the ward or respondent zealously. Zealous representation includes at least

(1) personal interviews with the ward or respondent;

(2) explaining, if possible, to the ward or respondent in terms which the ward or respondent can understand, the nature and possible consequences of the proceeding, the alternatives which are available, and the rights to which he is entitled;

(3) securing and presenting evidence and testimony and offering arguments to protect the ward's or respondent's rights and to further his interests.

(b) To the maximum extent possible, the ward or respondent shall remain responsible for determining his interests. However, his attorney may seek appointment of a guardian ad litem if the circumstances of AS 13.26.112 apply.

Sec. 13.26.112. APPOINTMENT OF A GUARDIAN AD LITEM. (a) Upon the

request of a ward or respondent or his attorney, the court shall appoint a guardian ad litem to protect the rights of the ward or respondent in proceedings under AS 13.26.090 - 13.26.155 if the court is satisfied that because of impaired ability to effectively receive and evaluate information regarding the proceedings or because of impaired ability to communicate decisions regarding the proceedings, the ward or respondent cannot determine his own interests without assistance, and

(1) a guardian has not been appointed;

(2) his interests and those of his guardian conflict; or

(3) the appointment is otherwise in the interests of justice.

(b) The guardian ad litem shall assist the ward or respondent in determining his interests in regard to the legal proceedings in which he is involved. If the ward or respondent is entirely incapable of determining his own interests, the guardian ad litem shall make that determination and advise the court and counsel for all parties accordingly. The guardian ad litem shall

(1) inquire thoroughly into all the circumstances that a prudent individual in the position of the ward or respondent would consider in determining his own interests in the proceedings; and

(2) encourage the ward or respondent to participate, to the maximum extent of his capability, in all decisions and to act on his own behalf on all matters in which he is able.

(c) The attorney may also be the guardian ad litem for the ward or respondent if there is no other party readily available and able to serve as a guardian ad litem and whose interests would not conflict with those of the ward or respondent.

Sec. 13.26.113. HEARING. (a) At the hearing scheduled under AS 13.26.106, the respondent has the right to

(1) present evidence on his own behalf;

(2) cross-examine witnesses who testify against him;

(3) remain silent;

(4) have the hearing open or closed to the public as he elects;

(5) be present unless the court determines that his conduct in the courtroom is so disruptive that the proceedings cannot reasonably continue with him present;

(6) be tried by jury on the issue of incapacity.

(b) The burden of proof by clear and convincing evidence is upon the petitioner, and a determination of incapacity shall be made before consideration of proper disposition.

(c) If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of alternatives to guardianship to meet the needs of the respondent.

(d) If it is found that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action and order an alternative form of protection.

(e) If it is found that the respondent is able to perform some, but not all, of the functions necessary to care for himself, and alternatives to guardianship are not feasible or adequate to provide for the needs of the respondent, the court may appoint a partial guardian, but may not appoint a full guardian.

(f) If it is found that the respondent is totally without capacity to care for himself and that a combination of alternatives to guardianship and the appointment of a partial guardian is not feasible or adequate to meet the needs of the respondent, the court may appoint a full guardian.

(g) At the time a guardian is appointed, the court shall make a reasonable effort to acquaint the ward with his right to request, at a

later time, his guardian's dismissal or a modification of the guardianship order. The court shall provide a written statement to the ward, explaining his rights and specifying the procedures to be followed in petitioning the court.

Sec. 13.26.114. PSYCHOTROPIC MEDICATION INFLUENCING WARDS OR RESPONDENTS AT JUDICIAL HEARINGS. (a) A ward or respondent has a right to participate to the maximum extent possible in all judicial proceedings concerning him and to be free from the influence of psychotropic medication during the proceedings.

(b) It is the responsibility of the attorney for the ward or respondent to determine if the ward or respondent is being given treatment with psychotropic medication the effects of which would continue during the judicial proceedings and, if so, to inform the court in writing a reasonable time before the hearing.

require a medical opinion if one is found

(c) The court, upon receipt of the information, shall determine the advisability of continuation or suspension of the treatment for the duration of the judicial proceedings and may make any appropriate order it considers necessary. The court in making its determination shall balance the interest of maximum participation from the ward or respondent in the hearings against the medical and rehabilitative needs of the ward or respondent.

(d) If the ward or respondent is under the influence of psychotropic medication during the judicial proceeding determining capacity, the trier of fact shall take that fact into consideration in making its determination.

Sec. 13.26.116. GUARDIANSHIP ORDER. (a) If the court or jury determines that a person is incapacitated and the services of a guardian are necessary, the court shall enter an order which

(1, names the guardian and establishes a guardian-ward rela-

tionship;

(2) includes findings of fact which support each grant of authority to the guardian;

(3) adopts a guardianship plan.

(b) The guardianship plan shall specify the authority which the guardian has with regard to

(1) medical care for the ward's physical condition;

(2) mental health treatment which the guardian considers to be in the ward's best interests;

(3) housing for the ward with consideration of the following:

(A) the wishes of the ward;

(B) the preferability of allowing the ward to retain local community ties; and

(C) the requirement for services to be provided in the least restrictive setting;

(4) personal care, educational and vocational services necessary for the physical and mental welfare of the ward and to return the ward to full capacity;

(5) application for health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or related services provided to the ward;

(6) physical and mental examinations necessary to determine the ward's medical and mental health treatment needs; and

(7) control of the estate and income of the ward to pay for the cost of services which the guardian is authorized to obtain on behalf of the ward.

(c) The guardianship plan may not be more restrictive of the liberty of the ward than is reasonably necessary to protect the ward

Change Reasonable

from serious physical injury, illness or disease and to provide him with medical care and mental health treatment for his physical and mental health. The guardianship plan shall be designed to encourage a ward to participate in all decisions which affect him and to act on his own behalf to the maximum extent possible. The court may not assign a duty or power to a guardian unless the need for it has been proven to the satisfaction of the court and no less restrictive alternative or combination of alternatives is sufficient to satisfy the need.

(d) The duration of the term of guardianship shall be determined by the court order. Upon receipt of a report or other information that requires further consideration, the court may order a review hearing if it determines that the hearing is in the best interests of the ward.

Sec. 13.26.117. GUARDIANSHIP IMPLEMENTATION REPORT. Within 90 days after appointment as guardian, the guardian shall submit to the court a report. The report shall describe the guardian's program for implementing the guardianship plan. The primary goal of the program described in the report shall be, to the maximum extent possible, to develop or regain the ward's abilities to handle his own affairs. The report shall consider housing, medical care, and educational and vocational needs and resources. In developing the report, the guardian shall consult with his ward to the maximum extent possible. The office of public guardian shall contact the guardian to offer assistance in preparing the report. The report shall specify the services which are necessary to meet the essential requirements for the ward's physical health or safety and the means for obtaining the services. The report shall specify the manner in which the guardian will exercise and share decision-making authority and other items which will assist in fulfilling the needs of the ward, the terms of the guardianship order, and the duties of the guardian.

Sec. 13.26.118. REPORTING. (a) A guardian shall submit a report to the court or request that a visitor be appointed to prepare and submit a report at least annually. A court-appointed visitor shall prepare the report at least once in each three-year period. The guardian shall submit an additional report to the court when

(1) the court orders it;

(2) there is a significant change in the capacity of the ward to meet the essential requirements for his health and safety or to protect his rights;

(3) the guardian resigns or is removed; or

(4) the guardianship is terminated.

(b) The report shall contain, but is not limited to, the following information:

(1) the name and address of the ward and the guardian;

(2) the ward's present mental, physical, and social conditions and present living arrangements;

(3) changes in the capacity of the ward to meet essential requirements for his physical health and safety;

(4) the services being provided to the ward;

(5) the significant actions taken by the guardian during the reporting period in regard to his ward;

(6) a financial accounting of the estate which has been subject to the possession or control of the guardian;

(7) any other information requested by the court or necessary or desirable in the opinion of the guardian or visitor.

Sec. 13.26.131. COSTS IN GUARDIANSHIP PROCEEDINGS. (a) The state shall bear the costs of the visitor and expert appointed under AS 13.26.-106(c).

(b) Subject to (c) of this section, the respondent shall bear the

costs of the attorney appointed under AS 13.26.106(b), of the expert appointed under AS 13.26.109(d), of the guardian ad litem appointed under AS 13.26.112, and of other court and guardianship costs incurred under this chapter.

(c) The state shall pay all or part of the costs described in (b) of this section if the court finds that the payment is necessary to prevent the respondent from suffering financial hardship or from becoming dependent upon a government agency or a private person or agency.

* Sec. 7. AS 13.26.120 is amended to read:

Sec. 13.26.120. TERMINATION OF GUARDIANSHIP FOR INCAPACITATED PERSON. The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, the [OR UPON] removal or resignation of the guardian as provided in AS 13.26.125, or upon the expiration of the period specified by court order as the duration of the guardianship. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect a guardian's [HIS] liability for prior acts nor his obligation to account for [FUNDS AND] assets of the [HIS] ward over which he exercised control.

* Sec. 8. AS 13.26.125 is amended to read:

Sec. 13.26.125. REMOVAL OR RESIGNATION OF GUARDIAN; CHANGE IN OR TERMINATION OF GUARDIANSHIP [INCAPACITY]. (a) On petition of the ward, the guardian, or any person interested in the ward's [HIS] welfare, the court may (1) review and amend a decision of a guardian; or (2) if alternatives which are less restrictive than guardianship or less restrictive than the existing guardianship plan would assist the ward in meeting his essential requirements for physical health and safety, modify the provisions of its order to (A) amend the guardianship plan

or the responsibilities of the guardian; (B) remove a guardian and appoint a successor; or (C) terminate the guardianship [IF IN THE BEST INTERESTS OF THE WARD]. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(b) The [AN ORDER ADJUDICATING INCAPACITY MAY SPECIFY A MINIMUM PERIOD, NOT EXCEEDING ONE YEAR, DURING WHICH NO PETITION FOR AN ADJUDICATION THAT THE WARD IS NO LONGER INCAPACITATED MAY BE FILED WITHOUT SPECIAL LEAVE. SUBJECT TO THIS RESTRICTION, THE] ward, the guardian, or any person interested in the ward's [HIS] welfare may petition for an order that the ward [HE] is no longer incapacitated or no longer incapacitated to the same extent as he was when the original guardianship order was made or when the court last amended the guardianship order, and for removal or resignation of the guardian, termination of the guardianship, or a change in the responsibilities of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be held in [ADJUDGED GUILTY OF] contempt of court.

(c) Before removing a guardian, changing his responsibilities, accepting the resignation of a guardian, or ordering that a ward's guardianship be changed or [INCAPACITY HAS] terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian and applying the least restrictive alternative necessary to meet the needs of the ward after consideration of alternatives to guardianship services, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.

(d) If at any time the ward requests or indicates to his guardian

or to the agency responsible for his care or its employee that he desires a change in guardianship, the guardian or the agency providing care shall inform the court of the request or indication.

(e) If the guardian dies, or if on the basis of a petition filed under this section or a report or other information, there is probable cause to believe a guardian is not performing his responsibilities effectively and there is an imminent danger that the physical health or safety of the ward will be seriously impaired, the court shall take whatever action is necessary to protect the ward, including the dismissal of the guardian and appointment of a temporary guardian without a hearing.

* Sec. 9. AS 13.26.135 is amended to read:

Sec. 13.26.135. NOTICES IN GUARDIANSHIP PROCEEDINGS. (a) In a proceeding for the appointment, change in responsibilities, [OR] removal of a guardian, or termination of guardianship, [OF AN INCAPACITATED PERSON] other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or respondent by the visitor as provided in AS 13.26.107 [THE PERSON ALLEGED TO BE INCAPACITATED AND HIS SPOUSE, PARENTS AND ADULT CHILDREN];

(2) any person who is serving as his guardian, conservator or who has his care and custody; [AND]

(3) in case no other person is notified under (4) [(1)] of this subsection, at least one of his closest adult relatives, if any can be found;

(4) the spouse, parents, and adult children of the ward or respondent;

(5) any person who performed an evaluation for the visitor's report within the previous two years;

(6) the ward's or respondent's attorney; and

(7) the ward's or respondent's guardian ad litem if one has been appointed.

(b) Notice shall be served personally on the ward's or respondent's [ALLEGED INCAPACITATED PERSON, AND HIS] spouse and parents if they can be found within the state. Except as provided in (a)(1) of this section, notice [NOTICE] to the spouse and parents, if they cannot be found within the state, and to all other persons [EXCEPT THE ALLEGED INCAPACITATED PERSON] shall be given as provided in AS 13.06.110. [WAIVER OF NOTICE BY THE PERSON ALLEGED TO BE INCAPACITATED IS NOT EFFECTIVE UNLESS HE ATTENDS THE HEARING OR HIS WAIVER OF NOTICE IS CONFIRMED IN AN INTERVIEW WITH THE VISITOR. REPRESENTATION OF THE ALLEGED INCAPACITATED PERSON BY A GUARDIAN AD LITEM IS NOT NECESSARY.]

(c) The notice shall set out the date, time, place, purpose and possible consequences of the hearing and the rights of the ward or respondent and any other parties to the proceedings.

* Sec. 10. AS 13.26.140 is repealed and re-enacted to read:

Sec. 13.26.140. TEMPORARY GUARDIANS. (a) If during the pendency of an initial petition for guardianship it appears that the respondent is in need of immediate services to protect him against serious injury, illness or disease and the respondent is not capable of procuring the necessary services, the petitioner may request the appointment of a temporary guardian to authorize the services. The request shall state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and his attorney. The court shall conduct a hearing within 72 hours after the filing.

(b) At the temporary guardianship hearing, the respondent shall have the rights set out in AS 13.26.113(b).(a)

(c) The burden of proof at the hearing shall be by a preponderance of the evidence and shall be upon the petitioner.

(d) If the court determines that a temporary guardian should be appointed, it shall make the appointment and grant to the guardian only the authorities that are least restrictive upon the liberty of the respondent and which enable the temporary guardian to provide the emergency services necessary to protect the respondent from serious injury, illness or disease.

(e) The temporary guardianship shall expire at the time of the appointment of a full or partial guardian or upon the dismissal of the petition for guardianship.

(f) If no guardianship petition is pending but the court is informed of a person who is apparently incapacitated and in need of emergency life-saving services, the court may authorize the services upon determining that delay until a guardianship hearing can be held would entail a life-threatening risk to the person.

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

Sec. 13.26.141. EMERGENCY POWERS. Notwithstanding the limits of a temporary guardianship or guardianship order, a temporary guardian and guardian at all times have the right to authorize the provision of emergency life-saving services. This right includes the power to authorize hospitalization without advance court approval.

* Sec. 12. AS 13.26.145 is repealed and re-enacted to read:

Sec. 13.26.145. WHO MAY BE GUARDIAN; PRIORITIES. (a) The court may appoint a competent person, the public guardian, or a private association organized solely to conduct an active guardianship program for incapacitated persons, as guardian of an incapacitated person.

(b) The court may not appoint a person to be a guardian of an incapacitated person if the person

(1) provides, or is likely to provide during the guardianship period, substantial services to the incapacitated person in a professional or business capacity, other than in his capacity as guardian;

(2) is, or is likely to become during the guardianship period, a creditor of the incapacitated person, other than in his capacity as guardian;

(3) has, or is likely to have during the guardianship period, interests which may conflict with those of the incapacitated person; or

(4) is employed by a person who would be disqualified under (1) - (3) of this subsection.

(c) A person may be appointed as the guardian of an incapacitated person notwithstanding the provisions of (b) of this section if he is the spouse, adult child, parent, or sibling of the incapacitated person and the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the best interests of the incapacitated person.

(d) Subject to (e) of this section, qualified persons have priority for appointment as guardian in the following order:

(1) a person or association nominated by the incapacitated person, if at the time of the nomination the incapacitated person had the capacity to make a reasonably intelligent choice;

(2) the spouse of the incapacitated person;

(3) an adult child or parent of the incapacitated person;

(4) a relative of the incapacitated person with whom the incapacitated person has resided for more than six months during the year before the filing of the petition;

(5) a relative or friend who has demonstrated a sincere, longstanding interest in the welfare of the incapacitated person;

(6) the public guardian.

(e) The priorities established in (d) of this section are not binding, and the court shall select the person or association who is best qualified and willing to serve. The court shall also give consideration to a nomination by a person described in (d) of this section and to a nomination in the will of a deceased parent or spouse of the incapacitated person.

* Sec. 13. AS 13.26.150 is repealed and re-enacted to read:

Sec. 13.26.150. GENERAL POWERS AND DUTIES OF GUARDIAN. (a) A guardian shall diligently and in good faith carry out the specific duties and powers assigned by the court. In carrying out his duties and powers, the guardian shall encourage the ward to participate to the maximum extent of his capacity in all decisions which affect him, to act on his own behalf in all matters in which he is able, and to develop or regain, to the maximum extent possible, his capacity to meet the essential requirements for his physical health or safety, to protect his rights, and to manage his financial resources.

(b) A partial guardian of an incapacitated person has only the powers and duties respecting his ward enumerated in the court order.

(c) A full guardian of an incapacitated person has the same powers and duties respecting his ward that a parent has respecting his unemancipated minor child except that the guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. Except as modified by order of the court, a full guardian's powers and duties include, but are not limited to, the following:

(1) he is entitled to custody of the person of his ward and shall assure that the ward has a place of abode in the least restrictive setting consistent with the essential requirements for the ward's physical health and safety;

(2) he shall assure the care, comfort, and maintenance of the

ward;

(3) he shall assure that the ward receives the services necessary to meet the essential requirements for the ward's physical health and safety and to develop or regain, to the maximum extent possible, the capacity to meet his needs for physical health and safety;

(4) he shall assure through the initiation of court action and other means that the ward enjoys all personal, civil, and human rights to which the ward is entitled;

(5) he may give consents or approvals necessary to enable the ward to receive medical or other professional care, counsel, treatment or services except as otherwise limited by (e) of this section;

(6) if a conservator for the estate of the ward has not been appointed, the guardian may receive money and property deliverable to the ward and apply the money and property for support, care, and education of the ward; however, he may not use the ward's money or property to pay for room and board which he, his spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible; he shall exercise care to conserve any excess for the ward's needs;

(7) if a conservator of the estate of the ward has been appointed, the guardian shall pay all of the ward's estate received by the guardian in excess of the money expended to meet current expenses for support, care, and education of the ward to the conservator for management as provided in AS 13.26.165 - 13.26.315, and the guardian shall account to the conservator for money expended.

(d) A full guardian of a ward, for whom a conservator has also been appointed, shall control the custody and care of the ward and is entitled to receive reasonable sums for his services and for room and

board furnished to the ward as agreed upon between the guardian and the conservator. The guardian may request the conservator to expend the ward's estate for the ward's care and maintenance.

(e) A guardian may not

(1) place the ward in a facility or institution for the mentally ill other than through a formal commitment proceeding under AS 47.30.070 in which the ward has a separate guardian ad litem;

(2) consent on behalf of the ward to an abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary to preserve the life or prevent serious impairment of the physical health of the ward;

(3) consent on behalf of the ward to the withholding of life-saving medical procedures;

(4) consent on behalf of the ward to the performance of an experimental medical procedure or to participation in a medical experiment not intended to preserve the life or prevent serious impairment of the physical health of the ward;

(5) prohibit the marriage or divorce of the ward;

(6) consent on behalf of the ward to termination of the ward's parental rights.

* Sec. 14. AS 13.26.195 is amended by adding a new subsection to read:

(d) The court shall investigate alternatives to a conservator and the use of a special conservator as provided in AS 13.26.205(c). A conservator may be appointed only if a less restrictive protective order or the services of a special conservator are not adequate to protect the estate of the protected person. The court shall, to the extent possible, consult with the protected person in determining what action should be taken.

* Sec. 15. AS 13.26.205(c) is amended to read:

(c) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. If only certain powers need be given to the conservator or the services of a conservator are needed only for a limited number of transactions, a special conservator may be appointed. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters carried out under [DONE PURSUANT TO] the order of appointment.

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

Sec. 13.26.218. PUBLIC BOND. (a) If the public guardian is appointed as a conservator, the court may not require a bond other than the bond required in AS 13.26.410.

(b) If the court requires a conservator, other than the public guardian, to provide a bond under AS 13.26.215 and the conservator is financially unable to provide the bond, the court may order the cost of the bond to be paid from court funds.

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

ARTICLE 6. PUBLIC GUARDIANS.

Sec. 13.26.360. PURPOSE. The legislature recognizes that many Alaskans, for reasons of incapacity or minority, are in need of a guardian or conservator. Often these persons cannot find a person able and willing to serve as guardian or conservator. The legislature intends through AS 13.26.360 - 13.26.420 to establish the office of public guardian for the purpose of furnishing guardianship and conservatorship services. It further intends by establishing this office to provide

assistance to guardians throughout the state in securing necessary services for their wards and to assist the courts, attorneys, visitors, proposed guardians, and respondents in the orderly and expeditious handling of guardianship proceedings.

Sec. 13.26.370. PUBLIC GUARDIAN. (a) The public administrator (AS 22.15.310) shall also act as the public guardian for the judicial district for which he is appointed.

(b) A court may order the public guardian to act as full guardian, partial guardian, conservator, or special conservator for a person who is determined under this chapter to be in need of guardianship or conservatorship service if no person or private guardianship association is willing and qualified to perform the function.

Sec. 13.26.380. POWERS AND DUTIES OF PUBLIC GUARDIAN. (a) The public guardian has the same powers and duties with respect to his wards and protected persons as a private guardian or conservator.

(b) The public guardian, when appointed as guardian or conservator, shall endeavor, for as long as practical, to find a suitable private guardian or conservator for his ward or protected person. For each ward and protected person, the public guardian shall report to the court having jurisdiction of the ward or protected person, at least once every six months, his efforts to find a private guardian or conservator.

(c) The public guardian shall

(1) establish and maintain relationships with governmental, public, and private agencies, institutions, and organizations to assure the most effective guardianship or conservatorship program for each ward and protected person;

(2) visit each of his wards and protected persons at least once every quarter to monitor their welfare;

(3) keep and maintain financial and statistical records of

all cases in which the public guardian provides guardianship or conservatorship services;

(4) provide information and referrals to the public regarding guardianship and conservatorship proceedings;

(5) assist guardians and court-appointed visitors of wards and respondents in the preparation and revision of guardianship plans and reports;

(6) assist guardians to understand the disabilities of wards and to foster the increased independence of wards;

(7) assist guardians in securing the rights, benefits, and services to which their wards are entitled;

(8) develop and maintain a current listing of public and private medical, mental health, social advocacy, educational, rehabilitative, counseling, therapeutic, homemaking, recreational, and financial services and programs available to assist wards and protected persons and their families.

(d) The public guardian may

(1) contract for services necessary to carry out the duties of his office;

(2) accept the services of volunteer workers or consultants and reimburse them for their necessary expenses.

Sec. 13.26.390. INTERVENTION. The public guardian may, on his own motion or at the request of the court, intervene in a guardianship or conservatorship proceeding if he or the court considers the intervention to be justified because

(1) an appointed guardian or conservator is not fulfilling his duties;

(2) the estate is subject to waste as a result of the costs of the guardianship or conservatorship;

(3) a willing and qualified guardian or conservator is not available; or

(4) the best interests of the ward, respondent, protected person, or person who is the subject of a conservatorship proceeding require the intervention.

Sec. 13.26.400. DELEGATION OF POWERS AND DUTIES. The public guardian may employ staff and delegate to members of his staff or to volunteers his powers and duties as guardian or conservator and other powers and duties under this chapter. However, the public guardian retains responsibility for the proper performance of the delegated powers and duties. All delegations shall be to persons who meet the eligibility requirements of AS 13.26.145.

Sec. 13.26.410. BOND. The administrative director of the Alaska Court System shall provide for one public bond to be held to cover all the conservatorship duties of the public guardian. The amount of the bond depends on the value of the estates in the control of the public guardian. Every six months the public guardian shall submit to the administrative director a report stating the value of the estates under his control. On receipt of the report, the administrative director shall adjust the public bond to the present value of the estates.

Sec. 13.26.420. ALLOCATION OF COSTS. (a) If a public guardian is appointed guardian or conservator, the administrative costs of his services and the costs incurred in the appointment procedure may not be charged against the income or the estate of the ward or protected person unless the court determines that the ward or protected person is financially able to pay all or part of the costs.

(b) The court shall determine the ability of the ward or protected person to pay for administrative costs of a public guardian or costs incurred in the appointment procedure by determining the financial

ability of the ward or protected person to pay a private guardian or conservator, considering the nature, extent, and liquidity of assets of the ward or protected person, the disposable net income of the ward or protected person, the nature of the guardianship or conservatorship, the type, duration and complexity of the services required, and any other foreseeable expenses.

(c) The public guardian shall investigate the financial status of a person who requests the appointment of the public guardian as his guardian or conservator or for whom a court is considering the appointment of the public guardian. The public guardian may require the person to execute and deliver written requests or authorizations necessary under law to provide the public guardian with access to records of public or private sources, otherwise confidential, needed to evaluate financial eligibility. The public guardian may obtain information from any public record office of the state or of a subdivision or agency of the state upon request and without payment of fees ordinarily required by law.

(d) The reasonable value of the services rendered without cost to the ward or protected person shall be allowed as a claim against the estate upon the death of the ward or protected person.

* Sec. 18. AS 22.15.310 is amended to read:

Sec. 22.15.310. APPOINTMENT. When authorized by the supreme court, the presiding judge in each judicial district shall appoint a person to act as public administrator of the estates of deceased persons, [AND] as coroner, and as public guardian.

* Sec. 19. AS 22.15.350 is amended to read:

Sec. 22.15.350. DUTIES [AS CORONER]. In addition to his other duties, a public administrator shall perform the duties set out in AS 22.15.110 and shall perform the duties of public guardian as set out

in AS 13.26.360 - 13.26.420.

* Sec. 20. AS 13.26.110 and 13.26.130 are repealed.

* Sec. 21. TRANSITION. No later than July 1, 1983, all guardianships for incapacitated persons established before July 1, 1980, and in effect on July 1, 1980 shall be reviewed by the court. Until the review, a guardian appointed before July 1, 1980, whose guardianship is still in effect on July 1, 1980, shall retain the powers assigned to him, unless a petition for modification under AS 13.26.125 amended by sec. 8 of this Act is granted. Before the review, the guardian shall submit one report in the form prescribed in AS 13.26.118 added by sec. 6 of this Act.

* Sec. 22. This Act takes effect July 1, 1980.

Revisions

Introduced: 1/18/80
Referred: Judiciary

IN THE HOUSE S.B 339-Like BY PARR

HOUSE BILL NO. 572

IN THE LEGISLATURE OF THE STATE OF ALASKA

ELEVENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to guardians and conservators; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 13.26.005(1) is repealed and re-enacted to read:

(1) "incapacitated person" means a person whose ability to receive and evaluate information or to communicate decisions is impaired for reasons other than minority to the extent that he lacks the ability to provide for himself the essential requirements for his physical health or safety without court-ordered assistance;

* Sec. 2. AS 13.26.005 is amended by adding new paragraphs to read:

(5) "essential requirements for physical health or safety" means the health care, food, shelter, clothing, personal hygiene and protection without which serious physical injury or illness is more likely than not to occur;

(6) "partial guardian" means a guardian who possesses fewer than all of the legal duties and powers of a full guardian, and whose rights, powers, and duties have been specifically enumerated by court order;

(7) "full guardian" means a guardian who possesses the legal duties and powers enumerated in AS 13.26.150(c);

(8) "visitor" means a person trained or experienced in law, medical care, mental health care, education, rehabilitation, or social work who is an officer, employee, or special appointee of the court with no personal interest in the proceedings;

(9) "guardian" includes full guardian and partial guardian;

(10) "respondent" means a person who, in a guardianship proceeding under this chapter, is alleged to be incapacitated and for whom the appointment of a guardian or alternative assistance is sought; "respondent" includes a person seeking the appointment of a guardian or alternative assistance for himself.

* Sec. 3. AS 13.26 is amended by adding a new section to article 3 to read:

Sec. 13.26.090. PURPOSE AND BASIS FOR GUARDIANSHIP. Guardianship for an incapacitated person shall be used only as is necessary to promote and protect the well-being of the person, shall be designed to encourage the development of maximum self-reliance and independence of the person, and shall be ordered only to the extent necessitated by the person's actual mental and physical limitations. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.

* Sec. 4. AS 13.26.095 is amended by adding a new subsection to read:

(e) A testamentary appointment of a guardian by the parent of an incapacitated person, or by the spouse of a married incapacitated person, may grant all guardianship powers and duties which the deceased parent or spouse held, subject to <u>confirmation</u> (modification) by the court under AS 13.26.125.

* Sec. 5. AS 13.26.105 is repealed and re-enacted to read:

Sec. 13.26.105. PETITION. (a) Any person may petition the court for a finding of incapacity and the appointment of a guardian for himself or for another person.

(b) The petition for appointment of a guardian shall state

(1) the name, age, and address of the petitioner and his

relationship to the respondent;

(2) the name, age, and present address of the respondent;

(3) the name and address of the person or facility presently having care, custody, guardianship, or conservatorship of the respondent, if any, and the existence of any other restrictions on the legal capacity of the respondent to act in his own behalf;

(4) the nature and degree of the alleged incapacity;

(5) the particular type and duration of appointment and the protection and assistance being sought;

(6) the names and addresses, unless they are unknown and cannot reasonably be ascertained, of the individuals most closely related to the respondent by blood or marriage;

(7) the facts supporting the allegations of incapacity and the need for appointment of a guardian;

(8) the names and addresses of persons known to the petitioner who have knowledge that might prove helpful in determining the capacity and needs of the respondent.

(c) The petition may also nominate a guardian and include a request for temporary guardianship as provided in AS 13.26.140 if the petitioner believes there is an imminent danger that the physical health or safety of the respondent will be seriously impaired during the pendency of the guardianship proceeding. A request for temporary guardianship shall specify facts which cause the petitioner to believe that a temporary guardian is necessary.

* Sec. 6. AS 13.26 is amended by adding new sections to read:

Sec. 13.26.106. INITIAL COURT PROCEDURES. (a) Upon the filing of a petition, the court shall schedule a hearing on the issue of incapacity. The hearing shall be conducted within 120 days from the filing of the petition unless the court postpones the hearing for cause.

(b) If the respondent does not have or can not afford an attorney of his own choice, the court shall appoint and compensate an attorney to represent him in the proceedings.

(c) The court shall appoint a visitor as defined in AS 13.26.005(8). The visitor shall arrange for evaluations to be performed and prepare a written report to be filed with the court. The court shall also appoint an expert who has expertise in regard to the alleged or admitted incapacity to investigate the issue of incapacity.

(d) The visitor shall interview the respondent and the person seeking appointment as guardian, if any. The visitor shall conduct the interviews and investigations necessary to prepare his report and shall arrange for the respondent to be examined by the expert appointed under (c) of this section. The expert's written report shall be separately attached as well as (shall be) incorporated into the visitor's report.

(e) Interviews and examinations shall take place in the respondent's usual residence unless

(1) the respondent consents to being examined or interviewed in a medical or mental health facility; or

(2) the visitor considers it necessary to conduct interviews or examinations in a medical or mental health facility.

Sec. 13.26.107. NOTICE OF RIGHTS. (a) Upon appointment, the visitor shall promptly

(1) explain to the respondent, in a language or communication system he can understand, the purpose of the interview and possible consequences of the proceedings;

(2) serve a copy of the petition on the respondent in accordance with the procedure described in AS 13.06.110;

(3) explain and provide to the respondent a written statement of the following rights:

(A) he may communicate with an attorney or an expert in

the alleged incapacity before proceeding with the interview:

(B) if he does not have an attorney, an attorney, whose name, address, and telephone number shall be included in the statement, will be designated to advise and represent him before and at any judicial hearings, and the attorney may arrange for an examination and consultation with an expert; and

(C) he may, instead, employ an attorney or expert of his own choice; and

(4) offer assistance to the respondent in contacting an attorney.

(b) A substantive interview of the respondent or other investigation may not be conducted until (a) of this section has been satisfied.

Sec. 13.26.108. VISITOR'S REPORT. (a) The visitor shall file with the court his evaluation report, proof of service of the petition upon the respondent and proof of service of his report upon the respondent, his attorney, and the petitioner, within 90 days after the date on which the petition was filed.

(b) The visitor shall, as part of the evaluation report, explain alternatives to guardianship and recommend any which will safeguard the respondent's essential requirement for physical health and safety. The evaluation report may recommend personal guardianship only if the visitor determines that the needs of the respondent cannot be met by other alternatives.

(c) The evaluation report shall include:

(1) a release statement from the respondent for each evaluation before the evaluation is conducted.

(2) the results and analyses of medical and other tests and examinations performed which describe the respondent's mental, emotional, physical, and educational condition, adaptive behavior and social skills, and which specify the data on which the description is

based;

(3) recommendations regarding the types and extent of assistance, if any, necessary to meet the essential requirements for the physical health and safety of the respondent;

(4) an evaluation by a qualified professional of the respondent's need for mental health treatment and whether there is a substantial probability that available treatment will significantly improve his mental condition;

(5) an evaluation by a qualified professional of the respondent's need for educational or vocational assistance or personal care and whether these can be made available to the respondent;

(6) an evaluation by a qualified professional of the probability that the incapacity may significantly lessen, and the type of services or treatment which will facilitate improvement in the respondent's condition or skills;

(7) a list of the names and addresses of all individuals who examined, interviewed or investigated the respondent and of the names and addresses of all persons contacted in preparation of the report;

(8) a summary of the information which

(A) was supplied by the persons described in (7) of this subsection; and copies of all reports prepared by qualified professionals conducting evaluatio described of (4), (5), and (6) of this subsection; and

(B) supports the conclusions of the reports;

(9) a description of the alternatives to guardianship which were considered and not recommended and an explanation of why they are not feasible to meet the respondent's needs;

(10) a description of the present home and living arrangement of the respondent and of any other proposed placement and recommendation for the respondent's living arrangement that provides the least restrictive setting necessary to protect the respondent for serious illness, injury, or disease; and

(11) a specification of the financial resources of the respon-

dent and his entitlements to insurance benefits and publicly operated or sponsored health, mental health, and welfare assistance which might be employed in the provision of services to him.

(d) If professional guardianship is recommended, the evaluation report required under (c) of this section shall include a guardianship outline which identifies

(1) potential guardianship;

(2) the specific services necessary and available to protect the respondent from serious injury, illness or disease, and, to the extent possible, return the respondent to full capacity in handling his own affairs;

(3) the means by which the services described in (2) of this subsection may be financed;

(4) the specific, least restrictive authority needed by the guardian to provide the services described in (2) of this subsection.

(e) The petitioner and the respondent may file responses to the evaluation report within 10 days of receiving it. The court may grant additional time if requested for cause.

Sec. 13.26.109. EVALUATIONS: RIGHT TO REMAIN SILENT; RESPONDENT'S ATTORNEY OR EXPERT. (a) A ward or respondent has the right to refuse to respond to questions in the course of examinations and evaluations. However, he may be required to submit to interviews for the purpose of ascertaining whether he lacks the capacity to make informed decisions about care and treatment services.

(b) Statements of a ward or respondent in the course of evaluations, examinations, and treatment under AS 13.26.090. - 13.26.155 are privileged, (and) confidential, and shall be sealed and not admissible without the ward's or respondent;s consent in any civil or criminal proceedings other than proceedings under AS 13.26.090 - 13.26.155. A ward or respondent at all

times has the right to refuse to answer questions if the answers may tend to incriminate him.

(c) During the interview or testing conducted under 13.26.090 - 13.26.155, a ward or respondent has the right to be accompanied by an attorney or expert of his own choosing.

(d) The court, if requested by a ward or respondent in preparation for and in connection with a hearing held under AS 13.26.090 - 13.26.155, shall appoint an expert having expertise in regard to the alleged or admitted incapacity to examine the respondent and testify on his behalf. The request shall be filed in court at least five days before the hearing. An expert appointed under this subsection may be the same expert appointed under AS 13.26.106(c).

Sec. 13.26.111. DUTIES AND POWERS OF RESPONDENT'S ATTORNEY. (a) The principal duty of an attorney representing a ward or respondent is to represent the ward or respondent zealously. Zealous representation includes at least.

(1) personal interviews with the ward or respondent, the first contact with the respondent shall be at least two weeks prior to the hearings;

(2) explaining, if possible, to the ward or respondent in terms which the ward or respondent can understand, the nature and possible consequences of the preceeding, the alternatives which are available, and the rights to which he is entitled;

(3) securing and presenting evidence and testimony and offering arguments to protect the ward's or respondent's rights and to further his interests.

(b) To the maximum extent possible, the ward or respondent shall remain responsible for determining his interests. However, his attorney may seek appointment of a guardian ad litem if the circumstances of AS 13.26.112 apply.

Sec. 13.26.112. APPOINTMENT OF A GUARDIAN AD LITEM. (a) Upon the

request of a ward or respondent or his attorney, the court shall appoint a guardian ad litem to protect the rights of the ward or respondent in proceedings under AS 13.26.090 - 13.26.155 if the court is satisfied that because of impaired ability to effecticely receive and evaluate information regarding the proceedings or because of impaired ability to communicate decisions regarding the proceedings, the ward or respondent cannot determine his own interests without assistance, and

(1) a guardian has not been appointed;

(2) his interests and those of his guardian conflict; or

(3) the appointment is otherwise in the interests of justice.

(b) The guardian ad litem shall assist the ward or respondent in determining his interests in regard to the legal proceedings in which he is involved. If the ward or respondent is entirely incapable of determining his own interests, the guardian ad litem shall make that determination and advise the court and counsel for all parties accordingly. The guardian ad litem shall

(1) inquire thoroughly into all the circumstances that a prudent individual in the position of the ward or respondent would consider in determining his own interests in the proceedings; and

(2) encourage the ward or respondent to participate, to the maximum extent of his capability, in all decisions and to act on his own behalf on all matters in which he is able.

(c) The attorney may <u>not</u> (also) be the guardian ad litem for the ward or respondent. (If there is no other party readily available and able to serve as a guardian ad litem and whose interests would not conflict with those of the ward or respondent.)

Sec. 13.26.113. HEARING. (a) At the hearing scheduled under AS 13.26.106, the respondent has the right to

(1) present evidence on his own behalf:

(2) cross-examine witnesses who testify against him;

(3) remain silent;

(4) have the hearing open or closed to the public as he elects;

(5) be present unless the court determines that his conduct in the courtroom is so disruptive that the proceedings cannot reasonably continue with him present;

(6) be tried by jury on the issue of incapacity.

(b) The burden of proof by clear and convincing evidence is upon the petitioner, and a determination of incapacity shall be made before consideration of proper disposition.

(c) If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of alternatives to guardianship to meet the needs of the respondent.

(d) If it is found that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action and order an alternative form of protection.

(e) If it is found that the respondent is able to perform some, but not all, of the functions necessary to care for himself, and alternatives to guardianship are not feasible or adequate to provide for the needs of the respondent, the court may appoint a partial guardian, but may not appoint a full guardian.

(f) If it is found that the respondent is totally without capacity to care for himself and that a combination of alternatives to guardianship and the appointment of a partial guardian is not feasible or adequate to meet the needs of the respondent, the court may appoint a full guardian.

(g) If it is necessary to appoint a partial or full guardian, the court shall take into consideration and give priority to any preference the respondent may have.

(h) At the time a guardian is appointed, the court shall make a reasonable effort to acquaint the ward with his right to request, at a

later time, his guardian's dismissal or a modification of the guardianship order. The court shall provide a written statement to the ward, explaining his rights and specifying the procedures to be followed in petitioning the court.

Sec. 13.26.114. PSYCHOTROPIC MEDICATION INFLUENCING WARDS OR RESPONDENTS AT JUDICIAL HEARINGS. (a) A ward or respondent has a right to participate to the maximum extent possible in all judicial proceedings concerning him and to be free from the influence of psychotropic medication during the proceedings.

(b) It is the responsibility of the attorney for the ward or respondent to determine if the ward or respondent is being given treatment with psychotropic medication the effects of which would continue during the judicial proceedings and, if so, to inform the court in writing a reasonable time before the hearing.

(c) The court, upon receipt of the information, shall determine the advisability of continuation or suspension of the treatment for the duration of the judicial proceedings and may make any appropriate order it considers necessary. The court in making its determination shall balance the interest of maximum participation from the ward or respondent in the hearings against the medical and rehabilitative needs of the ward or respondent.

(d) If the ward or respondent is under the influence of psychotropic medication during the judicial proceeding determining capacity, the trier of fact shall take that fact into consideration in making its determination.

Sec. 13.26.116. GUARDIANSHIP ORDER. (a) If the court or jury determines that a person is incapacitated and the services of a guardian are necessary, the court shall enter an order which

(1) names the guardian and establishes a guardian-ward rela-

tionship;

(2) includes findings of fact which support each grant of authority to the guardian;

(3) adopts a guardianship plan.

(b) The guardianship plan shall specify the authority which the guardian has with regard to

(1) medical care for the ward's physical condition;

(2) mental health treatment which the guardian considers to be in the ward's best interests;

(3) housing for the ward with consideration of the following:

(A) the wishes of the ward;

(B) the preferability of allowing the ward to retain local community ties; and

(C) the requirement for services to be provided in the least restrictive setting;

(4) personal care, educational and vocational services necessary for the physical and mental welfare of the ward and to return the ward to full capacity;

(5) application for health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or related services provided to the ward;

(6) physical and mental examinations necessary to determine the ward's medical and mental health treatment needs; and

(7) control of the estate and income of the ward to pay for the cost of services which the guardian is authorized to obtain on behalf of the ward.

(c) The guardianship plan may not be more restrictive of the liberty of the ward than is reasonably necessary to protect the ward

from serious physical injury, illness or disease and to provide him with medical care and mental health treatment for his physical and mental health. The guardianship plan shall be designed to encourage a ward to participate in all decisions which affect him and to act on his own behalf to the maximum extent possible. The court may not assign a duty or power to a guardian unless the need for it has been proven to the satisfaction of the court and no less restrictive alternative or combination of alternatives is sufficient to satisy the need.

(d) The duration of the term of guardianship shall be determined by the court order. Upon receipt of a report or other information that requires further consideration, the court may order a review hearing if it determines that the hearing is in the best interests of the ward. In any case the court shall review the guardianship plan and relationship every two years.

Sec. 13.26.117. GUARDIANSHIP IMPLEMENTATION REPORT. Within 90 days after appointment as guardian, the guardian shall submit to the court a report. The report shall describe the guardian's program for implementing the guardianship plan. The primary goal of the program described in the report shall be, to the maximum extent possible, to develop or regain the ward's abilities to handle his own affairs. The report shall consider housing, medical care, and educational and vocational needs and resources. In developing the report, the guardian shall consult with his ward to the maximum extent possible. The office of public guardian shall contact the guardian to offer assistance in preparing the report. The report shall specify the services which are necessary to meet the essential requirments for the ward's physical health or safety and the means for obtaining the services. The report shall specify the manner in which the guardian will exercise and share the decision-making authority and other items which will assist in fulfilling the needs of the ward, the terms of the guardianship order, and the duties of the guardian.

Sec. 13.26.118. REPORTING. (a) A guardian shall submit a report to the court or request that a visitor be appointed to prepare and submit a report at least annually. A court-appointed visitor shall prepare the report at least (once in each three-year period.) annually. The guardian shall submit an additional report to the court when

(1) the court orders it;

(2) there is a significant change in the capacity of the ward to meet the essential requirements for his health and safety or to protect his rights;

(3) the guardian resigns or is removed; or

(4) the guardianship is terminated.

(5) the ward requests one.

(b) The report shall contain, but is not limited to, the following information:

(1) the name and address of the ward and the guardian;

(2) the ward's present mental, physical, and social conditions and present living arrangements, and the ward's opinion of such arrangements.

(3) changes in the capacity of the ward to meet essential requirements for his physical health and safety;

(4) the services being provided to the ward;

(5) the significant actions taken by the guardian during the reporting period in regard to his ward;

(6) a financial accounting of the estate which has been subject to the possession or control of the guardian;

(7) a list of the number and nature of all contacts between the guardian and ward.

(8) any other information requested by the court or necessary or desirable in the opinion of the guardian or visitor.

Sec. 13.26.131. COSTS IN GUARDIANSHIP PROCEEDINGS. (a) The state shall bear the costs of the visitor and expert appointed under AS 13.26.106(c).

(b) Subject to (c) of this section, the respondent shall bear the

costs of the attorney appointed under AS 13.26.106(b), of the expert appointed under AS 13.26.112, and of other court and guardianship costs incurred under this chapter.

(c) The state shall pay all or part of the costs described in (b) of this section if the court finds that the payment is necessary to prevent the respondent from suffering financial hardship or from becoming dependent upon a government agency or a private person or agency.

(d) If the respondent is found incapacitated the petitioner shall pay all costs.

* Sec. 7. AS 13.26.120 is amended to read:

Sec. 13.26.120. TERMINATION OF GUARDIANSHIP FOR INCAPACITATED PERSON. The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, the (OR UPON) removal or resignation of the guardian as provided in AS 13.26.125, or upon the expiration of the period specified by court order as the duration of the guardianship. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect a guardian's (HIS) liability for prior acts nor his obligation to account for (FUNDS AND) assets of the (HIS) ward over which he exercised control.

Sec. 13.26.125. REMOVAL OR RESIGNATION OF GUARDIAN; CHANGE IN OR TERMINATION OF GUARDIANSHIP (INCAPACITY). (a) On petition of the ward the guardian, or any person interested in the ward's (HIS) welfare, the court may (1) review and amend a decision of a guardian; or (2) if alternatives which are less restrictive than guardianship; or less restrictive than the existing guardianship plan would assist the ward in meeting his essential requirement for physical health and safety, modify the provisions of its order to (A) amend the guardianship plan

or the responsibilities of the guardian; (B) remove a guardian and appoint a successor; or (C) terminate the guardianship [IF IN THE BEST INTERESTS OF THE WARD]. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(b) The [AN ORDER ADJUDICATING INCAPACITY MAY SPECIFY A MINIMUM PERIOD, NOT EXCEEDING ONE YEAR, DURING WHICH NO PETITION FOR AN ADJUDICATION THAT THE WARD IS NO LONGER INCAPACITATED MAY BE FILED WITHOUT SPECIAL LEAVE. SUBJECT TO THIS RESTRICTION, THE] ward, the guardian, or any person interested in the ward's [HIS] welfare may petition for an order that the ward [HE] is no longer incapacitated or no longer incapacitated to the same extent as he was when the original guardianship order was made or when the court last amended the guardianship order, and for removal or resignation of the guardian, termination of the guardianship, or a change in the responsibilities of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be held in [ADJUDGED GUILTY OF] contempt of court.

(c) Before removing a guardian, changing his responsibilities, accepting the resignation of a guardian, or ordering that a ward's guardianship be changed or [INCAPACITY HAS] terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian and applying the least restrictive alternative necessary to meet the needs of the ward after consideration of alternatives to guardianship services, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.

(d) If at any time the ward requests or indicates to his guardian

or to the agency responsible for his care or its employee that he desires a change in guardianship, the guardian or the agency providing care shall inform the court of the request or indication.

(e) If the guardian dies, or if on the basis of a petition filed under this section or a report or other information, there is probable cause to believe a guardian is not performing his responsibilities effectively and there is an imminent danger that the physical health or safety of the ward will be seriously impaired, the court shall take whatever action is necessary to protect the ward, including the dismissal of the guardian and appointment of a temporary guardian without a hearing.

* Sec. 9. AS 13.26.135 is amended to read:

Sec. 13.26.135. NOTICES IN GUARDIANSHIP PROCEEDINGS. (a) In a proceeding for the appointment, change in responsibilities, [OR] removal of a guardian, or termination of guardianship, [OF AN INCAPACITATED PERSON] other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or respondent by the visitor as provided in AS 13.26.107 [THE PERSON ALLEGED TO BE INCAPACITATED AND HIS SPOUSE, PARENTS AND ADULT CHILDREN];

(2) any person who is serving as his guardian, conservator or who has his care and custody; [AND]

(3) in case no other person is notified under (4) [(i)] of this subsection, at least one of his closest adult relatives, if any can be found;

(4) the spouse, parents, and adult children of the ward or respondent;

(5) any person who performed an evaluation for the visitor's report within the previous two years;

(6) the ward's or respondent's attorney; and

(7) the ward's or respondent's guardian ad litem if one has been appointed.

(b) Notice shall be served personally on the ward's or respondent's [ALLEGED INCAPACITATED PERSON, AND HIS] spouse and parents if they can be found within the state. Except as provided in (a)(1) of this section, notice [NOTICE] to the spouse and parents, if they cannot be found within the state, and to all other persons [EXCEPT THE ALLEGED INCAPACITATED PERSON] shall be given as provided in AS 13.06.110. [WAIVER OF NOTICE BY THE PERSON ALLEGED TO BE INCAPACITATED IS NOT EFFECTIVE UNLESS HE ATTENDS THE HEARING OR HIS WAIVER OF NOTICE IS CONFIRMED IN AN INTERVIEW WITH THE VISITOR. REPRESENTATION OF THE ALLEGED INCAPACITATED PERSON BY A GUARDIAN AD LITEM IS NOT NECESSARY.]

(c) The notice shall set out the date, time, place, purpose and possible consequences of the hearing and the rights of the ward or respondent and any other parties to the proceedings.

* Sec. 10. AS 13.26.140 is repealed and re-enacted to read:

Sec. 13.26.140. TEMPORARY GUARDIANS. (a) If during the pendency of an initial petition for guardianship it appears that the respondent is in need of immediate services to protect him against serious injury, illness or disease and the respondent is not capable of procuring the necessary services, the petitioner may request the appointment of a temporary guardian to authorize the services. The request shall state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and his attorney. The court shall conduct a hearing within 72 hours after the filing.

(b) At the temporary guardianship hearing, the respondent shall have the rights set out in AS 13.26.113(b).

(c) The burden of proof at the hearing shall be by a preponderance of the evidence and shall be upon the petitioner.

(d) If the court determines that a temporary guardian should be appointed, it shall make the appointment for a period of not more than six months and not renewable and grant to the guardian only the authorities that are least restrictive upon the liberty of the respondent and which enable the temporary guardian to provide the emergency services necessary to protect the respondent from serious injury, illness, or disease.

(e) The temporary guardianship shall expire at the time of the appointment of a full or partial guardian or upon the dismissal of the petition for guardianship or at the end of six months, whichever is first.

(f) If no guardianship petition is pending but the court is informed of a person who is apparently incapacitated and in need of emergency life-saving services, the court may authorize the services upon determining the delay until a guardianship hearing can be held would entail a life-threatening risk to the person.

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

Sec. 13.26.141. EMERGENCY POWERS. Notwithstanding the limits of a temporary guardianship or guardianship order, a temporary guardian and guardian at all times have the right to authorize the provision of emergency life-saving services. This right includes the power to authorize hospitalization without advance court approval.

* Sec. 12. AS 13.26.145 is repealed and re-enacted to read:

Sec. 13.26.145. WHO MAY BE GUARDIAN; PRIORITIES. (a) The court may appoint a competent person, the public guardian, or a private association organized solely to conduct an active guardianship program for incapacitated persons, as guardian of an incapacitated person.

(b) The court may not appoint a person to be a guardian of an incapacitated person if the person

(1) provides, or is likely to provide during the guardianship period, substantial services to the incapacitated person in a professional or business capacity, other than in his capacity as guardian;

(2) is, or is likely to become during the guardianship period, a creditor of the incapacitated person, other than in his capacity as guardian;

(3) has, or is likely to have during the guardianship period, interests which may conflict with those of the incapacitated person; or

(4) is employed by a person who would be disqualified under (1) - (3) of this subsection.

(c) A person may be appointed as the guardian of an incapacitated person notwithstanding the provisions of (b) of this section if he is the spouse, adult child, parent, or sibling of the incapacitated person and the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the best interests of the incapacitated person.

(d) Subject to (e) of this section, qualified persons have priority for appointment as guardian in the following order:

(1) a person or association nominated by the incapacitated person, if at the time of the nomination the incapacitated person had the capacity to make a reasonably intelligent choice;

(2) the spouse of the incapacitated person;

(3) an adult child or parent of the incapacitated person;

(4) a relative of the incapacitated person with whom the incapacitated person has resided for more than six months during the year before the filing of the petition;

(5) a relative or friend who has demonstrated a sincere, longstanding interest in the welfare of the incapacitated person;

(6) the public guardian.

(e) The priorities established in (d) of this section are not binding, and the court shall select the person or association who is best qualified and willing to serve. The court shall also give consideration to a nomination by a person described in (d) of this section and to a nomination in the will of a deceased parent or spouse of the incapacitated person.

* Sec. 13. AS 13.26.150 is repealed and re-enacted to read:

Sec. 13.26.150. GENERAL POWERS AND DUTIES OF GUARDIAN. (a) A guardian shall diligently and in good faith carry out the specific duties and powers assigned by the court. In carrying out his duties and powers, the guardian shall encourage the ward to participate to the maximum extent of his capacity in all decisions which affect him, to act on his own behalf in all matters in which he is able, and to develop or regain, to the maximum extent possible, his capacity to meet the essential requirements for his physical health and safety, to protect his rights, and to manage his financial resources.

(b) A partial guardian of an incapacitated person has only the powers and duties respecting his ward enumerated in the court order.

(c) A full guardian of an incapacitated person has the same powers and duties respecting his ward that a parent has respecting his unemancapated minor child except that the guardian shall not be financed for the ward from his or or her personal assets, is not liable to third persons for acts of the ward solely by reason of the parental relationship. Except as modified by order of the court, a full guardian's powers and duties include, but are not limited to, the following:

(1) he is entitled to custody of the person of his ward and shall assure that the ward has a place of abode in the least restrictive setting consistent with the essential requirements for the ward's physical health and safety;

(2) he shall assure the care, comfort, and maintenance of the

(e) The priorities established in (d) of this section are not binding, and the court shall select the person or association who is best qualified and willing to serve. The court shall also give consideration to a nomination by a person described in (d) of this section and to a nomination in the will of a deceased parent or spouse of the incapacitated person.

* Sec. 13. AS 13.26.150 is repealed and re-enacted to read:

Sec. 13.26.150. GENERAL POWERS AND DUTIES OF GUARDIAN. (a) A guardian shall diligently and in good faith carry out the specific duties and powers assigned by the court. In carrying out his duties and powers, the guardian shall encourage the ward to participate to the maximum extent of his capacity in all decisions which affect him, to act on his own behalf in all matters in which he is able, and to develop or regain, to the maximum extent possible, his capacity to meet the essential requirements for his physical health and safety, to protect his rights, and to manage his financial resources.

(b) A partial guardian of an incapacitated person has only the powers and duties respecting his ward enumerated in the court order.

(c) A full guardian of an incapacitated person has the same powers and duties respecting his ward that a parent has respecting his unemancapated minor child except that the guardian <u>shall not be financed for the ward from his or or her personal assets</u>, is not liable to third persons for acts of the ward solely by reason of the parental relationship. Except as modified by order of the court, a full guardian's powers and duties include, but are not limited to, the following:

(1) he is entitled to custody of the person of his ward and shall assure that the ward has a place of abode in the least restrictive setting consistent with the essential requirements for the ward's physical health and safety;

(2) he shall assure the care, comfort, and maintenance of the

ward;

(3) he shall assure that the ward receives the services necessary to meet the essential requirements for the ward's physical health and safety and to develop or regain, to the maximum extent possible, the capacity to meet his needs for physical health and safety;

(4) he shall assure through the initiation of court action and other means that the ward enjoys all personal, civil, and human rights to which the ward is entitled, but in the event that such action arrives out of conflict of interest between the ward and guardian the ward may, with the court approval contract with an attorney to represent him in such action.

(5) he may give consents or approvals necessary to enable the ward to receive medical or other professional care, counsel, treatment or services except as otherwise limited by (e) of this section.

(6) if a conservator for the estate of the ward has not been appointed, the guardian may receive money and property deliverable to the ward and apply the money and property for support, care, and education of the ward; however, he may not use the ward's money or property to pay for room and board which he, his spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible; he shall exercise care to conserve any excess for the ward's needs;

(7) if a conservator of the estate of the ward has been appointed, the guardian shall pay all of the ward's estate received by the guardian in excess of the money expended to meet current expenses for support, care, and education of the ward to the conservator for management as provided in AS 13.26.165 - 13.26.315, and the guardian shall account to the conservator for money expended.

(8) A full guardian of a ward, for whom a conservator has also been appointed, shall control the custody and care of the ward and is entitled to receive reasonable sums for his services and for room and

board furnished to the ward as agreed upon between the guardian and the conservator. The guardian may request the conservator to expend the ward's estate for the ward's care and maintenance.

(e) A guardian may not

(1) place the ward in a facility or institution for the "mentally ill" (question the use of this wording) other than through a formal committment proceeding under AS 47.30.070 in which the ward has a separate guardian ad litem;

(2) consent on behalf of the ward to an abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary to preserve the life or prevent serious impairment of the physical health of the ward;

(3) consent on behalf of the ward to the withholding of life-saving medical procedures;

(4) consent on behalf of the ward to the performance of an experimental medical procedure or to participation in a medical experiment not intended to preserve the life or prevent serious impairment of the physical health of the ward;

(5) prohibit the marriage or divorce of the ward;

(6) consent on behalf of the ward to termination of the ward's parental rights.

(7) prohibit the ward to register or cast ballot at public election

(8) prohibit the ward from applying for and obtaining a drivers license

* Sec. 14. AS 13.26.195 is amended by adding a new subsection to read:

(d) The court shall investigate alternatives to a conservator and the use of a special conservator as provided in AS 13.26.205(c). A conservator may be appointed only if a less restrictive protective order or the services of a special conservator are not adequate to protect the estate of the protected person. The court shall, to the extent possible, consult with the protected person in determining what action should be taken.

* Sec. 15. AS 13.26.205 (c) is amended to read:

(c) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. If only certain powers need be given to the conservator or the services of a conservator are needed only for a limited number of transactions, a special conservator may be appointed. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters carried out under [DONE PURSUANT TO] the order of appointment.

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

Sec. 13.26.218. PUBLIC BOND. (a) If the public guardian is appointed as a conservator, the court may not require a bond other than the bond required in AS 13.26.410.

(b) If the court requires a conservator, other than the public guardian, to provide a bond under AS 13.26.215 and the conservator is financially unable to provide the bond, the court may order the cost of the bond to be paid from court funds.

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

ARTICLE 6. PUBLIC GUARDIANS.

Sec. 13.26.360. PURPOSE. The legislature recognizes that many Alaskans, for reasons of incapacity or minority, are in need of a guardian or conservator. Often these persons cannot find a person able and willing to serve as guardian or conservator. The legislature intends through AS 13.26.360 - 13.26.420 to establish the office of public guardian for the purpose of furnishing guardianship and conservatorship services. It further intends by establishing this office to provide

assistance to guardians throughout the state in securing necessary services for their wards and to assist the courts, attorneys, visitors, proposed guardians, and respondents in the orderly and expeditious handling of guardianship proceedings.

Sec. 13.26.370. PUBLIC GUARDIAN. (a) The public administrator (AS 22.15.310) shall also act as the public guardian for the judicial district for which he is appointed.

(b) A court may order the public guardian to act as full guardian, partial guardian, conservator, or special conservator for a person who is determined under this chapter to be in need of guardianship or conservatorship service if no person or private guardianship association is willing and qualified to perform the function.

Sec. 13.26.380. POWERS AND DUTIES OF PUBLIC GUARDIAN. (a) The public guardian has the same powers and duties with respect to his wards and protected persons as a private guardian or conservator.

(b) The public guardian, when appointed as guardian or conservator, shall endeavor, for as long as practical, to find a suitable private guardian or conservator for his ward or protected person. For each ward and protected person, the public guardian shall report to the court having jurisdiction of the ward or protected person, at least once every six months, his efforts to find a private guardian or conservator.

(c) The public guardian shall

(1) establish and maintain relationships with governmental, public, and private agencies, institutions, and organizations to assure the most effective guardianship or conservatorship program for each ward and protected person;

(2) visit each of his wards and protected persons at least once every quarter to monitor their welfare;

(3) keep and maintain financial and statistical records of

all cases in which the public guardian provides guardianship or conservatorship services;

(4) provide information and referrals to the public regarding guardianship and conservatorship proceedings;

(5) assist guardians and court-appointed visitors of wards and respondents in the preparation and revision of guardianship plans and reports;

(6) assist guardians to understand the disabilities of wards and to foster the increased independence of wards;

(7) assist guardians in securing the rights, benefits, and services to which their wards are entitled;

(8) develop and maintain a current listing of public and private medical, mental health, social advocacy, educational, rehabilitative, counseling, therapeutic, homemaking, recreational, and financial services and programs available to assist wards and protected persons and their families.

(d) The public guardian may

(1) contract for services necessary to carry out the duties of his office;

(2) accept the services of volunteer workers or consultants and reimburse them for their necessary expenses.

Sec. 13.26.390. INTERVENTION. The public guardian may, on his own motion or at the request of the court, intervene in a guardianship or conservatorship proceeding if he or the court considers the intervention to be justified because

(1) an appointed guardian or conservator is not fulfilling his duties;

(2) the estate is subject to waste as a result of the costs of the guardianship or conservatorship;

(3) a willing and qualified guardian or conservator is not available; or

(4) the best interests of the ward, respondent, protected person, or person who is the subject of a conservatorship proceeding require the intervention.

Sec. 13.26.400. DELEGATION OF POWERS AND DUTIES. The public guardian may employ staff and delegate to members of his staff or to volunteers his powers and duties as guardian or conservator and other powers and duties under this chapter. However, the public guardian retains responsibility for the proper performance of the delegated powers and duties. All delegations shall be to persons who meet the eligibility requirements of AS 13.26.145.

Sec. 13.26.410. BOND. The administrative director of the Alaska Court System shall provide for one public bond to be held to cover all the conservatorship duties of the public guardian. The amount of the bond depends on the value of the estates in the control of the public guardian. Every six months the public guardian shall submit to the administrative director a report stating the value of the estates under his control. On receipt of the report, the administrative director shall adjust the public bond to the present value of the estates.

Sec. 13.26.420. ALLOCATION OF COSTS. (a) If a public guardian is appointed guardian or conservator, the administrative costs of his services and the costs incurred in the appointment procedure may not be charged against the income or the estate of the ward or protected person unless the court determines that the ward or protected person is financially able to pay all or part of the costs.

(b) The court shall determine the ability of the ward or protected person to pay for administrative costs of a public guardian or costs incurred in the appointment procedure by determining the financial

ability of the ward or protected person to pay a private guardian or conservator, considering the nature, extent, and liquidity of assets of the ward or protected person, the disposable net income of the ward or protected person, the nature of the guardianship or conservatorship, the type, duration and complexity of the services required, and any other foreseeable expenses.

(c) The public guardian shall investigate the financial status of a person who requests the appointment of the public guardian as his guardian or conservator or for whom a court is considering the appointment of the public guardian. The public guardian may require the person to execute and deliver written requests or authorizations necessary under law to provide the public guardian with access to records of public or private sources, otherwise confidential, needed to evaluate financial eligibility. The public guardian may obtain information from any public record office of the state or of a subdivision or agency of the state upon request and without payment of fees ordinarily required by law.

(d) The reasonable value of the services rendered without cost to the ward or protected person shall be allowed as a claim against the estate upon the death of the ward or protected person.

* Sec. 18. AS 22.15.310 is amended to read:

Sec. 22.15.310. APPOINTMENT. When authorized by the supreme court, the presiding judge in each judicial district shall appoint a person to act as public administrator of the estates of deceased persons, [AND] as coroner, and as public guardian.

* Sec. 19. AS 22.15.350 is amended to read:

Sec. 22.15.350. DUTIES [AS CORONER]. In addition to his other duties, a public administrator shall perform the duties set out in AS 22.15.110 and shall perform the duties of public guardian as set out

in AS 13.26.360 - 13.26.420.

* Sec. 20. AS 13.26.110 and 13.26.130 are repealed.

* Sec. 21. TRANSITION. No later than July 1, 1983, all guardianships for incapacitated persons established before July 1, 1980, and in effect on July 1, 1980 shall be reviewed by the court. Until the review, a guardian appointed before July 1, 1980, whose guardianship is still in effect on July 1, 1980, shall retain the powers assigned to him, unless a petition for modification under AS 13.26.125 amended by sec. 8 of this Act is granted. Before the review, the guardian shall submit one report in the form prescribed in AS 13.26.118 added by sec. 6 of this Act.

* Sec. 22. This Act takes effect July 1, 1980.

page 4, line 13 delete
page 17A, (6) - typos
page 22, line 17+18 typos
page 26, line 5 - identify

Introduced: 1/18/80
Referred: Judiciary

IN THE HOUSE ~~BY PARR~~

CS for HOUSE BILL NO. 572 By House Judiciary

IN THE LEGISLATURE OF THE STATE OF ALASKA

ELEVENTH LEGISLATURE - SECOND SESSION

A BILL page 28, line 9 has appointed

For an Act entitled: "An Act relating to guardians and conservators; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 13.26.005(1) is repealed and re-enacted to read:

(1) "incapacitated person" means a person whose ability to receive and evaluate information or to communicate decisions is impaired for reasons other than minority to the extent that he lacks the ability to provide for himself the essential requirements for his physical health or safety without court-ordered assistance;

* Sec. 2. AS 13.26.005 is amended by adding new paragraphs to read:

(5) "essential requirements for physical health or safety" means the health care, food, shelter, clothing, personal hygiene and protection without which serious physical injury or illness is more likely than not to occur;

(6) "partial guardian" means a guardian who possesses fewer than all of the legal duties and powers of a full guardian, and whose rights, powers, and duties have been specifically enumerated by court order;

(7) "full guardian" means a guardian who possesses the legal duties and powers enumerated in AS 13.26.150(c);

(8) "visitor" means a person trained or experienced in law, medical care, mental health care, education, rehabilitation, ~~or~~ social work or pastoral care, who is an officer, employee, or special appointee of the court with no personal interest in the proceedings;

(9) "guardian" includes full guardian and partial guardian;

(10) "respondent" means a person who, in a guardianship proceeding under this chapter, is alleged to be incapacitated and for whom the appointment of a guardian or alternative assistance is sought; "respondent" includes a person seeking the appointment of a guardian or alternative assistance for himself.

* Sec. 3. AS 13.26 is amended by adding a new section to article 3 to read:

Sec. 13.26.090. PURPOSE AND BASIS FOR GUARDIANSHIP. Guardianship for an incapacitated person shall be used only as is necessary to promote and protect the well-being of the person, shall be designed to encourage the development of maximum self-reliance and independence of the person, and shall be ordered only to the extent necessitated by the person's actual mental and physical limitations. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.

* Sec. 4. AS 13.26.095 is amended by adding a new subsection to read:

(e) A testamentary appointment of a guardian by the parent of an incapacitated person, or by the spouse of a married incapacitated person, may grant all guardianship powers and duties which the deceased parent or spouse held, subject to modification by the court under AS 13.26.125.

* Sec. 5. AS 13.26.105 is repealed and re-enacted to read:

Sec. 13.26.105. PETITION. (a) Any person may petition the court for a finding of incapacity and the appointment of a guardian for himself or for another person.

(b) The petition for appointment of a guardian shall state

(1) the name, age, and address of the petitioner and his

relationship to the respondent;

(2) the name, age, and present address of the respondent;

(3) the name and address of the person or facility presently having care, custody, guardianship, or conservatorship of the respondent, if any, and the existence of any other restrictions on the legal capacity of the respondent to act in his own behalf;

(4) the nature and degree of the alleged incapacity;

(5) the particular type and duration of appointment and the protection and assistance being sought;

(6) the names and addresses, unless they are unknown and cannot reasonably be ascertained, of the individuals most closely related to the respondent by blood or marriage;

(7) the facts supporting the allegations of incapacity and the need for appointment of a guardian;

(8) the names and addresses of persons known to the petitioner who have knowledge that might prove helpful in determining the capacity and needs of the respondent.

(c) The petition may also nominate a guardian and include a request for temporary guardianship as provided in AS 13.26.140 if the petitioner believes there is an imminent danger that the physical health or safety of the respondent will be seriously impaired during the pendency of the guardianship proceeding. A request for temporary guardianship shall specify facts which cause the petitioner to believe that a temporary guardian is necessary.

* Sec. 6. AS 13.26 is amended by adding new sections to read:

Sec. 13.26.106. INITIAL COURT PROCEDURES. (a) Upon the filing of a petition, the court shall schedule a hearing on the issue of incapacity. The hearing shall be conducted within 120 days from the filing of the petition unless the court postpones the hearing for cause.

(b) The respondent is entitled to be represented by an attorney in the proceedings. If the respondent is financially unable to employ an attorney to assist him, the court shall appoint an attorney to represent the respondent in the proceedings.

(c) The court shall appoint a visitor as defined in AS 13.26.-005(8). The visitor shall arrange for evaluations to be performed and prepare a written report to be filed with the court. The court shall also appoint an expert who has expertise in regard to the alleged or admitted incapacity to investigate the issue of incapacity.

(d) The visitor shall interview the respondent and the person seeking appointment as guardian, if any. The visitor shall conduct the interviews and investigations necessary to prepare his report and shall arrange for the respondent to be examined by the expert appointed under (c) of this section. The expert's written report shall be ~~incorporated into~~ ATTACHED TO the visitor's report.

(e) Interviews and examinations shall take place in the respondent's usual residence unless

(1) the respondent consents to being examined or interviewed in a medical or mental health facility; or

(2) the visitor considers it necessary to conduct interviews or examinations in a medical or mental health facility.

Sec. 13.26.107. NOTICE OF RIGHTS. (a) Upon appointment, the visitor shall promptly

(1) explain to the respondent, in a language or communication system he can understand, the purpose of the interview and possible consequences of the proceedings;

(2) serve a copy of the petition on the respondent in accordance with the procedure described in AS 13.06.110;

(3) explain and provide to the respondent a written statement of the following rights:

(A) he may communicate with an attorney or an expert in

the alleged incapacity before proceeding with the interview;

(B) if he does not have an attorney, an attorney, whose name, address, and telephone number shall be included in the statement, will be designated to advise and represent him before and at any judicial hearings, and the attorney may arrange for an examination and consultation with an expert; and

(C) he may, instead, employ an attorney or expert of his own choice; and

(4) offer assistance to the respondent in contacting an attorney.

(b) A substantive interview of the respondent or other investigation may not be conducted until (a) of this section has been satisfied.

Sec. 13.26.108. VISITOR'S REPORT. (a) The visitor shall file with the court his evaluation report, proof of service of the petition upon the respondent and proof of service of his report upon the respondent, his attorney, and the petitioner, within 90 days after the date on which the petition was filed.

(b) The visitor shall, as part of the evaluation report, explain alternatives to guardianship and recommend any which will safeguard the respondent's essential requirements for physical health and safety. The evaluation report may recommend personal guardianship only if the visitor determines that the needs of the respondent cannot be met by other alternatives.

(c) The evaluation report shall include

(1) the results and analyses of medical and other tests and examinations performed which describe the respondent's mental, emotional, physical, and educational condition, adaptive behavior and social skills, and which specify the data on which the description is

based;

(2) recommendations regarding the types and extent of assistance, if any, necessary to meet the essential requirements for the physical health and safety of the respondent;

(3) an evaluation of the respondent's need for mental health treatment and whether there is a substantial probability that available treatment will significantly improve his mental condition;

(4) an evaluation of the respondent's need for educational or vocational assistance or personal care and whether these can be made available to the respondent;

(5) an evaluation of the probability that the incapacity may significantly lessen, and the type of services or treatment which will facilitate improvement in the respondent's condition or skills;

(6) a list of the names and addresses of all individuals who examined, interviewed, or investigated the respondent and of the names and addresses of all persons contacted in preparation of the report;

(7) a summary of the information which

(A) was supplied by the persons described in (6) of this subsection; and

(B) supports the conclusions of the report;

(8) a description of the alternatives to guardianship which were considered and not recommended and an explanation of why they are not feasible to meet the respondent's needs;

(9) a description of the present home and living arrangement of the respondent and of any other proposed placement and a recommendation for the respondent's living arrangement that provides the least restrictive setting necessary to protect the respondent from serious illness, injury, or disease; and

(10) a specification of the financial resources of the respon-

dent and his entitlements to insurance benefits and publicly operated or sponsored health, mental health, and welfare assistance which might be employed in the provision of services to him.

(d) If personal guardianship is recommended, the evaluation report required under (c) of this section shall include a guardianship outline which identifies

(1) potential guardians;

(2) the specific services necessary and available to protect the respondent from serious injury, illness or disease, and, to the extent possible, return the respondent to full capacity in handling his own affairs;

(3) the means by which the services described in (2) of this subsection may be financed;

(4) the specific, least restrictive authority needed by the guardian to provide the services described in (2) of this subsection.

(e) The petitioner and the respondent may file responses to the evaluation report within 10 days of receiving it. The court may grant additional time if requested for cause.

Sec. 13.26.109. EVALUATIONS: RIGHT TO REMAIN SILENT; RESPONDENT'S ATTORNEY OR EXPERT. (a) A ward or respondent has the right to refuse to respond to questions in the course of examinations and evaluations. However, he may be required to submit to interviews for the purpose of ascertaining whether he lacks the capacity to make informed decisions about care and treatment services.

(b) Statements of a ward or respondent in the course of evaluations, examinations, and treatment under AS 13.26.090 - 13.26.155 are privileged and confidential and not admissible without the ward's or respondent's consent in any civil or criminal proceeding other than proceedings under AS 13.26.090 - 13.26.155. A ward or respondent at all

times has the right to refuse to answer questions if the answers may tend to incriminate him.

(c) During an interview or testing conducted under AS 13.26.090 - 13.26.155, a ward or respondent has the right to be accompanied by an attorney or expert of his own choosing.

(d) The court, if requested by a ward or respondent in preparation for and in connection with a hearing held under AS 13.26.090 - 13.26.155, shall appoint an expert having expertise in regard to the alleged or admitted incapacity to examine the respondent and testify on his behalf. The request shall be filed in court at least five days before the hearing. An expert appointed under this subsection may be the same expert appointed under AS 13.26.106(c).

Sec. 13.26.111. DUTIES AND POWERS OF RESPONDENT'S ATTORNEY. (a) The principal duty of an attorney representing a ward or respondent is to represent the ward or respondent zealously. Zealous representation includes at least

(1) personal interviews with the ward or respondent. Unless good cause exists for the contrary, the first contact with the ward or respondent shall be at least two weeks prior to the hearing.

(2) explaining, if possible, to the ward or respondent in terms which the ward or respondent can understand, the nature and possible consequences of the proceeding, the alternatives which are available, and the rights to which he is entitled;

(3) securing and presenting evidence and testimony and offering arguments to protect the ward's or respondent's rights and to further his interests.

(b) To the maximum extent possible, the ward or respondent shall remain responsible for determining his interests. However, his attorney may seek appointment of a guardian ad litem if the circumstances of AS 13.26.112 apply.

Sec. 13.26.112. APPOINTMENT OF A GUARDIAN AD LITEM. (a) Upon the

request of a ward or respondent or his attorney, the court shall appoint a guardian ad litem to protect the rights of the ward or respondent in proceedings under AS 13.26.090 - 13.26.155 if the court is satisfied that because of impaired ability to effectively receive and evaluate information regarding the proceedings or because of impaired ability to communicate decisions regarding the proceedings, the ward or respondent cannot determine his own interests without assistance, and

(1) a guardian has not been appointed;

(2) his interests and those of his guardian conflict; or

(3) the appointment is otherwise in the interests of justice.

(b) The guardian ad litem shall assist the ward or respondent in determining his interests in regard to the legal proceedings in which he is involved. If the ward or respondent is entirely incapable of determining his own interests, the guardian ad litem shall make that determination and advise the court and counsel for all parties accordingly. The guardian ad litem shall

(1) inquire thoroughly into all the circumstances that a prudent individual in the position of the ward or respondent would consider in determining his own interests in the proceedings; and

(2) encourage the ward or respondent to participate, to the maximum extent of his capability, in all decisions and to act on his own behalf on all matters in which he is able.

(c) The attorney may also be the guardian ad litem for the ward or respondent if there is no other party readily available and able to serve as a guardian ad litem and whose interests would not conflict with those of the ward or respondent.

Sec. 13.26.113. HEARING. (a) At the hearing scheduled under AS 13.26.106, the respondent has the right to

(1) present evidence on his own behalf;

(2) cross-examine witnesses who testify against him;

(3) remain silent;

(4) have the hearing open or closed to the public as he elects;

(5) be present unless the court determines that his conduct in the courtroom is so disruptive that the proceedings cannot reasonably continue with him present;

(6) be tried by jury on the issue of incapacity.

(b) The burden of proof by clear and convincing evidence is upon the petitioner, and a determination of incapacity shall be made before consideration of proper disposition.

(c) If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of alternatives to guardianship to meet the needs of the respondent.

(d) If it is found that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action and order an alternative form of protection.

(e) If it is found that the respondent is able to perform some, but not all, of the functions necessary to care for himself, and alternatives to guardianship are not feasible or adequate to provide for the needs of the respondent, the court may appoint a partial guardian, but may not appoint a full guardian.

(f) If it is found that the respondent is totally without capacity to care for himself and that a combination of alternatives to guardianship and the appointment of a partial guardian is not feasible or adequate to meet the needs of the respondent, the court may appoint a full guardian.

(g) If it is necessary to appoint a partial or full guardian, the court shall take into consideration any preference the ward may have.

(h) ~~(g)~~ At the time a guardian is appointed, the court shall make a reasonable effort to acquaint the ward with his right to request, at a

later time, his guardian's dismissal or a modification of the guardianship order. The court shall provide a written statement to the ward, explaining his rights and specifying the procedures to be followed in petitioning the court.

Sec. 13.26.114. PSYCHOTROPIC MEDICATION INFLUENCING WARDS OR RESPONDENTS AT JUDICIAL HEARINGS. (a) A ward or respondent has a right to participate to the maximum extent possible in all judicial proceedings concerning him and to be free from the influence of psychotropic medication during the proceedings.

(b) It is the responsibility of the attorney for the ward or respondent to determine if the ward or respondent is being given treatment with psychotropic medication the effects of which would continue during the judicial proceedings and, if so, to inform the court in writing a reasonable time before the hearing. require A MEDICAL EXAMINATION if necessary AND

(c) The court, upon receipt of the information, shall determine the advisability of continuation or suspension of the treatment for the duration of the judicial proceedings and may make any appropriate order it considers necessary. The court in making its determination shall balance the interest of maximum participation from the ward or respondent in the hearings against the medical and rehabilitative needs of the ward or respondent.

(d) If the ward or respondent is under the influence of psychotropic medication during the judicial proceeding determining capacity, the trier of fact shall take that fact into consideration in making its determination.

Sec. 13.26.116. GUARDIANSHIP ORDER. (a) If the court or jury determines that a person is incapacitated and the services of a guardian are necessary, the court shall enter an order which

(1) names the guardian and establishes a guardian-ward rela-

tionship;

(2) includes findings of fact which support each grant of authority to the guardian;

(3) adopts a guardianship plan.

(b) The guardianship plan shall specify the authority which the guardian has with regard to

(1) medical care for the ward's physical condition;

(2) mental health treatment which the guardian considers to be in the ward's best interests;

(3) housing for the ward with consideration of the following:

(A) the wishes of the ward;

(B) the preferability of allowing the ward to retain local community ties; and

(C) the requirement for services to be provided in the least restrictive setting;

(4) personal care, educational and vocational services necessary for the physical and mental welfare of the ward and to return the ward to full capacity;

(5) application for health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or related services provided to the ward;

(6) physical and mental examinations necessary to determine the ward's medical and mental health treatment needs; and

(7) control of the estate and income of the ward to pay for the cost of services which the guardian is authorized to obtain on behalf of the ward.

(c) The guardianship plan may not be more restrictive of the liberty of the ward than is reasonably necessary to protect the ward

from serious physical injury, illness or disease and to provide him with medical care and mental health treatment for his physical and mental health. The guardianship plan shall be designed to encourage a ward to participate in all decisions which affect him and to act on his own behalf to the maximum extent possible. The court may not assign a duty or power to a guardian unless the need for it has been proven to the satisfaction of the court and no less restrictive alternative or combination of alternatives is sufficient to satisfy the need.

(d) The duration of the term of guardianship shall be determined by the court order. Upon receipt of a report or other information that requires further consideration, the court may order a review hearing if it determines that the hearing is in the best interests of the ward.

Sec. 13.26.117. GUARDIANSHIP IMPLEMENTATION REPORT. Within 90 days after appointment as guardian, the guardian shall submit to the court a report. The report shall describe the guardian's program for implementing the guardianship plan. The primary goal of the program described in the report shall be, to the maximum extent possible, to develop or regain the ward's abilities to handle his own affairs. The report shall consider housing, medical care, and educational and vocational needs and resources. In developing the report, the guardian shall consult with his ward to the maximum extent possible. The office of public guardian shall contact the guardian to offer assistance in preparing the report. The report shall specify the services which are necessary to meet the essential requirements for the ward's physical health or safety and the means for obtaining the services. The report shall specify the manner in which the guardian will exercise and share decision-making authority and other items which will assist in fulfilling the needs of the ward, the terms of the guardianship order, and the duties of the guardian.

Sec. 13.26.118. REPORTING. (a) A guardian shall submit a report to the court or request that a visitor be appointed to prepare and submit a report at least annually. A court-appointed visitor shall prepare the report at least once in each three-year period. The guardian shall submit an additional report to the court when

(1) the court orders it;

(2) there is a significant change in the capacity of the ward to meet the essential requirements for his health and safety or to protect his rights;

(3) the guardian resigns or is removed; ~~or~~

(4) the guardianship is terminated; or

(5) the WARD requests ONE.

(b) The report shall contain, but is not limited to, the following information:

(1) the name and address of the ward and the guardian;

(2) the ward's present mental, physical, and social conditions and present living arrangements AND the WARD's opinion of such ARRANGEMENTS;

(3) changes in the capacity of the ward to meet essential requirements for his physical health and safety;

(4) the services being provided to the ward;

(5) the significant actions taken by the guardian during the reporting period in regard to his ward;

(6) a financial accounting of the estate which has been subject to the possession or control of the guardian;

(7) a list of the number and nature of all contacts between the guardian and ward if the ward does not reside with the guardian;

(8) ~~(7)~~ any other information requested by the court or necessary or desirable in the opinion of the guardian or visitor.

Sec. 13.26.131. COSTS IN GUARDIANSHIP PROCEEDINGS. (a) Subject to (d) of this section, the ~~The~~ state shall bear the costs of the visitor and expert appointed under AS 13.26.-106(c).

(b) Subject to (c) AND (d) of this section, the respondent shall bear the

costs of the attorney appointed under AS 13.26.106(b), of the expert appointed under AS 13.26.109(d), of the guardian ad litem appointed under AS 13.26.112, and of other court and guardianship costs incurred under this chapter.

(c) The state shall pay all or part of the costs described in (b) of this section if the court finds that the payment is necessary to prevent the respondent from suffering financial hardship or from becoming dependent upon a government agency or a private person or agency.

(d) The court may require the petitioner to pay all or some of the costs described in (a) and (b) of this section, if the court finds that the petitioner initiated a proceeding under this chapter that was malicious, frivolous, or without just cause.

* Sec. 7. AS 13.26.120 is amended to read:

Sec. 13.26.120. TERMINATION OF GUARDIANSHIP FOR INCAPACITATED PERSON. The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, the [OR UPON] removal or resignation of the guardian as provided in AS 13.26.125, or upon the expiration of the period specified by court order as the duration of the guardianship. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect a guardian's [HIS] liability for prior acts nor his obligation to account for [FUNDS AND] assets of the [HIS] ward over which he exercised control.

* Sec. 8. AS 13.26.125 is amended to read:

Sec. 13.26.125. REMOVAL OR RESIGNATION OF GUARDIAN; CHANGE IN OR TERMINATION OF GUARDIANSHIP [INCAPACITY]. (a) On petition of the ward, the guardian, or any person interested in the ward's [HIS] welfare, the court may (1) review and amend a decision of a guardian; or (2) if alternatives which are less restrictive than guardianship or less restrictive than the existing guardianship plan would assist the ward in meeting his essential requirements for physical health and safety, modify the provisions of its order to (A) amend the guardianship plan

or the responsibilities of the guardian; (B) remove a guardian and appoint a successor; or (C) terminate the guardianship [IF IN THE BEST INTERESTS OF THE WARD]. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(b) The [AN ORDER ADJUDICATING INCAPACITY MAY SPECIFY A MINIMUM PERIOD, NOT EXCEEDING ONE YEAR, DURING WHICH NO PETITION FOR AN ADJUDICATION THAT THE WARD IS NO LONGER INCAPACITATED MAY BE FILED WITHOUT SPECIAL LEAVE. SUBJECT TO THIS RESTRICTION, THE] ward, the guardian, or any person interested in the ward's [HIS] welfare may petition for an order that the ward [HE] is no longer incapacitated or no longer incapacitated to the same extent as he was when the original guardianship order was made or when the court last amended the guardianship order, and for removal or resignation of the guardian, termination of the guardianship, or a change in the responsibilities of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be held in [ADJUDGED GUILTY OF] contempt of court.

(c) Before removing a guardian, changing his responsibilities, accepting the resignation of a guardian, or ordering that a ward's guardianship be changed or [INCAPACITY HAS] terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian and applying the least restrictive alternative necessary to meet the needs of the ward after consideration of alternatives to guardianship services, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.

(d) If at any time the ward requests or indicates to his guardian

Sec. 13.26.130 COURT RECORDS OF PROCEEDINGS; ACCESS; SEALING. (a) Notice of the filing of the petition, a summary of all formal proceedings, the dispositional orders and any modification or termination thereof regarding a proceeding under this chapter shall be available for public inspection. All other information contained in the court records shall be privileged and available only to the following persons:

(1) the subject of the record, his attorney or guardian ad litem;

(2) a person to whom the release of the information has been consented to by the subject of the record;

(3) the subject's guardian or his attorney;

(4) the subject's conservator or his attorney;

(5) any party to the proceeding and his attorney;

(6) the judge or judges hearing or reviewing the matter; and

(7) a member of the clerical or administrative staff of the court when access is essential for authorized internal administrative purposes.

In all other cases such privileged information shall be available for inspection only upon court order for good cause shown.

(b) Upon finding that a petition was malicious, frivolous, or without just cause, the court may order all information contained in the court records be sealed, and that they be disclosed only upon court order for good cause shown.

or to the agency responsible for his care or its employee that he desires a change in guardianship, the guardian or the agency providing care shall inform the court of the request or indication.

(e) If the guardian dies, or if on the basis of a petition filed under this section or a report or other information, there is probable cause to believe a guardian is not performing his responsibilities effectively and there is an imminent danger that the physical health or safety of the ward will be seriously impaired, the court shall take whatever action is necessary to protect the ward, including the dismissal of the guardian and appointment of a temporary guardian without a hearing.

INSERT HERE See Attached Sec. 13.26.130

* Sec. 9. AS 13.26.135 is amended to read:

Sec. 13.26.135. NOTICES IN GUARDIANSHIP PROCEEDINGS. (a) In a proceeding for the appointment, change in responsibilities, [OR] removal of a guardian, or termination of guardianship, [OF AN INCAPACITATED PERSON] other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or respondent by the visitor as provided in AS 13.26.107 [THE PERSON ALLEGED TO BE INCAPACITATED AND HIS SPOUSE, PARENTS AND ADULT CHILDREN];

(2) any person who is serving as his guardian, conservator or who has his care and custody; [AND]

(3) in case no other person is notified under (4) [(1)] of this subsection, at least one of his closest adult relatives, if any can be found;

(4) the spouse, parents, and adult children of the ward or respondent;

(5) any person who performed an evaluation for the visitor's report within the previous two years;

(6) the ward's or respondent's attorney; and

(7) the ward's or respondent's guardian ad litem if one has been appointed.

(b) Notice shall be served personally on the ward's or respondent's [ALLEGED INCAPACITATED PERSON, AND HIS] spouse and parents if they can be found within the state. Except as provided in (a)(1) of this section, notice [NOTICE] to the spouse and parents, if they cannot be found within the state, and to all other persons [EXCEPT THE ALLEGED INCAPACITATED PERSON] shall be given as provided in AS 13.06.110. [WAIVER OF NOTICE BY THE PERSON ALLEGED TO BE INCAPACITATED IS NOT EFFECTIVE UNLESS HE ATTENDS THE HEARING OR HIS WAIVER OF NOTICE IS CONFIRMED IN AN INTERVIEW WITH THE VISITOR. REPRESENTATION OF THE ALLEGED INCAPACITATED PERSON BY A GUARDIAN AD LITEM IS NOT NECESSARY.]

(c) The notice shall set out the date, time, place, purpose and possible consequences of the hearing and the rights of the ward or respondent and any other parties to the proceedings.

* Sec. 10. AS 13.26.140 is repealed and re-enacted to read:

Sec. 13.26.140. TEMPORARY GUARDIANS. (a) If during the pendency of an initial petition for guardianship it appears that the respondent is in need of immediate services to protect him against serious injury, illness or disease and the respondent is not capable of procuring the necessary services, the petitioner may request the appointment of a temporary guardian to authorize the services. The request shall state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and his attorney. The court shall conduct a hearing within 72 hours after the filing.

(b) At the temporary guardianship hearing, the respondent shall have the rights set out in AS 13.26.113~~(b)~~(a).

(c) The burden of proof at the hearing shall be by a preponderance of the evidence and shall be upon the petitioner.

(d) If the court determines that a temporary guardian should be appointed, it shall make the appointment and grant to the guardian only the authorities that are least restrictive upon the liberty of the respondent and which enable the temporary guardian to provide the emergency services necessary to protect the respondent from serious injury, illness or disease.

(e) The temporary guardianship shall expire at the time of the appointment of a full or partial guardian or upon the dismissal of the petition for guardianship.

(f) If no guardianship petition is pending but the court is informed of a person who is apparently incapacitated and in need of emergency life-saving services, the court may authorize the services upon determining that delay until a guardianship hearing can be held would entail a life-threatening risk to the person.

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

Sec. 13.26.141. EMERGENCY POWERS. Notwithstanding the limits of a temporary guardianship or guardianship order, a temporary guardian and guardian at all times have the right to authorize the provision of emergency life-saving services. This right includes the power to authorize hospitalization without advance court approval.

* Sec. 12. AS 13.26.145 is repealed and re-enacted to read:

Sec. 13.26.145. WHO MAY BE GUARDIAN; PRIORITIES. (a) The court may appoint a competent person, the public guardian, or a private association ~~organized solely to conduct an active~~ or nonprofit corporation with a guardianship program for incapacitated persons, as guardian of an incapacitated person.

(b) The court may not appoint a person to be a guardian of an incapacitated person if the person

(1) provides, or is likely to provide during the guardianship period, substantial services to the incapacitated person in a professional or business capacity, other than in his capacity as guardian;

(2) is, or is likely to become during the guardianship period, a creditor of the incapacitated person, other than in his capacity as guardian;

(3) has, or is likely to have during the guardianship period, interests which may conflict with those of the incapacitated person; or

(4) is employed by a person who would be disqualified under (1) - (3) of this subsection.

(c) A person may be appointed as the guardian of an incapacitated person notwithstanding the provisions of (b) of this section if he is the spouse, adult child, parent, or sibling of the incapacitated person and the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the best interests of the incapacitated person.

(d) Subject to (e) of this section, qualified persons have priority for appointment as guardian in the following order:

(1) a person, ~~or~~ association, or private nonprofit corporation nominated by the incapacitated person, if at the time of the nomination the incapacitated person had the capacity to make a reasonably intelligent choice;

(2) the spouse of the incapacitated person;

(3) an adult child or parent of the incapacitated person;

(4) a relative of the incapacitated person with whom the incapacitated person has resided for more than six months during the year before the filing of the petition;

(5) a relative or friend who has demonstrated a sincere, longstanding interest in the welfare of the incapacitated person;

(6) a private association or nonprofit corporation with a guardianship program for incapacitated persons;

(7) the public guardian.

(e) The priorities established in (d) of this section are not binding, and the court shall select the person, ~~or~~ association, or nonprofit corporation ~~who~~ that is best qualified and willing to serve. The court shall also give consideration to a nomination by a person described in (d) of this section and to a nomination in the will of a deceased parent or spouse of the incapacitated person.

* Sec. 13. AS 13.26.150 is repealed and re-enacted to read:

Sec. 13.26.150. GENERAL POWERS AND DUTIES OF GUARDIAN. (a) A guardian shall diligently and in good faith carry out the specific duties and powers assigned by the court. In carrying out his duties and powers, the guardian shall encourage the ward to participate to the maximum extent of his capacity in all decisions which affect him, to act on his own behalf in all matters in which he is able, and to develop or regain, to the maximum extent possible, his capacity to meet the essential requirements for his physical health or safety, to protect his rights, and to manage his financial resources.

(b) A partial guardian of an incapacitated person has only the powers and duties respecting his ward enumerated in the court order.

(c) A full guardian of an incapacitated person has the same powers and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable either for the care and maintenance of the ward, or to third persons for acts of the ward solely by reason of the guardianship.

ship. Except as modified by order of the court, a full guardian's powers and duties include, but are not limited to, the following:

(1) he is entitled to custody of the person of his ward and shall assure that the ward has a place of abode in the least restrictive setting consistent with the essential requirements for the ward's physical health and safety;

(2) he shall assure the care, comfort, and maintenance of the

ward;

(3) he shall assure that the ward receives the services necessary to meet the essential requirements for the ward's physical health and safety and to develop or regain, to the maximum extent possible, the capacity to meet his needs for physical health and safety;

(4) he shall assure through the initiation of court action and other means that the ward enjoys all personal, civil, and human rights to which the ward is entitled;

(5) he may give consents or approvals necessary to enable the ward to receive medical or other professional care, counsel, treatment or services except as otherwise limited by (e) of this section;

(6) if a conservator for the estate of the ward has not been appointed, the guardian may receive money and property deliverable to the ward and apply the money and property for support, care, and education of the ward; however, he may not apply the ward's money or property for his services or for room and board which he, his spouse, parent, or child have furnished the ward unless, prior to payment, the court finds that the ward is financially able to pay and that the charge is reasonable; notice, if possible, of a request for payment approval shall be provided to at least one next of kin of the ward; he shall excercise care to conserve any excess for the ward's needs

(7) if a conservator of the estate of the ward has been appointed, the guardian shall pay all of the ward's estate received by the guardian in excess of the money expended to meet current expenses for support, care, and education of the ward to the conservator for management as provided in AS 13.26.165 - 13.26.315, and the guardian shall account to the conservator for money expended.

(d) A ~~full~~ guardian of a ward, for whom a conservator has also been appointed, shall control the custody and care of the ward and is entitled to receive reasonable sums for his services and for room and

board furnished to the ward as agreed upon between the guardian and the conservator. The guardian may request the conservator to expend the ward's estate for the ward's care and maintenance.

(e) A guardian may not

(1) place the ward in a facility or institution for the mentally ill other than through a formal commitment proceeding under AS 47.30.070 in which the ward has a separate guardian ad litem;

(2) consent on behalf of the ward to an abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary to preserve the life or prevent serious impairment of the physical health of the ward;

(3) consent on behalf of the ward to the withholding of life-saving medical procedures;

(4) consent on behalf of the ward to the performance of an experimental medical procedure or to participation in a medical experiment not intended to preserve the life or prevent serious impairment of the physical health of the ward;

(5) prohibit the marriage or divorce of the ward;

(6) consent on behalf of the ward to termination of the ward's parental rights;

(7) prohibit the ward to register or cast a ballot at public election;

(8) prohibit the ward from applying for and obtaining a driver's license.

* Sec. 14. AS 13.26.195 is amended by adding a new subsection to read:

(d) The court shall investigate alternatives to a conservator and the use of a special conservator as provided in AS 13.26.205(c). A conservator may be appointed only if a less restrictive protective order or the services of a special conservator are not adequate to protect the estate of the protected person. The court shall, to the extent possible, consult with the protected person in determining what action should be taken.

* Sec. 15. AS 13.26.205(c) is amended to read:

(c) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. If only certain powers need be given to the conservator or the services of a conservator are needed only for a limited number of transactions, a special conservator may be appointed. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters carried out under [DONE PURSUANT TO] the order of appointment.

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

Sec. 13.26.218. PUBLIC BOND. (a) If the public guardian is appointed as a conservator, the court may not require a bond other than the bond required in AS 13.26.410.

(b) If the court requires a conservator, other than the public guardian, to provide a bond under AS 13.26.215 and the conservator is financially unable to provide the bond, the court may order the cost of the bond to be paid from court funds.

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

ARTICLE 6. PUBLIC GUARDIANS.

Sec. 13.26.360. PURPOSE. The legislature recognizes that many Alaskans, for reasons of incapacity or minority, are in need of a guardian or conservator. Often these persons cannot find a person able and willing to serve as guardian or conservator. The legislature intends through AS 13.26.360 - 13 26.420 to establish the office of public guardian for the purpose of furnishing guardianship and conservatorship services. It further intends by establishing this office to provide

assistance to guardians throughout the state in securing necessary services for their wards and to assist the courts, attorneys, visitors, proposed guardians, and respondents in the orderly and expeditious handling of guardianship proceedings.

Sec. 13.26.370. PUBLIC GUARDIAN. (a) The public administrator (AS 22.15.310) shall also act as the public guardian for the judicial district for which he is appointed.

(b) A court may order the public guardian to act as full guardian, partial guardian, conservator, or special conservator for a person who is determined under this chapter to be in need of guardianship or conservatorship service if no person or private guardianship association is willing and qualified to perform the function.

Sec. 13.26.380. POWERS AND DUTIES OF PUBLIC GUARDIAN. (a) The public guardian has the same powers and duties with respect to his wards and protected persons as a private guardian or conservator.

(b) The public guardian, when appointed as guardian or conservator, shall endeavor, for as long as practical, to find a suitable private guardian or conservator for his ward or protected person. For each ward and protected person, the public guardian shall report to the court having jurisdiction of the ward or protected person, at least once every six months, his efforts to find a private guardian or conservator.

(c) The public guardian shall

(1) establish and maintain relationships with governmental, public, and private agencies, institutions, and organizations to assure the most effective guardianship or conservatorship program for each ward and protected person;

(2) visit each of his wards and protected persons at least once every quarter to monitor their welfare;

(3) keep and maintain financial and statistical records of

all cases in which the public guardiar provides guardianship or conservatorship services;

(4) provide information and referrals to the public regarding guardianship and conservatorship proceedings, excluding information identifying ~~regarding~~ A particular CASE;

(5) assist guardians and court-appointed visitors of wards and respondents in the preparation and revision of guardianship plans and reports;

(6) assist guardians to understand the disabilities of wards and to foster the increased independence of wards;

(7) assist guardians in securing the rights, benefits, and services to which their wards are entitled;

(8) develop and maintain a current listing of public and private medical, mental health, social advocacy, educational, rehabilitative, counseling, therapeutic, homemaking, recreational, and financial services and programs available to assist wards and protected persons and their families.

(d) The public guardian may

(1) contract for services necessary to carry out the duties of his office;

(2) accept the services of volunteer workers or consultants and reimburse them for their necessary expenses.

Sec. 13.26.390. INTERVENTION. The public guardian may, on his own motion or at the request of the court, intervene in a guardianship or conservatorship proceeding if he or the court considers the intervention to be justified because

(1) an appointed guardian or conservator is not fulfilling his duties;

(2) the estate is subject to waste as a result of the costs of the guardianship or conservatorship;

(3) a willing and qualified guardian or conservator is not available; or

(4) the best interests of the ward, respondent, protected person, or person who is the subject of a conservatorship proceeding require the intervention.

Sec. 13.26.400. DELEGATION OF POWERS AND DUTIES. The public guardian may employ staff and delegate to members of his staff or to volunteers his powers and duties as guardian or conservator and other powers and duties under this chapter. However, the public guardian retains responsibility for the proper performance of the delegated powers and duties. All delegations shall be to persons who meet the eligibility requirements of AS 13.26.145.

Sec. 13.26.410. BOND. The administrative director of the Alaska Court System shall provide for one public bond to be held to cover all the conservatorship duties of the public guardian. The amount of the bond depends on the value of the estates in the control of the public guardian. Every six months the public guardian shall submit to the administrative director a report stating the value of the estates under his control. On receipt of the report, the administrative director shall adjust the public bond to the present value of the estates.

Sec. 13.26.420. ALLOCATION OF COSTS. (a) If a public guardian is appointed guardian or conservator, the administrative costs of his services and the costs incurred in the appointment procedure may not be charged against the income or the estate of the ward or protected person unless the court determines that the ward or protected person is financially able to pay all or part of the costs.

(b) The court shall determine the ability of the ward or protected person to pay for administrative costs of a public guardian or costs incurred in the appointment procedure by determining the financial

ability of the ward or protected person to pay a private guardian or conservator, considering the nature, extent, and liquidity of assets of the ward or protected person, the disposable net income of the ward or protected person, the nature of the guardianship or conservatorship, the type, duration and complexity of the services required, and any other foreseeable expenses.

(c) The public guardian shall investigate the financial status of a person who requests the appointment of the public guardian as his guardian or conservator, or ~~for whom~~ a court ~~is considering the~~ appoint~~ment of~~ the public guardian. The public guardian may require the person to execute and deliver written requests or authorizations necessary under law to provide the public guardian with access to records of public or private sources, otherwise confidential, needed to evaluate financial eligibility. The public guardian may obtain information from any public record office of the state or of a subdivision or agency of the state upon request and without payment of fees ordinarily required by law.

(d) The reasonable value of the services rendered without cost to the ward or protected person shall be allowed as a claim against the estate upon the death of the ward or protected person.

* Sec. 18. AS 22.15.310 is amended to read:

Sec. 22.15.310. APPOINTMENT. When authorized by the supreme court, the presiding judge in each judicial district shall appoint a person to act as public administrator of the estates of deceased persons, [AND] as coroner, and as public guardian.

* Sec. 19. AS 22.15.350 is amended to read:

Sec. 22.15.350. DUTIES [AS CORONER]. In addition to his other duties, a public administrator shall perform the duties set out in AS 22.15.110 and shall perform the duties of public guardian as set out

in AS 13.26.360 - 13.26.420.

* Sec. 20. AS 13.26.110 and 13.26.130 are repealed.

* Sec. 21. TRANSITION. No later than July 1, 1983, all guardianships for incapacitated persons established before July 1, 1980, and in effect on July 1, 1980 shall be reviewed by the court. Until the review, a guardian appointed before July 1, 1980, whose guardianship is still in effect on July 1, 1980, shall retain the powers assigned to him, unless a petition for modification under AS 13.26.125 amended by sec. 8 of this Act is granted. Before the review, the guardian shall submit one report in the form prescribed in AS 13.26.118 added by sec. 6 of this Act.

* Sec. 22. This Act takes effect July 1, 1980.

Dot 1: Charlie HB 572 File

TO: Representative Russ Meekins
House Finance Committee

DATE: April 18, 1980

FROM: Marsha Buck, Chairperson Marsha Buck
Governor's Council for the Handicapped and Gifted
600 University Avenue, Fairbanks, Alaska 99701
Phone: 479-6507

RECOMMENDATION REGARDING FISCAL
NOTE FOR CSHB 572

In addition to the $122,000 for travel, contractural, and commodities approved by the House Judiciary Committee, funds for the following personnel need to be included:

ANCHORAGE

Attorney III		Range 22-A
	Salary	$40,320
	Benefits @ 25.5%	10,281
		$50,601
Legal Secretary I or Accounting Clerk		Range 10-B
	Salary	$15,564
	Benefits @25.5%	3,968
		$19,532
	TOTAL	$70,133

RATIONALE: Personnel are essential in the first year to develop guardianship policies and procedures, provide assistance to court administrators in all judicial districts serving as public guardians, and to serve as public guardian for the approximately 30 individuals already under the court's jurisdiction plus an additional 50 to 80 individuals for whom the court system will probably be appointed as public guardians in F 81. This initial staffing is consistent with other states which have similar public guardianship statutes. Without these additional personnel the court system will be unable to carry out the guardianship responsibilities required in the proposed CS HB 572.

CC: Representative Charlie Parr, Chairman
House Judiciary Committee

Dot T. file copy

TO: Representative Russ Meekins
House Finance Committee

DATE: April 18, 1980

FROM: Marsha Buck, Chairperson Marsha Buck
Governor's Council for the Handicapped and Gifted
600 University Avenue, Fairbanks, Alaska 99701
Phone: 479-6507

RECOMMENDATION REGARDING FISCAL
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CC: Representative Charlie Parr, Chairman
House Judiciary Committee

file copy

LETTER OF INTENT

It is the intent of the House Judiciary Committee in passing out HB 572 that no additional personnel be authorized. Therefore, the Committee does not concur in the personal services section of the attached fiscal note.

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THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 572
Title An Act relating to guardians and Conservators
Requested by House Judiciary Date 3/26/80

II. FISCAL DETAIL
Agency Affected Alaska Court System
Program Category Affected Administration of Justice
BRU, Program, or Subprogram(s) Affected Alaska Court System
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 80	FY 81	FY 82	FY 83	FY 84	FY 85
100 PERSONAL SERVICES		242.0	258.9	277.0	296.4	317.2
200 TRAVEL		20.0	22.0	24.2	26.6	29.3
300 CONTRACTUAL		90.0	99.0	108.9	119.8	131.8
400 COMMODITIES		4.0	4.4	5.0	5.5	6.0
500 EQUIPMENT		8.0				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		364.0	384.3	415.1	448.3	484.3

FUNDING (Thousands of Dollars)

GENERAL FUND		364.0	384.3	415.1	448.3	484.3
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME		8	8	8	8	8
PART TIME						
TEMPORARY						

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

The attached budget was developed at a meeting of all coroner/public administrators in the state. It is based on estimates of the number of guardianship appointments in each location. These estimates were derived in part by the Department of Health and Social Services and in part by court personnel.

IV. DATE March 26, 1980 PREPARED BY Richard P. Barrier
AGENCY Alaska Court System
PHONE 264-0545

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

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FISCAL NOTE - HB 572

FY 81 BUDGET

	Salary 7/1-12/31/80	Salary 1/1-6/30/80	Total
Personal Services			
Anchorage:			
Guardians 2 @ Range 16	25,584	27,492	53,076
Acct. Clerk 1 @ Range 10	8,640	9,384	18,024
Fairbanks:			
Guardian 1 @ Range 16	14,790	15,840	30,630
Acct. Clerk 1 @ Range 10	9,768	10,566	20,334
Juneau:			
Guardian 1 @ Range 16	12,972	13,847	26,718
Acct. Clerk 1 @ Range 10	8,640	9,384	18,024
Ketchikan:			
Asst. Guardian 1 @ Range 14	11,100	11,970	23,070
			189,876
Benefits: 8 Employees: Health $12,192, ASB $11,582, Variable $28,311			52,085
Total Personal Services			241,961
Travel: Quarterly visits to all incapacitated persons			20,000
Contractual: $40,000 for contractual guardians & visitors. $50,000 for Respondent Attorneys			90,000
Commodities & Equipment: 8 employees at $1,500			12,000
Total Cost			$363,961

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 572

Title An Act relating to guardians and conservators

Requested by House Finance Committee Date 4/21/80

II. FISCAL DETAIL

Agency Affected Alaska Court System

Program Category Affected Administration of Justice

BRU, Program, or Subprogram(s) Affected Alaska Court System

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

		FY 80	FY 81	FY 82	FY 83	FY 84	FY 85
100	PERSONAL SERVICES		0	0	0	0	0
200	TRAVEL		20.0	22.0	24.2	26.6	29.3
300	CONTRACTUAL		90.0	99.0	108.9	119.8	131.8
400	COMMODITIES		4.0	4.4	5.0	5.5	6.0
500	EQUIPMENT		8.0				
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL		122.0	125.4	138.1	151.9	167.1

FUNDING (Thousands of Dollars)

GENERAL FUND		122.0	125.4	138.1	151.9	167.1
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME		0	0	0	0	0
PART TIME						
TEMPORARY						

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

Partial guardianship
Least restrictive alt.
Due process
Guarantee of rights
Conflict of interest
Public guardian

APPROVED: Oral Freeman

Oral Freeman, Vice-Chairman
House Finance Committee

IV. DATE 4/21/80 PREPARED BY

AGENCY

PHONE 465-3795

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

33-001 (Rev. 12/79)

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 572
Title Guardianship Bill
Requested by House Judiciary Date February 9, 1980

II. FISCAL DETAIL
Agency Affected Department of Health and Social Services
Program Category Affected Mental Health, Public Health, Social Services / Nursing
BRU, Program, or Subprogram(s) Affected Developmental Disabilities, Social Services, Homes
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 80	FY 81	FY 82	FY 83	FY 84	FY 85
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

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

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

Prepared by: D. Behr Date: February 9, 1980
Division/Office: Commissioner's PH: 465-3030
Department of Health & Social Services

Approval DHSS Mgt. & Bdgt [signature] Date: 2/8/80

33-001 (Rev. 12/79)
Modify by DHSS (11-28-79)

ATTACHMENT "B"

Analysis of

"An act relating to guardians of incapac tated persons and creating an office of public guardian."

Prepared by

Roger VanWagoner
Executive Director
December 17, 1979

Section 4 AS 13.26.095

(e) recommendation: Incorporate language where a testamentary guardian has to be confirmed by the court.

comment: Wills very often become outdated and circumstances change. As a matter of course it would be good practice to require confirmation of a testamentary guardianship.

Section 12.26.106 INITIAL COURT PROCEDURES

(b) recommendation: Add provision so that if the alleged incapacated person cannot afford an attorney, an attorney is appointed by the court, and those costs are paid for the alleged incapacitated person.

Section 13.26.109 VISITOR'S REPORT

(c)(3), (4), (5) recommendation and comment: The kind of judgement and recommendations required in these three sections are probably beyond the professional skill of the visitor. Say, for example, a social worker were to play this role. It would be very easy for recommendations to be made regarding mental health treatment that the social worker did not understand and could not represent, even if a qualified psychologist or psychiatrist had evaluated the alleged incapacitated person. This information will ultimately be the basis for the court's finding. The visitor can certainly provide coordination to bringing the information to the court, but somehow, their sphere of influence or ability to make recommendations should relate specifically to their technical skill and training.

Section 13.26.109 (continued)

(c)(6)

recommendation: Include language that requires a written release from the alleged incapacitated person.

comment: At this point in the process the alleged incapacitated person is not a ward, but is still only alleged to be incapacitated. Unless we are willing to concede that anyone who is alleged to be incapacitated is summarily assumed to have such incapacity until it is proven, then there should be some safeguards for protecting very confidential information.

Section 13.26.110 EVALUATIONS

(b) recommendation: Add strength here to the requirement of confidentiality by making provision for sealing of records or some other means of protection.

comment: If these records are truly to be confidential, the best safeguard may be to simply order them sealed.

Section 13.26.111 DUTIES OF PROPOSED WARD'S ATTORNEY

(1) recommendation: Require that the first visit must have occured at least 14 days before the hearing.

comment: Unless there is a requirement like this, it is so often the case where the attorney and the alleged incapacited person meet at the door to the courtroom for the first time. This is not the kind of representation that we want but, in reality, it will on occasion result unless there is some type of requirement as suggested above.

Section 13.26.112 APPOINTMENT OF A GUARDIAN AD LITEM

recommendation: This whole section needs further clarification.

comment: The role of a guardian ad litem is to represent and protect, using the best judgement of the guardian ad litem. On the other hand, an attorney is bound to represent the desires of the ward, regardless of whether the attorney agrees with the ward's viewpoint. Admittedly, there will be people who will not be capable of expressing any viewpoint whatsoever because of the severity of their disability. This section seems to be directed at meeting that need, providing a guardian ad litem to protect the rights of such a person. Unfortunately, the way this section is written, a guardian ad litem could be appointed for a person who can express their personal desires or points of view, but simply may need assistance in understanding all alternatives and sorting out the best alternative or alternatives. It would be unfortunate if this provision, really directed at more incapacitated people, were to trap them into not having the kind of unbiased representation that they have a right to. This section should be rewritten to narrow the circumstances under which it could be used. (c) provides that the guardian ad litem may also be the attorney. This is truly a contradiction of roles. It is not possible to expect an attorney, who must represent his client's point of view, to also be in the role of one who must interpret that point of view and in the final analysis use his own best judgement regardless of what the proposed ward might desire.

Section 13.26.113 HEARINGS

(h) recommendation: Include language that requires the court to give due regard or priority to a person the ward does or does not want to serve as guardian.

comment: Unless there is good cause shown, someone the ward does not want should not be appointed as guardian. Say, for example, the proposed ward does not get along with an adult brother or sister and does not want that person to serve as their guardian. The relationship between guardian and ward is extremely important and the court should be required to take these kinds of curcumstances into account.

Section 13.26.115 PSYCHOTROPIC MEDICATION

(d) recommendation: Delete the word "may" following the phrase "the trier of fact" and insert the word "must" so that the phrase reads "the trier of fact must take into consideration in making its determination."

comment: There is legal precedent that requires this change. This kind of consideration is not optional but required. More information is available on this if requested.

Section 13.26.116 GUARDIANSHIP ORDER

(d) recommendation: Add to this section the requirement that there must be a review hearing at least every two years.

comment: This provides the checks and balances to minimally ensure that the guardianship/ward relationship is viable and working. The court should take a proactive role in ensuring this rather than just reacting if someone raises a problem.

Section 13.26.118 REPORTING

(a)(5)

recommendation: Add a fifth subpart to (a) that states "if the ward requests one."

comment: The ward, being the subject of this entire process, ought to have the opportunity to request that his or her guardian report to the court or even request that a visitor do so.

(b)(2)

recommendation: Add the phrase to the end of that sentence "and the ward's opinion about such living arrangements."

comment: It is obvious that the ward's opinion in such a matter as where he lives can be extremely important to the court.

(b)(8)

recommendation: Add an eighth subsection to (b) that requires the guardian to list the number and nature of all actual contacts with the ward.

comment: For any successful guardian/ward relationship the court must be aware of the quantity and quality of interaction. If a guardian is not actively and dynamically involved with the ward, the court should be in a position to find this out.

Section 13.26.130 COST IN GUARDIANSHIP PROCEEDINGS

recommendation: Add language whereby if the alleged incapacitated person wins, and is not found to be incapacitated (the petition is not sustained) the petitioner should have to pay all costs.

Section 13.26.130 COST IN GUARDIANSHIP PROCEEDINGS (continued)

comment: If an alleged incapacitated person is dragged into court and forced to go through evaluations, and subject to the official proceedings of the court and then the petition is denied (not sustained by the court) there is no justification for requiring that person to pay for something he did not invite upon himself in the first place. The petitioner must bear the responsibility under such circumstances. This may, in fact, cause some potential petitioners to think twice and make sure there are good grounds before going to court.

Section 13.26.140 TEMPORARY GUARDIANS

(a) recommendation: Add a limitation here so that a temporary guardian cannot serve in such capacity for more than six months.

comment: It is entirely possible that a person seeking to be guardian might decide that the court would not appoint them as a regular guardian and circumvent or seek to circumvent that eventuality by becomming appointed a temporary guardian. There does need to be some limitation of time for a person to serve as a temporary guardian.

Section 13.26.145 WHO MAY BE GUARDIAN: PRIORITIES

(c)(1)

recommendation: Delete the word "intellegent" in the first sentence and change the word "reasonably" to "reasonable."

comment: Some judges may construe the word intellegent too strictly. What is necessary is that the proposed ward be able to make a "reasonable choice." Judges should not be trying to determine what intellegence is when it comes to making choices.

Section 13.26.145

(c)(i) comment: (continued)

Somewhere in this section the ward should have the opportunity to tell the court who he or she does or does not want as a guardian. This is the same concern as expressed in Section 13.26.113(h).

Section 13.26.150 GENERAL POWERS AND DUTIES OF A GUARDIAN

(c) recommendation: Include explicit provision whereby a guardian is not financially responsible for the ward out of his own financial assets.

comment: The way this is written, the guardian would be responsible out of his own personal assets for the needs of the ward. If this were the case, it would be even more difficult to get guardians than what it ordinarily is.

(c)(4)

recommendation: Add to the end of this sentence following the word "entitled" "but in the event that such action arises out of a conflict of interest between the ward and guardian, the ward may, with court approval, contract with an attorney to represent him in such action."

comment: With the full meaning and authority behind the principle of guardianship, it is not practical to expect in situations were a conflict arises between a ward and a guardian that the guardian is the best person to ensure that the ward enjoys personal, civil, and human rights. The necessity for this provision is obvious.

ction 13.26.150 (continued)

e)(6)(A)

recommendation: Following the word "duty at the end of the sentence, add the phrase "out of the ward's estate."

comment: It needs to be clarified here that the guardian is not liable out of his own assets.

e)(7)

recommendation: Add the word "vote".

comment: Reason obvious.

)(8)

recommendation: Add the phrase "get a driver's license".

comment: Reason obvious

neral Comment

n the whole, this proposed guardianship statute is extremely well developed. There re a number of technical suggestions for change and a few rather major changes, but the writer of this analysis is extremely pleased by the results of what must have been considerable effort put forth in the authorship of this statute. There is one other comment that must be made. There is no provision within this proposed statute for voluntary guardianship or conservatorship. It seems necessary and appropriate to have a procedure that does not require an adjudication of incompetency. Say, for example, a retarded person is having difficulty in dealing with their personal finances (in balancing their checkbook) and they know it and they ask for help. They should be in a position where they could choose someone they know they can work with and ask the court to appoint them to help in that capacity. If for some reason they reach the point where they don't get along with that person it would simply be a matter of firing them. This kind of flexibility would be very good for cases where the disability is mild or borderline.

JAY S. HAMMOND, GOVERNOR
STATE OF ALASKA

GOVERNORS COUNCIL FOR THE HANDICAPPED AND GIFTED

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POSITION PAPER
GUARDIANSHIP
January 1980

THE GOVERNOR'S COUNCIL FOR THE HANDICAPPED AND GIFTED SUPPORTS THE PASSAGE OF HB 572/SB 339.

A. RATIONALE

The Council takes this supportive position for the following reasons (background information follows in more detail):

1. HB 472/SB 339 bases a determination of incapacity on an individual's functional limitations rather than on a "blanket classification" on the basis of medical diagnosis or existence of a disability (such as mental retardation).

2. HB 572/SB 339 provides strengthened due process protections to individuals thought to be incapacitated.

   The Council feels that strong due process provisions are critical in legislation that deals with persons thought to be incapacitated because of the right of all persons, regardless of handicapping condition, to enjoy full constitutional protection of individual rights.

3. HB 572/SB 339 provides for partial or limited guardianship as well as full or plenary guardianship so that an individual's rights are modified only in those areas of incapacity.

   The Council feels that guardianship orders should only limit the rights of an individual in those areas of functioning where he/she cannot exercise individual choice, and, more importantly, should preserve the right of an individual to exercise free choice in those areas where his/her limitations are not in question. Present state statutes do not allow this "partial guardianship" option.

4. HB 572/SB 339 strengthens court procedures and provides for a guardianship order and plan which specifically enumerates the responsibilities and powers of the guardian.

   The Council feels that strengthening court procedures, providing for very specific guardianship orders, and requiring individualized plans are strong points of HB 572/SB 339. These requirements serve as additional protections to the individual who receives guardianship services as well as provide guidelines for all parties involved in guardianship hearings and providing guardianship services.

5. HB 572/SB 339 provides for an "office of public guardian" which has the responsibility to 1) serve as public guardian and 2) be a primary resource to locate private guardians and assist them in the performance of their duties.

The Council believes that the establishment of an "office of public guardian" (not currently existing in the State of Alaska) is important because such an office is needed to be public guardian for individuals who do not have family or friends available to be guardians. The Council further feels that the "office of public guardian's" responsibility to seek out and work with private sector guardians will serve to encourage family/concerned party involvement, and thus limit the caseload for which this office will be responsible in its role as public guardian.

6. HB 572/SB 339 sets priorities for appointment of private guardians (Sec. 13.26.145(d)).

The Council believes that such a prioritization is necessary and beneficial in four (4) respects: a) it directs the court as to individuals to be sought for appointment as guardians, b) it serves as notice to private parties concerning the order in which they will be considered as potential guardians, c) it allows as much choice as possible by the person determined incapacitated, and d) it lists the public guardian as the last to be considered after all other possible persons have been contacted.

7. HB 572/SB 339 locates the office of public guardian in the office of public administrator.

The Council feels that this is a good placement because the functions and expertise required of a public guardian are similar to those required of a public administrator. Further, the Council feels that such placement would ensure that there would be no possibility of conflict of interest which could arise if a social service agency providing care to an incapacitated person were acting as the person's guardian.

8. HB 572/SB 339 includes time limits within which guardianship hearings must be held.

The Council believes that both the petitioner and the respondent should have assurance that hearings will be scheduled and held within a reasonable period of time. For petitions for temporary guardianship there is a need to have the court hearing within a few days so that legal transactions can be finalized and medical services obtained. Regular guardianship hearings should be able to be held within four months of the filing of petition.

9. HB 572/SB 339 requires that annual reports be submitted by the guardian to the court.

This provides a mechanism for the court to monitor the guardian's discharge of his duties and may alert the court to a need for a change in the guardianship order or a termination in guardianship.

B. BACKGROUND INFORMATION

1. Guardianship Practices and Implications

[Excerpts taken from Guardianship & Conservatorship: Statutory Survey and Model Statute, American Bar Association, 1979.]

"Guardianship is a legal relationship which authorizes one individual to become a substitute decision-maker for another. Its most common form is the "natural guardianship" relationship between parents and their minor children. A guardianship is established by court order when because of age, illness, or disability, a person is determined to be incapable of managing some or all of his or her personal and/or financial affairs. A guardian may be given partial or total authority to determine whether the disabled person will live in the community or an institution, and what type of medical, mental health and other services the disabled person will receive (personal guardianship), and/or partial or total power to manage and control that person's property and income (conservatorship). Correspondingly, the individuals for whom a guardianship has been established may lose the right to decide whether to remain in their own home, to make contracts for goods and services, to go to court to enforce their rights, to hold or convey property, and in some instances to marry, to have children, to vote and to make a will.

The criteria for establishing a guardianship are often broad and vague, permitting the imposition of restrictions on persons who are "different" as well as on those who are disabled. Current procedures often omit the safeguards we have come to expect when restrictions on liberty are imposed or fundamental rights threatened in other contexts. And perhaps most importantly, even today in many jurisdictions, guardianship orders and guardians have failed to recognize that individuals with disabilities are often capable of doing many things for themselves.

> [A]...serious difficulty arises because the law usually represents incompetence in simple black and white terms, with the result that most guardianships of the person are looked on as plenary guardianships. The person declared incompetent is deprived of the legal capacity to act in any way on his own behalf. Even though he [or she] may have a guardian appointed to exercise some of his [or her] rights, the emphasis usually is on the deprivation of rights rather than on implementing rights constructively through informed representation. Moreover, the idea that the person himself [or herself] can properly retain and exercise some personal and even property rights, selectively, according to his [or her] individual capacity, is not adequately expressed in most existing statutes pertaining to guardianship.

Over the past two decades, a growing list of organizations and governmental commissions which have examined guardianship have called for

correction of these problems. For example, in 1962, the President's Panel on Mental Retardation stated:

> For some, of course, a comprehensive guardianship will be needed. But we urge that, as far as possible, mentally retarded adults be allowed freedom--even freedom to make their mistakes. We suggest the development of limited guardianships of the adult person, with the scope of the guardianship specified in the judicial order.

The 1969 Report of the International League of Societies for the Mentally Handicapped recommended:

> The retarded adult should be permitted to act for himself [or herself] in those matters which he [or she] has competence. The limitations of legal capacity inherent in guardianship should not extend to these matters. It follows that a person whose mental retardation is characterized by impairments of social competence which are partial should enjoy a partial guardianship specifically adapted to his [or her] strengths and weaknesses.

The 1975 edition of the Uniform Probate Code makes a clear distinction between guardianship of the person and conservatorship of the estate, and establishes a number of less restrictive alternatives for the protection of the property of a disabled individual (though not the person). It also provides for the execution of durable powers of attorney as a means of obviating the need for a guardianship or conservatorship. Finally, the 1976 Report of the President's Committee on Mental Retardation, urged that:

> Statutes and court procedures bearing on competency should be clarified and revised (a) to recognize gradations of competence, (b) to recognize that areas of competency may be quite varied and therefore should be separable in law, (c) to assure full and explicit due process safeguards on any and all areas of competency, and that the scope of any judgment of incompetence is made fully explicit, and (d) to ensure that restrictions of competency be limited to a specific period of time or subject to periodic review."

2. Commentary on Changes Needed in Alaska's Guardianship Laws

Existing state law does not provide for partial guardianship, does not provide sufficient due process protections, and does not tie appointment of a guardian or provision of guardianship services to the specific needs of the incapacitated person, nor does it provide for persons for whom no private guardian can be obtained.

Legislation is needed to correct these problems. It should require a determination of incapacity to be based on the individual's ability to provide for his [her] physical health and safety without focussing on the medical diagnosis of the disability. It should provide for

partial guardianship for those individuals who can meet some but not all of their own needs. Due process protections should be strengthened and ensure that the only legal rights a ward loses when a guardian is ordered are those specifically included in the court's guardianship order. A guardianship plan should be required which will make clear what the guardian's responsibilities and authorities are and thus provide clear direction for the guardian and help the court monitor the guardianship order. By prioritizing who can be a guardian, guidance can be given to those seeking guardians to help ensure that appropriate individuals are routinely contacted to be guardians.

Guardianship and conservatorship are closely tied and provisions need to be made to make conservatorship procedures consistent with guardianship procedures. The special conservator's role should be expanded to make it equivalent to that of a limited guardian.

An office of public guardian is needed. This is estremely important to ensure that individuals are not denied guardians or guardianship services simply because private guardians cannot be found. Guardianship petitions have not been filed for many individuals because there is no agency charged to actively seek out private guardians. In addition to serving as a public guardian, this office should be given the responsibility to seek private guardians. The public guardian should be required to seek other guardians before the court appoints it to be the guardian. This would also ensure that an office of public guardian would not have a burgeoning caseload. Recent experience in the state of Delaware, where such a provision is included in state statute has shown that the public guardian is able to locate private guardians thus reducing the public guardian's caseload and reducing court work which would be required to change guardians.

The public guardian should act as a special resource to the court, social servie agencies, the Attorney's General office and to private guardians in guardianship matters. If these guardianship support services are not included in the public guardian's duties, the current problems will continue with the result that the public guardian will be required to serve as the guardian for significantly more individuals than would otherwise be necessary. The current problems are failure to process cases, slow processing of cases, reluctance of individuals to serve as guardians because they are unsure of their duties, unfamiliar with preparing reports, and because they feel they have no readily available agency specializing in guardianship to advise them.

If an office of public guardian as described above is created, the number of persons who will be willing to act as private guardians is expected to increase since the public guardian will continually be searching for private persons to serve as guardians and will provide advice and assistance to lighten the burden anyone serving as a guardian may feel.

The placement of the public guardian office within the state government has been a subject of much discussion. As a result of meetings in October 1978 and a review of the efforts of the Attorney General

in this area in regards to HB 63 of the Tenth Legislature, two possible locations were proposed: the Office of the Governor or the Court System in connection with the Public Administrator Office. These options were shosen because no other bodies of state government seemed appropriate. HB 63's amendment placed the office in the Department of Health and Social Services. The possible conflicts of interest that could arise resulting from the department being often the main provider of care to incapacitated persons requires that it be placed elsewhere.

The best option in many ways seems to be that the office be combined with that of the public administrator. The public administrator acts both as coroner and administrator of the estates of deceased prsons. It is an appointive position for each judicial district, "when authorized by the Supreme Court". AS 22.15.310. The administration of estates is already an area of expertise required by a public administrator and would suggest that the public administrator is the appropriate person to act as a public conservator. Further, at present, the public administrator is already acting as an ad hoc public guardian for several clients at Harborview and individuals at other nursing care facilities. Given this ad hoc procedure, the public guardian office would legitimize this role and provide for a budget that allows the public guardian to truly provide adequate guardianship services.

3. Need for Guardianship Services

The number of individuals expected to require guardianship services equals about half the total number of persons in nursing homes and other residential care facilities. This totals about 335 people. Of these about 28% have private guardians. With active assistance from an office of public guardian, it is estimated that private guardians could be found for 10 to 15 percent of these people. This would result in the public guardian serving as guardian for about 10% or 35 people. Based on annual admission rates of these facilities and if a public guardian were to be needed for 10% of the cases, an additional 50 cases would be generated.

Because many of those in need of guardians are ill or aging the continuing caseload of a public guardian is estimated at between 50 and 90 individuals. Based on figures provided by the agencies it is estimated that 100 individuals will need the assistance of the public guardian to locate private guardians because of the current backlog of cases.

On an annual basis the caseload of the office of public guardian is expected to be:

50-90	public guardianship
100	guardianship resource services
50	location of private guardians

(See attached information gathered from a Council survey of agencies in 1979.)

Recent figures obtained on the Delaware public guardian office show 150 referrals per year to that office with only 10% or 15 becoming wards of the public guardian (Delaware population @ 600,000). The American Bar Association estimates 1/100th of one percent of Delaware's population is served by a public guardian.

4. Funding Needed

Based on court and associated costs and the time currently required for agencies to provide guardianship services, the annual cost of the bill is approximately $250,000. (See attached fiscal impact information.)

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A

CURRENT STATUS OF GUARDIANSHIPS

Facility	# Patients	# with Guardians	# with Private Guardians	# with Public or Dist. Guardians
Southcentral Region				
Harborview	90	37	26	11
Hope Cottages	126	3	1	2
Valley	6	2	2	0
Wesleyan	61	2	0	2
Glenmore	158	16	4	12
Careage House	43	1	0	1
Northern Region				
Careage North	73	8	6	2
Hope Center	25	6	5	1
Southeast Region				
Island View Manor	43	43	43	0
Wrangell General (long-term care)	14	4	0	4
Gateway	5	1	1	0
St. Ann's	21	2	1	1
TOTALS	665	125	89	36
Percent of Total Facility Population		19%	13%	6%

B

CURRENT NEED FOR GUARDIANS

Facility	# without Guardian	# which do not need Guardian	# needing Guardian	# needing Private Guardian	# needing Public Guardian
Southcentral Region					
Harborview	53	38	15	11	4
Hope Cottages	123	111	12	6	6
Valley	4	3	1	0	1
Wesleyan	59	3	56	35	21
Glenmore	142	81	61	3	58
Careage House	42	37	5	4	1
Northern Region					
Careage North	65	38	27	21	6
Hope Center	19	4	15	12	3
Southeast Region					
Island View Manor	0	0	0	0	0
Wrangell General (long-term care)	10	3	7	2	5
Gateway	4	0	4	1	3
St. Ann's	19	12	7	0	7
TOTALS	540	330	210	95	115
Percent of Total Facility Population	81%	50%	32%	14%	17%

C

PROJECTED NEED FOR GUARDIANSHIPS

Facility	Admissions (Approx. per yr.)	# needing Guardian	# needing Private Guardian	# needing Public Guardian
Southcentral Region				
Harborview	7	4	3	1
Hope Cottages	32	4	2	2
Valley	8	5	4	1
Wesleyan	38	36	22	14
Glenmore	36	17	1	16
Careage House	36	3	2	1
Northern Regica				
Careage North	236	40	30	10
Hope Center	4	3	3	0
Southeast Region				
Island View Manor	17	17	17	0
Wrangell General (long-term care)	4	4	1	3
Gateway	0	0	0	0
St. Ann's	45	19	2	17
TOTALS	463	152	87	65
Percent of Total Admissions		33%	19%	14%

COURT INFORMATION ON GUARDIANSHIPS

District	1976*		1977*		1978**	
	Guardianships	Protective Proceedings	Guardianships	Protective Proceedings	Guardianships	Protective Proceedings
#1 (Juneau, Ketchikan, Sitka)	7	7	11	14	7	6
#2 (Nome)	1	2	1	1	1	2
#3 (Kodiak, Anchorage, Kenai)	10	100	5	88	2	83
#4 (Fairbanks, Barrow, Bethel)	0	16	2	23	0	15
TOTALS	18	125	19	126	10	106

* Calendar year
** First nine months

E

FISCAL IMPACT-GUARDIANSHIP

Alternatives for staffing and operations of Office of Public Guardian

	A	B	C
Personal Services	Attorney III (R 22) Social Worker III (R 16) or Admin. Assist. (R 16)	Attorney III	Admin. Officer II (R19)
	Legal Secretary (R 10 or 11)	Legal Secy	Legal Secy
Travel	quarterly visits to wards	x	o
	visitors	x	x
	location of private guardians	x	x
Contractual	office operations	x	x attorney fees
Materials/Supplies	office supplies, printing	x	x
Equipment	office equipment	x	x

Consideration needs to be given to the advantages and cost-savings resulting from utilization of an attorney to head the office of public guardian. An attorney could prepare legal forms and develop procedures, file petitions, and handle court appearances. Otherwise contracts with private attorneys will be required. Attorney fees range from &75 to $100 per hour. More time would be required for private attorneys to do preparation work than in one attorney was employed who specialized in guardianship matters.

F

FISCAL IMPACT-GUARDIANSHIP

Preliminary Analysis-1979

PERSONAL SERVICES		54,218
Admin. Officer II (R 19)	26,916	
Legal Secretary I (R 10)	14,328	
	41,244	
FICA-.0613% x 37,228	2,282	
PERS-17.70%	7,300	
Health Ins.-24m.x 141.32	3,392	
	54,218	
TRAVEL		24,300

Quarterly visits to wards, visitor inquiries estimated @ 5 trips/month

Transportation-225/trip	13,500
Per Diem-60/day x 3 cays/trip	10,800
	24,300

Assumptions made:

(1) Quarterly visitation requirement would be delegated to public administrator at the judicial district level.
(2) Length of trip provides concurrent visitation with several wards.
(3) No distinction is made in cost for visitor requirements as it is presumed quarterly visitation could not be fully complied with initially.

CONTRACTUAL SERVICES		151,055
Telephone and tolls	7,200	
Postage-correspondence	540	
certified mail @ 15/mo @ 1.25	225	
Copy machine	2,500	
Printingletterset, forms, pamphlets	3.700	
Typewriter rental	4,380	

Professional fees and services if current backlog of cases (210) were processed by public guardian office using private attorneys. (Court system estimates on 188 cases in first 4 months of FY 79 reflect average cost of $525 per case: @14 hours attorney time, 2 hours hearing time before a Standing Master.)

110,250

Expert testimony-Rules of Court specifications @ $50/hour @ 2 hours/case

21,000

Psychiatric or other evaluative testing is arbitrarily estimated at 2 % of total caseload. Current costs vary from $180-300 per case

1,260

151,055

COMMODITIES	1,200
EQUIPMENT	2,400

Exec. Desk,300; Secy desk,345; bookcase,81; legal files (2 4dr) 350; Exec. chair 141; Secy chair, 93; calculator, 220; transcriber, 465; dictating unit,465.

TOTAL PROJECTED FY 80 BUDGET REQUEST	$233,212

FISCAL IMPACT GUARDIANSHIP

As the present caseload in the courts for all guardianship cases is averaging 45-50 cases per month statewide, it is reasonable to assume the current backlog would more likely be dealt with over a two year period.

The budgeting alternative would be to provide funding as follows:

	FY 80 A	FY 80 B	FY 81 (2)
Personal Services	$ 54,218	$ 54,218	$ 58,013(1)
Travel	24,300	24,300	26,730
Contractual Services	151,055	85,430	136,961(3)
Commodoties	1,200	1,200	1,320
Equipment	2,439	2,439	
Total	$233,212	$167,587	$223,024

Funding would be general funds allocated to the Court System.

(1) FY 81 increase assumes maximum 7% increase in keeping with the President's guidelines.

(2) Basic inflation 10% all other costs.

(3) Assumes 170 cases (50% current backlog plus 65 projected additional).

While it is not feasible to identify specific amounts of federal funds which could be utilized to defray state costs, it is reasonable to assume certain programs would be appropriately billed for such costs, i.e.

Office of Ageing - under requirements for advocacy and legal services to those over 60.

Social Services - under protective care.

Other social services programs.

ALASKA STATE HOSPITAL ASSOCIATION INC.

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ANCHORAGE, ALASKA 99503

February 12, 1980

Representative Charles Parr
Chairman, House Judiciary Committee
Room 124 - Capitol
Alaska State Legislature
Pouch H
Juneau, Alaska 99811

re: Testimony for Committee Hearings/
teleconference 2/13/80.
HB 572 "An Act relating to
guardians and conservators"

Dear Representative Parr;

We hereby submit written testimony to the joint judiciary committee hearings to be held in Juneau and via teleconference on February 13. Our membership is very aware of existing guardianship problems, and the need for legislation such as proposed in HB 572. We have carefully reviewed this bill and would like to recommend some language modifications. We believe that these modifications will improve the effectiveness of this piece of legislation.

The accompanying enclosure(Exhibit "A") is our marked up copy for your committees consideration. We have underlined the language changes recommended and bracketed the language being replaced. Most of the reasoning and back ground for these recommendations are adequately covered in Mr. Van Wagoner's analysis dated 12/17/79 (Attachment"B"). You will note that he is the Executive Director of Hope Cottages, a facility which deals with the guardianship issue on a frequent basis.

Thank you for the opportunity to comment, and if you have questions concerning any of our recommendations please make them known to me.

Sincerely,

Max F. Kersbergen
Executive Director

Alaska State Legislature

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House of Representatives

February 11, 1980

M E M O R A N D U M

DISTRICT 14:

Bellsflats
Chiniak
Kodiak
Ouzinkie

To: Representative Charlie Parr, Chairman
House Judiciary Committee

From: Representative Fred F. Zharoff

Re: SB 333 and HB 572

I have received telephone calls and letters asking that I support legislation pertaining to guardianship. I wish to inform you and the Judiciary Committee that I am receiving positive requests for support of SB 333 and HB 572. At this time I do not wish to testify on these bills. My main concern is that you be informed that my constituents appear to favor these two items of legislation.

COMMENTS ON HOUSE BILL No. 572 AND THE SENATE COUNTERPART MEASURE
"AN ACT RELATING TO GUARDIANS AND CONSERVATORS..."

My name is John A. Sandor of 3311 Foster Avenue, Juneau, Alaska, 99802. I am offering comments on House Bill No. 572 and the Senate counterpart proposal "An Act Relating to Guardians and Conservators...". These written comments are offered for House and Senate consideration as I will not be in Juneau at the time of Committee hearings on these bills.

These observations are based on my own situation and experience in dealing with incapacitation of family members. An act of this type is definitely needed to deal with existing situations and the liklihood of the increasing number of partial incapacitation problems that can be expected as Alaska develops a larger population of the elderly who can be expected to suffer strokes and similar disabling afflictions.

As the father of a child born in Ketchikan, Alaska in 1957, who subsequently learned of the child's brain damage that is resulting in as yet an unclearly defined degree of incapacitation - the subject of House Bill 572 is of special interest. Although completing High School, this child - now an adult age 22- apparently sustained brain damage which limits some abilities, results in some incapacitation and makes the person more vulnerable to exploitation.

As the son of a parent who suffered a partially disabling stroke, I am also keenly aware of the special problems that can be associated with incapacitation from such afflictions.

I believe the bill under consideration by the House and Senate would clearly be of help in dealing with the situations I have noted. The provisions for partial guardianship would be helpful in assisting and protection such individuals and doing so - hopefully- without restricting the civil and legal rights of such persons. Because of the importance of assuring full protection of the civil and legal rights of these people, and to recognize different degrees of incapacitation, I suggest adding another definition "partially incapacitated person" meaning a person whose ability to receive and evaluate information or to communicate decisions is partially impaired for reasons other than minority to the extent that he or she lacks the ability to completely provide for the essential requirements without court-ordered assistance. An alternative to that suggestions is to modify the definition of an incapacitated person to one that lacks the ability to "fully or partially provide the essential requirements" etc.

The point being that in many of the situations we are dealing with, the individual needs partial assistance and protection without the assumption of total incapacitation as the present definition seems to imply.

I also favor strengthening and reinforcing the protection and legal rights of such persons. This can be done in several ways. For example in Sec. 13, 7 (e), I would add: A guardian may not (7) prevent the ward from voting in elections (8) prohibit the ward from acquiring property (9) restrict any civil or legal right as a citizen of the United States and Alaska without an expressed order of the court including the opportunity for nearest relative of the ward as well as the guardian to participate in such deliberations and decisions.

Again, I believe the bill under consideration will be helpful, and commend those who are attempting to alleviate existing guardianship-conservator problems. Thank you for the opportunity to comment.

John A. Sandor

JOHN A. SANDOR
February 10, 1980

members packets
HB 572

TELEGRAM

ALASCOM, INC.
PHONE: 586-6442
JUNEAU, AK 99802

1980 FEB 12 PM 10 01

02015 NL ANCHORAGE ALASKA 50 02-12 215P AST

PMS REP CHARLES PARR

2036

JUNEAU

I SUPPPORT HOUSE BILL 572. THE BILL SHOULD PROVIDE NECESSARY ASSISTANCE TO HANDICAPPED INDIVIDUALS TO MAKE LIFE STYLE DECISIONS FOR HIMSELF. FURTHERMORE IT APPEARS TO PROVIDE AMPLE ASSURANCE THAT THE GUARDIANSHIP CONCEPT WILL NOT BE ABUSED IN A MANNER WHICH WOULD PROHIBIT AN INDIVIDUAL FROM PURSUING HIS NATUR AL RIGHTS

FRANCES MAIURI

ROY ANDERSON, COORDINATOR ALASKA RESOURCES FOR THE MODERATELY/SEVERELY IMPARED

Imc contact Lucille Oligney
789-2464

I attended meeting 8am Jan. 23 in
room 510 Ak. Office Bldg.

present were Dot Truran
Lucille Oligney
? Liz McTeria
Debbie Bear
Dr Dave Spencer

decided to hold H Jud. hearings
M. Feb 11 3pm
W Feb 13 3pm
& Feb 13 7pm } checked with Charlie & called

Alaska State Legislature

REPRESENTATIVE
FRED F. ZHAROFF
P.O. BOX 405
KODIAK, ALASKA 99615
(907) 486-5254



WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA
99811
(907) 465-4926
465-4951

House of Representatives

February 11, 1980

M E M O R A N D U M

DISTRICT 14:

BELLSFLATS
CHINIAK
KODIAK
OUZINKIE

To: Representative Charlie Parr, Chairman
House Judiciary Committee

From: Representative Fred F. Zharoff

Re: SB 333 and HB 572

I have received telephone calls and letters asking that I support legislation pertaining to guardianship. I wish to inform you and the Judiciary Committee that I am receiving positive requests for support of SB 333 and HB 572. At this time I do not wish to testify on these bills. My main concern is that you be informed that my constituents appear to favor these two items of legislation.

Central Peninsula Mental Health Center

P. O. Box 247 • Kenai, Alaska 99611 • (907) 283-7501

February 26, 1980

Representative Charles Parr
Chairman
House Judiciary Committee
Pouch V
Juneau, Alaska 99811

Daer Representative Parr:

I am writing you in support of House Bill 572 and the identical bill, Senate Bill 339 as they are important improvements. Particularly important are the establishment of an office of public guardian and a due process protections for individuals who are thought to need a guardian. I urge passage of this bill.

Sincerely,

Paul Turner/ye

Paul E. Turner, Ph.D.
Clinical Psychologist
Director, Clinical Services

PET/yml

Copies made for packets on HB 572

X

2146 Belair Dr.
Anchorage, Ak. 99503

February 7, 1980

TO: HOUSE JUDICIARY COMMITTEE MEMBERS

RE: HOUSE BILL 572

Dear Representative,

I am writing to you in support of the passage of House Bill 572 which was introduced by Rep. Charles Parr and was referred to the House Judiciary Committee.

It is important that a judgment of "incapacity" be based on functional limitations for self-care rather than a categorical disability.

It is important that partial guardianship is established so that an individual's rights are limited only in areas of incapacity.

Due process protections for the person thought to be incapacitated need to be strengthened.

Pricrities of persons to be considered by the court for appointment as partial or full guardians should be spelled out.

An Office of Public Guardian should be established which will act as a resource to private guardians, help find friends and relatives of the incapacitated person who might serve as guardians, and serve as guardian if a private guardian cannot be found.

Please support this bill and try to see that it is passed this session.

Sincerely,

Betty Halsey

Betty S. Halsey
Chairperson, REACH (An organization for families of the mentally ill.)
Treasurer, Alaska Mental Health Association

JUNEAU Ass'n. FORGET ME NOT Retarded Children

J.A.R.C.

P.O. Box 1495
JUNEAU, ALASKA
99802

Juneau Association for Retarded Citizens

"Retarded Children CAN Be Helped"

February 14, 1980

To: House Judiciary Committee
Charles Parr
Nels Anderson
Fred Brown
Thelma Buchholdt
Hugh Malone
Ramona Barnes
Terry Martin
Patrick O'Connell
Randy Phillips

Re: House Bill 572

As President of the Juneau Association for Retarded Citizens, I wish to express my support (personally) and collectively for the parent group of mentally retarded adults and children in this community. We studied the bill at length and find it most considerate of the rights of the ward and are especially impressed with the timeliness for the expediency of process.

I did sit in on two of the hearing here in Juneau and was favorably impressed with the many areas of concern voiced by the committee. Your task as our representatives is indeed a responsible one - and I would like to say thank you for the many hours of service you render.

Sincerely,

Sister Patrick Mary

Sister Patrick Mary, President

3908 Lois Drive
Anchorage, AK 99503
February 1, 1980

The Honorable Charles Parr
House Judiciary Committee
Pouch V
Juneau, AK 99811

Dear Mr. Parr:

I'm writing this letter in regards to H.B. 572. As a concerned individual for the rights of the handicapped, I feel strongly that this bill should be passed this year by the legislature.

The bill speaks to issues which are crucial for handicapped individuals, and paramount to their basic constitutional rights as human beings.

I support a YES vote.

Sincerely,

Marilyn Stack

Marilyn Stack

5330 Tudortop Circle
Anchorage, AK 99507
February 1, 1980

The Honorable Charles Parr
Chairman, House Judiciary
Committee
Pouch V
Juneau, AK 99811

Dear Sir:

I am writing to encourage you to vote for House Bill Number 572 concerning Limited Guardianship.

Approval of this bill will indicate to the public a legislative awareness of the needs of all people in the State of Alaska.

Further, it provides individuals requiring limited guardianship an opportunity to exercise their legal rights in those areas in which they are competent.

Moreover, the passing of this bill will help keep Alaska parallel with the national trend of providing services to individuals in the "least restrictive environment."

Sincerely,

Gordon T. Ward

members packets
HB 572

TELEGRAM

ALASCOM, INC.
PHONE: 586-6442
JUNEAU, AK 99802

1980 FEB 12 PM 10 01

02015 NL ANCHORAGE ALASKA 50 02-12 215P AST

PMS REP CHARLES PARR

2036

JUNEAU

I SUPPPORT HOUSE BILL 572. THE BILL SHOULD PROVIDE NECESSARY ASSISTANCE TO HANDICAPPED INDIVIDUALS TO MAKE LIFE STYLE DECISIONS FOR HIMSELF. FURTHERMORE IT APPEARS TO PROVIDE AMPLE ASSURANCE THAT THE GUARDIANSHIP CONCEPT WILL NOT BE ABUSED IN A MANNER WHICH WOULD PROHIBIT AN INDIVIDUAL FROM PURSUING HIS NATUR AL RIGHTS

FRANCES MAIURI

ROY ANDERSON, COORDINATOR ALASKA RESOURCES FOR THE MODERATELY/SEVERELY IMPARED

Employment & Training Center of Alaska
2330 Nichols Street
Anchorage, Alaska 99504
February 8, 1980

SCRRC
Southcentral
Regional Resource
Center

An Educational
Service Agency

Monte K McBride, PhD.
Director

1111 E. Dowling Road
Anchorage, AK 99502
Phone: (907) 344-9646

Representative Charles Parr, Chairman
House Judiciary Committee
Pouch V
Juneau, Alaska 99811

Dear Chairman:

I am writing to express my support for House Bill 572, the guardianship legislation. I think it is an extremely important piece of legislation and endorse its passage.

I strongly endorse the following major aspects of the bill:

Partial guardianship, restricting the legal duties and powers of the guardian to court enumerated items.

The careful protection of the ward or respondents rights.

The creation of an office of public guardians to serve as a public guardian for individuals without a private guardian.

However, I feel that sections of the bill need clarification. For example, in Section 13.26.131 it is not clear who will ultimately bear the financial burden for the guardianship proceedings.

I also think Section 13.26.135, "Notices In Guardianship Proceedings," needs to include a specific time limitation for the filing of the notice for identification of potential guardians.

Overall, I support the bill as written and hope to see it passed in both the House and the Senate!

Sincerely,

Constance E. Rawlings

Constance E. Rawlings
Project Coordinator
Satellite Home Program

CER/sa

An Equal Opportunity Employer

Marilyn Houser
3207 Raspberry Rd. # 4
Anchorage, AK 99502
February 4, 1980

House Judiciary Committee
Charles Parr, Chair person
Pouch V
Juneau, AK 99811

Dear Mr. Parr,

As a concerned citizen and one who works on a daily basis with handicapped individuals, I support House Bill 572. Alaska is in need of amending its guardianship laws. Partial guardianship is necessary as some individuals need assistance in some areas but can function independently in others. The handicapped should not be denied their human rights either because no one wants to assume the responsibility for full guardianship when it is unnecessary or because someone looking out for a person's best interests has complete guardianship when he or she is perfectly capable of partially meet his or her own needs. Each case needs to be treated individually and Alaska needs to adopt the provisions to do so.

Sincerely,
Marilyn Houser

Please excuse the handwritten letter. My typewriter is not functioning properly.

February 6, 1980

X

Representative Charles Parr
House Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Ak 99811

Dear Representative Parr:

I am writing to request your serious consideration of Senate Bill 339/ House Bill 572, establishing Guardianship Procedures for developmentally disabled citizens. As a special education teacher and concerned citizen, I urge your support of this most important bill. Guardianship is a real issue for these people + their families; we need to ensure that all care is taken to provide for due process, partial guardianship and an office of Public Guardianship

Thank you for your time and attention to this matter.

Sincerely,
Mary Arosan

ALASKA STATE HOSPITAL ASSOCIATION INC.
5401 CORDOVA STREET
PHONE: 277-1633
ANCHORAGE, ALASKA 99503

February 12, 1980

Representative Charles Parr
Chairman, House Judiciary Committee
Room 124 - Capitol
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

re: Testimony for Committee Hearings/ teleconference 2/13/80.
HB 572 "An Act relating to guardians and conservators"

Dear Representative Parr:

We hereby submit written testimony to the joint judiciary committee hearings to be held in Juneau and via teleconference on February 13. Our membership is very aware of existing guardianship problems, and the need for legislation such as proposed in HB 572. We have carefully reviewed this bill and would like to recommend some language modifications. We believe that these modifications will improve the effectiveness of this piece of legislation.

The accompanying enclosure(Exhibit "A") is our marked up copy for your committees consideration. We have underlined the language changes recommended and bracketed the language being replaced. Most of the reasoning and back ground for these recommendations are adequately covered in Mr. Van Wagoner's analysis dated 12/17/79 (Attachment"B"). You will note that he is the Executive Director of Hope Cottages, a facility which deals with the guardianship issue on a frequent basis.

Thank you for the opportunity to comment, and if you have questions concerning any of our recommendations please make them known to me.

Sincerely,

Max F. Kersberger
Executive Director

Residential Educational Alternatives in the Community for the Handicapped
P.O. Box 1266 • Juneau, Alaska • 99802
Phone: (907) 586-2360

March 17, 1980

Representative Charles Parr
Room 124, Capitol Building
Juneau, Alaska 99801

Dear Representative Parr:

The Board of Directors, the staff and the clients of REACH, Inc. encourage your support of House Bill 572.

It is our feeling that this Bill will do much to rectify the inequities in the current laws, and will provide for a degree of guardianship that will allow individuals to actively participate to the best of their abilities in the conduct of their own lives. It is our feeling that this Bill will go far toward allowing handicapped individuals to lead more normal lives in Alaska by giving them an opportunity to be involved in the decisions that will affect their lives.

In addition, HB 572 seeks to protect the rights of individuals in the process of establishing guardianship. The addition of the public guardian will also provide for needed protection for handicapped individuals.

HB 572 deserves consideration as a much needed improvement in the present Alaska guardianship law, and we encourage your support for this measure.

Sincerely,

Dan R. Hutson

Dan Hutson
President, Board of Directors
REACH, Inc.

DH/lh

Sandra - are you working on this? Yes S.

~~Peggy:~~

Bob Gregovich, Program Administrator for Developmental Disabilities, called and asked me to give you the following information:

He met with Randy Phillips and Terry Martin and they raised the following questions for him to find answers:

Under the general powers and duties of the guardian: Subsection (e) which refers to the "guardian may not place a ward in an institution...", he was asked to give a better term for "mentally ill" and this won't be possible as the term is used throughout the statutes.

On page 26 of the original HB 572, under powers and duties of public guardian, "(4) to provide information of referrals.... proceedings", he said they (Phillips and Martin) had some concern about confidentiality. Gregovich said that the meaning is supposed to be general so they should therefore consider doing it this way: "provide information to the public regarding guardianship and conservatorship", striking the words "and referrals" and "proceedings".

* He does not have the answer for the section on allocation of costs on page 28 of the original bill. Either he or a Dorothy Truan will call back on this one.

Vi took message from BG. Mon. Mar 17

* Dot Truran called 3/18 - 5:30pm. She stated "paragraph C is merely a means of implementing paragraph B - para C could be deleted in its entirety with no major effect on the bill" (message taken by Sandra)

jackets in HB 572

X

2146 Belair Dr.
Anchorage, Ak. 99503

February 7, 1980

TO: HOUSE JUDICIARY COMMITTEE MEMBERS

RE: HOUSE BILL 572

Dear Representative,

I am writing to you in support of the passage of House Bill 572 which was introduced by Rep. Charles Parr and was referred to the House Judiciary Committee.

It is important that a judgment of "incapacity" be based on functional limitations for self-care rather than a categorical disability.

It is important that partial guardianship is established so that an individual's rights are limited only in areas of incapacity.

Due process protections for the person thought to be incapacitated need to be strengthened.

Priorities of persons to be considered by the court for appointment as partial or full guardians should be spelled out.

An Office of Public Guardian should be established which will act as a resource to private guardians, help find friends and relatives of the incapacitated person who might serve as guardians, and serve as guardian if a private guardian cannot be found.

Please support this bill and try to see that it is passed this session.

Sincerely,

Betty Halsey

Betty S. Halsey
Chairperson, REACH (An organization for families of the mentally ill.)
Treasurer, Alaska Mental Health Association

COMMENTS ON HOUSE BILL No. 572 AND THE SENATE COUNTERPART MEASURE
"AN ACT RELATING TO GUARDIANS AND CONSERVATORS..."

My name is John A. Sandor of 3311 Foster Avenue, Juneau, Alaska, 99802. I am offering comments on House Bill No. 572 and the Senate counterpart proposal "An Act Relating to Guardians and Conservators...". These written comments are offered for House and Senate consideration as I will not be in Juneau at the time of Committee hearings on these bills.

These observations are based on my own situation and experience in dealing with incapacitation of family members. An act of this type is definitely needed to deal with existing situations and the liklihood of the increasing number of partial incapacitation problems that can be expected as Alaska develops a larger population of the elderly who can be expected to suffer strokes and similar disabling afflictions.

As the father of a child born in Ketchikan, Alaska in 1957, who subsequently learned of the child's brain damage that is resulting in as yet an unclearly defined degree of incapacitation - the subject of House Bill 572 is of special interest. Although completing High School, this child - now an adult age 22- apparently sustained brain damage which limits some abilities, results in some incapacitation and makes the person more vulnerable to exploitation.

As the son of a parent who suffered a partially disabling stroke, I am also keenly aware of the special problems that can be associated with incapacitation from such afflictions.

I believe the bill under consideration by the House and Senate would clearly be of help in dealing with the situations I have noted. The provisions for partial guardianship would be helpful in assisting and protection such individuals and doing so - hopefully- without restricting the civil and legal rights of such persons. Because of the importance of assuring full protection of the civil and legal rights of these people, and to recognize different degrees of incapacitation, I suggest adding another definition "partially incapacitated person" meaning a person whose ability to receive and evaluate information or to communicate decisions is partially impaired for reasons other than minority to the extent that he or she lacks the ability to completely provide for the essential requirements without court-ordered assistance. An alternative to that suggestions is to modify the definition of an incapacitated person to one that lacks the ability to "fully or partially provide the essential requirements" etc.

The point being that in many of the situations we are dealing with, the individual needs partial assistance and protection without the assumption of total incapacitation as the present definition seems to imply.

I also favor strengthening and reinforcing the protection and legal rights of such persons. This can be done in several ways. For example in Sec. 13, 7 (e), I would add: A guardian may not (7) prevent the ward from voting in elections (8) prohibit the ward from acquiring property (9) restrict any civil or legal right as a citizen of the United States and Alaska witnout an expressed order of the court including the opportunity for nearest relative of the ward as well as the guardian to participate in such deliberations and decisions.

Again, I believe the bill under consideration will be helpful, and commend those who are attempting to alleviate existing guardianship-conservator problems. Thank you for the opportunity to comment.

John A. Sandor

JOHN A. SANDOR
February 10, 1980

Alaska State Legislature

REPRESENTATIVE
FRED F. ZHAROFF
P.O. Box 405
Kodiak, Alaska 99615
(907) 486-5254

WHILE IN JUNEAU
Pouch V
Juneau, Alaska
99811
(907) 465-4986
465-4951

House of Representatives

February 11, 1980

M E M O R A N D U M

DISTRICT 14:

GELLSFLATS
CHINIAK
KODIAK
OUZINKIE

To: Representative Charlie Parr, Chairman
House Judiciary Committee

From: Representative Fred F. Zharoff

Re: SB 333 and HB 572

I have received telephone calls and letters asking that I support legislation pertaining to guardianship. I wish to inform you and the Judiciary Committee that I am receiving positive requests for support of SB 333 and HB 572. At this time I do not wish to testify on these bills. My main concern is that you be informed that my constituents appear to favor these two items of legislation.

TELECONFERENCE HEARINGS

DATE 2/5/80

CONFIRMATION OF TELECONFERENCE

TO SANDRA STRINGER

FROM DEBORAH GAZAWAY

SCHEDULED DATE OF TELECONFERENCE 2/13/80

LOCATIONS JNO

(Site, Room, etc.) ANCH

FBX

TIME 3:30 PM

SUBJECT GUARDIANSHIP BILL - HB532

CHAIRMAN

NOTES

If any of the above information is incorrect or has changed since our last contact with you, please call the Juneau Teleconference Office ASAP.

Legislative Affairs Agency
Legislative Teleconferencing Network
State Capitol . Pouch Y . Juneau . 99811

Phone: 465-4980

STATE OF ALASKA
DEPT. OF HEALTH AND SOCIAL SERVICES
DIVISION OF PUBLIC HEALTH
SECTION OF FAMILY HEALTH

JAY S. HAMMOND, GOVERNOR

POUCH H 06B – JUNEAU 99811

January 15, 1980

Honorable Charles H. Parr
House of Representatives
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Mr. Parr:

This is a note to confirm our phone conversation regarding the next meeting of the legislative committee of the Governor's Council on Handicapped and Gifted. It will be held in Room 510 of the Alaska Office Building from 8 to 10 a.m. on Wednesday, January 23, 1980.

The prime topic of discussion will be guardianship legislation. Other items to be discussed will be bills that affect special education.

We are looking forward to your attendance as we hope to effectively organize support for this guardianship legislation.

Sincerely,

David A. Spence

David A. Spence, M.D., M.P.H.
Chief, Section of Family Health
(Chairman, Legislative Committee
Governor's Council)

Enclosure

TESTIMONY OF RICHARD VAN DUIZEND

on H.B. 572

FEBRUARY 13, 1980

Mr. Chairman, Members of the Committee:

I am honored to appear before you today as you discuss a topic of vital importance to an increasing number of people. So there is no misunderstanding, let me make clear, at the outset that I am here as an individual who has had the opportunity to investigate and study the subject of guardianship in depth over the past year and a half, but not as a spokesperson for either the American Bar Association or its Commission on the Mentally Disabled.

As the Committee is aware, guardianship is the legal procedure through which one person is authorized to make decisions on behalf of another. The usual analogy for the guardian-ward relationship is that of the loving-parent to a child. However, one of the problems that must be addressed in a guardianship bill is that not every proposed ward is or remains a child and not every petitioner or guardian is a loving parent. Thus, as well as assuring that guardianship services can be provided as quickly and smoothly as possible in emergency situations, a guardianship law must guard against having adults unnecessarily stripped of their rights by being reduced to the legal status of a child -- unable to choose where to live; unable to marry or dispose of property without permission; and subject to hospitalization without consent.

I believe that H.B. 572 when taken as a whole, goes a long way toward achieving that balance, and if enacted will help to alleviate the problems which have long troubled

the guardianship process. To illustrate this point, I will briefly highlight 5 problem areas and indicate how H.B. 572 addresses them. Following that, I would like to point out a few areas of ambiguity in the current bill and suggest possible changes which would enhance its clarity and further its stated purposes.

PROBLEM AREAS OF GUARDIANSHIP:

1. The first problem with most current guardianship legislation is that it fails to deal with disabled persons as individuals. Just as each member of the Committee has unique abilities, likes and dislikes, as well as characteristics which other members may share, so too, do persons with a developmental disability, age-related infirmity or mental illness have unique abilities and disabilities as well as a shared characteristics. Yet guardianship is treated as an all-or-nothing proposition without intermediate levels or alternatives. While Alaska's current law provides a range of services and alternatives short of conservatorship for persons unable to handle their financial affairs, it fails to recognize a similar series of gradations where health and safety rather than property is involved.

As Delaware's Manual for Guardians suggests:

> Guardianship should be a last resort, when all other means for dealing with a situation have been exhausted. Guardianship has serious legal and emotional consequences for the client, more so than any other service. It is an official

> recognition that the prospective ward is unable to manage for himself and must therefore have someone else direct his life. . . . 1/

Or, as another commentator has put it a bit more colorfully:

> "When the government. . . [has] a legitimate communal interest to serve by regulating human conduct it should use methods that curtail human freedom to no greater extent than is essential for securing that interest. When you swat a mosquito on a friend's back, you should not use a baseball bat."2/

H.B. 572 corrects this problem. First, proposed section 13.26.005(1) provides an objective functional definition. It focuses on the central question -- is the respondent able to do those things necessary to protect him or herself from serious physical injury or illness -- rather than raising subjective questions about what is a "reasonable" decision. Proposed section 13.26.108(b) prevents allegations of incapacity from becoming self-fulfilling prophecies. By requiring consideration and investigation of alternatives it will enable

---

1/ Delaware Court of Chancery, Manual for Guardians 48 (1975).

2/ Chambers, "The Principle of the Least Restrictive Alternative: The Constitutional Issues," in President's Committee on Mental Retardation, The Mentally Retarded and the Law, 48 (1976).

the court to use the criteria set forth in proposed section 13.26.113(d)-(f), not just recite them in its order. Finally, proposed sections 13.26.116 and 13.26.117 recognize that even if a guardianship is ordered, the services to be provided and the legal restrictions imposed on the ward's capacity should be tailored to meet the his or her needs and abilities. While these provisions should present no obstruction to establishment of a guardianship for a severely disabled person, they will provide significant protection against unwarranted interference into the lives of individuals, who, although suffering a partial impairment due to age, illness, or a developmental disability, are able to exercise some measure of self-reliance and independence when encouraged and allowed to do so.

2. The second problem area is the general unfamiliarity guardianship laws. Although forms of guardianship have existed in western civilizations for at least 2000 years, few people know what the duties and responsibilities of a guardian are. H.B. 572 addresses this area effectively as well. For respondents and wards, it presumes neither that they are incapable of understanding anything nor that they are able to intuitively grasp the subtleties of the proceeding. Instead, proposed sections 13.26.107, 13.26.111 and 13.26.113 provide that respondents are to have the purpose, nature and consequences of the proceeding and their rights explained to them in the manner which they are most likely to understand.

Admittedly, in some cases the attempts at explanation will be futile. But I submit that in many cases, respondents will be able to grasp what is going on if the information is properly presented, and to contribute to the factfinding, dispositional, and habilitative process. Moreover, these explanations are an elementary courtesy. They represent a way of treating disabled persons with the dignity with which we expect to be treated.

For visitors, attorneys, guardians ad litem, and potential and actual guardians, proposed sections 13.26.108 - 112, 13.26.116, and 13.26.150 describe what is expected of them, far more explicitly than the current law both here in Alaska and elsewhere. This is particularly important for newly appointed guardians who, as I mentioned a moment ago, are often bewildered by their new role. Of equal significance is the delineation of the powers which a guardian does not have. Probably the greatest abuse to which guardianship has been subject, is its use as a means for circumventing the protections which have been imposed on civil commitment. Recent cases in Kansas, Arkansas and the District of Columbia have brought to light instances in which elderly or partially disabled persons have been institutionalized against their wills by a guardian who in some cases was appointed on an emergency basis without a hearing, or notice and counsel

for the ward.[3/]

For the court, the bill makes clear the information to be presented, (proposed sections 13.26.105 and 13.26.108) and provides some guidance in making the difficult judgments inherent in any proceeding involving the possible imposition of restraints on a person's liberty and determinations regarding capacity. (Proposed section 13.26.113.)

3. The third problem area in many guardianship laws is the absense of means for preventing and correcting errors and for recognizing changes in the condition and abilities of the ward, short of regaining full capacity. The provisions of H.B. 572 which attend to these problems include proposed sections 13.26.106 and 13.26.111 regarding the right to, the appointment of, and the duties of counsel; proposed section 13.26.118 on reporting and review; and the proposed amendments to section 13.26.125 which permit modification in the terms of a guardianship or dispositional order. While these rights and procedures are not as extensive as those in some existing statutes and models, they do permit oversight and flexibility without placing an undue strain on guardianship or the courts.

3/ Powell vs. Harder, (U.S.D.C. Kan.) 3 Mental Disability Law Reporter 104 (1979); Von Luce vs. Rankin, 588 S.W. 2d 445 (Ark. 1979); Justice vs. Superior Court, (U.S.D.C. for Dist. of Col.; now filed in D.C. Super. Ct.) 3 Mental Disability Law Reporter 244 (1979).

4. The fourth problem area has been the procedures applicable in emergency situations resulting from the death of a disabled person's parent or a sudden incapacitating illness. The vagueness or absence of procedures for temporary guardianship, have, on the one hand, created uncertainty on the part of persons trying to help regarding what they can and should do, and sometimes caused life-threatening delays. On the other hand, this ambiguity has also led, as noted above, to the imposition of guardianship for extended periods and institutionalization without an opportunity for the respondent to object. Again H.B. 572 takes a balanced approach Proposed sections 13.26.140 and 13.26.141 outline clearly the procedures to be followed; provide for a prompt hearing to determine what if any emergency powers are needed; set a specific time limit with an exception I will discuss later; and permit consent to emergency life-saving services without delay.

5. The final problem area is the provision of guardianship services to persons who are unable to pay for them or who have no one able and willing to exercize substitute judgment. While the need for some form of public guardianship is apparent, the way to best provide those services is less obvious. The fiscal costs of creating another large social service bureaucracy are great. The human costs can also be high when the public guardian is not independent of other service-providing agencies, particularly those operating institutional facilities, or when caseloads are so great as to prevent truly individualized attention. H.B. 572 proposes

a unique and promising approach to this problem by situating public guardianship responsibilities in the public administrator for each judical district. This assures the independence of the public guardian office and avoids creation of a new bureaucratic entity. (Proposed sections 13.26.145(d) and 13.26.370). The emphasis on use of the Public Guardian as a last resort and on a continuing search for private alternatives, as well as the provision permitting use of volunteers, will help to reduce both the size and impersonalness of the public guardian office. [(Proposed sections 13.26.370(b), and 13.26.380(b) and (d)]. Moreover, the specific direction to provide training, orientation and continuing assistance to private guardians may ultimately prove to be the most significant measure for improving the guardianship services provided in this bill.

However, with some relatively minor changes both the public and private guardianship portions of the bill could I believe, be clarified, be implemented more easily, and provide greater assurance that the intent of the legislature will be carried out. In the few minutes remaining, I would like to briefly describe three sets of substantive suggestions and mention a handful of small, easily corrected technical problems in the bill.

SUGGESTED CHANGES:

1. Let me begin with the suggestions concerning public guardianship. A recent small field study of the judically operated Public Guardian Office in Delaware revealed that once the Office is appointed, it has had little luck in

finding a private alternative, but that the Delaware Public Guardian has had substantial success in finding individuals willing to serve as guardians prior to appointment.[4/]

Accordingly, I suggest that in addition to the duty to find a private guardian or conservator following appointment established in proposed section 13.26.380(b), the public guardian should be required to seek out a private alternative whenever the public guardian is nominated for appointment in the report of a visitor pursuant to proposed section 13.26.108 or a petition filed under section 13.26.180. This could be accomplished by amending proposed section 13.26.380 to read:

> (b) The public guardian, when NOMINATED OR appointed as guardian or conservator, shall endeavor, for as long as practical, to find a suitable private guardian or conservator for his ward or protected person. [For each ward and protected person] FOLLOWING APPOINTMENT, the public guardian shall. . .;

by amending proposed section 13.26.108(a) to read:

4/ Axilbund, Substituted Judgment for the Disabled: Report of an Inquiry into Limited Guardianship, Public Guardianship and Adult Protective Services in Six States 71 (1979).

(a) The visitor shall file with the court his evaluation report, proof of service of the petition upon the respondent and proof of service of his report upon the respondent, his attorney, [and] the petitioner, AND IF NOMINATED FOR APPOINTMENT, THE PUBLIC GUARDIAN, within. . .;

and by amending section 13.26.185(b) to read

. . .to interested persons, THE PUBLIC GUARDIAN IF NOMINATED FOR APPOINTMENT, and other persons as the court may direct.

The second suggestion with regard to public guardianship is intended to provide for greater consistency and accountability in the performance of public guardians throughout the state. As now formulated, the act would permit vast differences in caseloads and the degree to which public guardians assist private guardians and the public, allow their wards to remain at home or in community settings, and monitor the services being provided to their wards. While the legislature could provide the required oversight, guardianship is but one of hundreds of issues which compete for this Committee's attention and time. Therefore, I suggest establishing a Public Guardianship Policy Board appointed by the Chief Justice of the Alaska Supreme Court to establish an operational framework within which local offices can function and adapt to community conditions; monitor the appointment process to assure that the public guardian is appointed only when private alternatives are inappropriate

or unavailable; assist in developing training materials and public information packages; and help to identify public guardians who because of lack of resources or other reasons, fail to meet their responsibilities. If the Board would be too cumbersome a mechanism, perhaps some existing entity within the judicial branch could undertake this critical function.

2.The second set of substantive suggestions have to do with the use of varying standards and requirements in the bill which cloud its meaning and may lead to implementation problems. Specifically, proposed sections 13.26.005(1) and (5) define an incapacited person as:

> (1) "incapacitated person" means a person whose ability to receive and evaluate information or to communicate decisions is impaired for reasons other than minority to the extent that he lacks the ability to provide for himself the essential requirements for his physical health or safety without court-ordered assistance;
>
> (5) "essential requirements for physical health or safety" means the health care, food, shelter, clothing, personal hygiene and protection without which serious physical injury or illness is more likely than not to occur.

Yet, differing, non-synonymous terms are used throughout the remainder of the bill. For example, proposed section 13.26.108(c)(8) talks of "the respondent's needs." The following

paragraph and proposed section 13.26.108(d)(2) use the phrase "to protect the respondent from serious illness, injury or disease." Proposed sections 13.26.113(c)-(f) employ the phrase "needs of the respondent." See also proposed sections 13.26.116(c); 13.26.117, 13.26.125(c) and (e) and 13.26.150(c)(3).

Another though less frequent problem occurs in provisions describing how information must be explained to a respondent [language and system of communication" in proposed section 13.26.107 and "terms" in proposed section 13.26.111(2) -- I recommend using "language, terms, and system of communication in both sections]; and in the denomination of the responsibilities of a guardian ["authority" in proposed section 13.26.116 and "duties and powers" in proposed section 13.26.150 -- the latter term appears to be more descriptive]. These inconsistencies are easily corrected and would substantially simplify interpretation of the act.

3. The final major substantive question concerns the appointment of the visitor. Proposed section 13.26.005(8) prohibits individuals with a personal interest in the proceedings from serving as a visitor. However, it is not clear that this would exclude, for example, an official of the state hospital or a private residential facility or an employee of the public guardian, from acting in this capacity. Given the power of the visitor to hospitalize proposed wards under proposed section 13.26.106(e) and to recommend the disposition under proposed section 13.26.108, the conflict of interest provisions governing the selection of visitors should be

strengthened. This can be accomplished by amending proposed section 13.26.005(8) as follows:

> (8) "visitor" means a person trained or experienced in law, medical care, mental health care, education, rehabilitation, or social work who is an officer, employee, or special appointee of the court, [with] AND WHO HAS no personal interest in the proceedings; IS NOT A CREDITOR OF THE RESPONDENT; DOES NOT AND IS UNLIKELY TO PROVIDE SUBSTANTIAL SERVICES TO THE RESPONDENT IN A PROFESSIONAL OR BUSINESS CAPACITY; DOES NOT HAVE OTHER INTERESTS WHICH MAY CONFLICT WITH THOSE OF THE RESPONDENT; AND IS NOT EMPLOYED BY AN AGENCY OR PERSON WHO WOULD BE DISQUALIFIED UNDER THE ABOVE CRITERIA.

This would conform the conflict of interest criteria for visitors to those for guardians under proposed section 13.26.145(b) and provide a significant safeguard against abuse.

The remaining points are limited to smaller changes to single sections. Currently, the bill does not absolve guardians of adults from having to support their wards from their own pockets. Unless remedied, this oversight would discourage persons not related to the ward from volunteering to serve as a guardian. Accordingly, the following should be added at the end of the first sentence to proposed section 13.26.150(c):

> . . .relationship[.], NOR REQUIRED TO PROVIDE FOR THE WARD FROM THE GUARDIAN'S OWN FUNDS.

Next, proposed section 13.26.140 provides for a time limit on emergency appointments when a guardianship petition is pending but places no time limit on court-ordered emergency life-saving services when no petition has been filed. [Paragraphs (e) and (f)]. This can be remedied by amending proposed section 13.26.140 to read:

> (f) If no guardianship petition is pending but the court is informed of a person who is apparently incapacitated and in need of emergency life-saving services, the court may authorize the services upon determining that delay until a guardianship hearing can be held would entail a life-threatening risk to the person[.], AND REQUEST THE PUBLIC GUARDIAN TO FILE A PETITION UNDER A.S. 13.26.105 AND A.S. 13.26.140(b) WITHIN 7 DAYS. THE AUTHORIZATION SHALL EXPIRE AFTER 10 DAYS OR UPON THE APPOINTMENT OF A TEMPORARY GUARDIAN.

Also the reference in proposed section 13.26.140(b) to proposed section 13.26.113(b) should be to proposed section 13.26.113(a).

Finally, proposed section 13.26.131 is printed out of sequence between proposed sections 13.26.118 and 13.26.120.

Thank you again for permitting me to appear before you today. As I indicated earlier, H.B. 572 is an important bill which, if enacted and coupled with the provision of necessary habilitative, rehabilitative, and care services, will do much to improve the health, welfare and dignity of Alaskans with mental disabilities and the peace of mind of their loved ones. If there are any questions, I shall be happy to answer them as best I can.

COMMISSION ON THE MENTALLY DISABLED

AMERICAN BAR ASSOCIATION

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November 28, 1979

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Dorothy Truran
Health Planner
Governor's Council for the
Handicapped and Gifted
600 University Avenue
Suite C
Fairbanks, Alaska 99701

Dear Dot:

It was good to talk with you again.

Enclosed is the brochure of the Practising Law Institute training session on the legal rights of mentally disabled persons, and the two copies of the guardianship and conservatorship report which you requested in your November 19 letter. Also enclosed is a marked-up copy of the 4th draft of the proposed guardianship bill. The comments and suggestions in the margin and on the face of the draft are intended to enhance the bill's consistency, clarity and effectiveness.

As I indicated during our telephone conversation, I would be happy to testify on behalf of the bill or assist in any way I can. I am sure you realize, any testimony I would give would be as an individual and not as a representative of the American Bar Association or the Commission on the Mentally Disabled.

My reservations concerning the bill are quite few. The first concern is the use of "visitors." Proposed section 13.26.005(8) prohibits individuals with a personal interest in the proceedings from serving as a visitor. However, it is not clear that this would exclude, for example, an official of the state hospital or a private residential facility or an employee of the public guardian, from acting in this capacity. I realize the approach taken in the model act may not be feasible for Alaska. However, given the power of the visitor to hospitalize proposed wards under proposed section 13.26.106(e), and to recommend the disposition under proposed section 13.26.109, the conflict of interest provisions governing the selection of visitors should be strengthened. (see e.g., §13(1) of the model act.)

Second, the 90 day/120 day time limits appear longer than necessary to perform the evaluation and hold the hearing. A 30 day/45 day limit or at most a 45 day/75 day limit should be sufficient to accomplish the required tests. The continuance provisions would take care of the exceptional cases.

Third, without the right to services language formerly included in proposed section 13.26.160, there is a danger that guardianship will be found necessary under proposed section 13.26.113 due to the poor quality of or non-availability of basic services rather than due to the disability of the proposed ward. There seem to me two ways for reducing this danger. The first would be to restyle the criteria to resemble more closely those in section 12(3) of the model act. The other would be to provide for a right to services together with a monitoring or enforcement mechanism. Obviously, these options are not mutually exclusive.

Fourth, I was surprised by the deletion from proposed section 13.26.195, of the provisions requiring the same procedural protections in conservatorship proceedings as in guardianship proceedings.

Finally, I am troubled by the provisions on public guardianship. From a purely technical standpoint, there need to be provisions governing the selection, qualifications, and salary of the public guardian, permitting staff to be hired, and authorizing appropriations. Substantively, a major problem with public guardianship is the potential for its impersonalness. The human bond is often, though by no means always, a safeguard against abuse. Hence, maintaining a small caseload is critical. The proposed draft seeks to assure this in two ways: proposed section 13.26.520 requires the public guardian, following appointment, to endeavor to find a suitable private guardian or conservator, and proposed section 13.26.510 creates an independent public guardian officer in each judicial district rather than a large statewide system. A recently concluded American Bar Association study of public guardianship, limited guardianship, and protective services in 6 states examined the judically-based public guardian office in Delaware. (I'll send you a copy of the executive summary as soon as it arrives from the printer.) The Delaware Public Guardian is empowered to identify and propose alternative nominees as well as alternatives to guardianship prior to appointment. In this way, he has been quite successful in keeping his caseload in balance with his limited resources. Alternatives have been found in the vast majority of cases prior to appointment but in very few after appointment. Accordingly, I suggest that in line with proposed section 13.26.145(d), the public guardian office should be required to seek a private alternative whenever it is proposed for appointment in the visitor's report or by the parties.

With regard to the second means for reducing caseload, the inherent drawback of a locally-based system is the potential for substantial variation in the quality and thrust of the guardianship services. The draft provides no oversight mechanism to assure some uniformity in the basic approach and decision-making criteria. While this could be accomplished through legislative oversight hearings, given the workload and range of concerns of the legislature, a more certain approach may be an executive board of some type. Since the office is in the judicial branch, the board would probably have to be appointed by the chief justice, though provision could be made to assure that it includes advocates and consumer representatives. The board's function would be: to provide a general operational framework within which local offices could function and adapt to local conditions; to investigate possible abuses and major service system inadequacies affecting guardianships; and to assist in recruiting private guardians and conservators. It could also help to monitor the conduct of visitors, and the use and effect of the decision-making criteria noted earlier. In this way, many of the dangers which the model act's proposal on public guardian seeks to avoid would be addressed.

You asked about other individuals who might be willing to testify on behalf of the bill. One such person is Russell Webb, the managing attorney of the Idaho Legal Aid office in Idaho Falls. Russ, formerly director of the Commission on the Mentally Disabled, is very familiar with the concepts of limited and public guardianship, and is currently handling mental disability cases in a state with low population density which has adopted both the Uniform Probate Code and a limited guardianship provision. I have mentioned the proposed bill to him. If you wish to send him a copy of the draft bill, his address is:

Russell E. Webb
Managing Attorney
Idaho Legal Aid Services, Inc.
P. O. Box 1136
Idaho Falls, Idaho 83401

I hope these comments are useful. Please let me know if you have any questions, or if I can be of further assistance.

Sincerely,

Richard Van Duizend
Associate Director
Developmental Disabilities
Legislative Project

RVD/ml

Enclosures

DRAFT

POSITION PAPER
GUARDIANSHIP

GOVERNOR'S COUNCIL FOR THE HANDICAPPED AND GIFTED
January 1980

1. BACKGROUND

"Guardianship is a legal relationship which authorizes one individual to become a substitute decision-maker for another. Its most common form is the "natural guardianship" relationship between parents and their minor children. A guardianship is established by court order when because of age, illness, or disability, a person is determined to be incapable of managing some or all of his or her personal and/or financial affairs. A guardian may be given partial or total authority to determine whether the disabled person will live in the community or an institution, and what type of medical, mental health and other services the disabled person will receive (personal guardianship), and/or partial or total power to manage and control that person's property and income (conservatorship). Correspondingly, the individuals for whom a guardianship has been established may lose the right to decide whether to remain in their own home, to make contracts for goods and services, to go to court to enforce their rights, to hold or convey property, and in some instance to marry, to have children, to vote and to make a will.

The criteria for establishing a guardianship are often broad and vague, permitting the imposition of restrictions on persons who are "different" as well as on those who are disabled. Current procedures often omit the safeguards we have come to expect when restrictions on liberty are imposed or fundamental rights threatened in other contexts. And perhaps most importantly, even today in many jurisdictions, guardianship orders and guardians have failed to recognize that individuals with disabilities are often capable of doing many things for themselves.

> [A]...serious difficulty arises because the law usually represents incompetence in simple black and white terms, with the result that most guardianships of the person are looked on as plenary guardianships. The person declared incompetent is deprived of the legal capacity to act in any way on his own behalf. Even though he [or she] may have a guardian appointed to exercise some of his [or her] rights, the emphasis usually is on the deprivation of rights rather than on implementing rights constructively through informed representation. Moreover, the idea that the person himself [or herself] can properly retain and exercise some personal and even property rights, selectively, according to his [or her] individual capacity, is not adequately expressed in most existing statutes pertaining to guardianship.

Over the past two decades, a growing list of organizations and governmental commissions which have examined guardianship have called for correction of these problems. For example, in 1962, the President's Panel on Mental Retardation stated:

> For some, of course, a comprehensive guardianship will be needed. But we urge that, as far as possible, mentally retarded adults be allowed freedom--even freedom to make their

mistakes. We suggest the development of limited guardianships of the adult person, with the scope of the guardianship specified in the judicial order.

The 1969 Report of the International League of Societies for the Mentally Handicapped recommended:

> The retarded adult should be permitted to act for himself [or herself] in those matters which he [or she] has competence. The limitations of legal capacity inherent in guardianship should not extend to these matters. It follows that a person whose mental retardation is characterized by impairments of social competence which are partial should enjoy a partial guardianship specifically adapted to his [or her] strengths and weaknesses.

The 1975 edition of the Uniform Probate Code makes a clear distinction between guardianship of the person and conservatorship of the estate, and establishes a number of less restrictive alternatives for the protection of the property of a disabled individual (though not the person). It also provides for the execution of durable powers of attorney as a means of obviating the need for a guardianship or conservatorship. Finally, the 1976 Report of the President's Committee on Mental Retardation, urged that:

> Statutes and court procedures bearing on competency should be clarified and revised (a) to recognize gradations of competence, (b) to recognize that areas of competency may be quite varied and therefore should be separable in law, (c) to assure full and explicit due process safeguards on any and all areas of competency, and that the scope of any judgment of incompetence is made fully explicit, and (d) to ensure that restrictions of competency be limited to a specific period of time or subject to periodic review."

(Excerpts from Guardianship & Conservatorship; statutory survey and model statute". American Bar Association, 1979.)

Existing state law does not provide for partial guardianship, does not provide sufficient due process protections, and does not tie appointment of a guardian or provision of guardianship services to the specific needs of the incapacitated person, nor does it provide for persons for whom no private guardian can be obtained.

Legislation is needed to correct these problems. It should require a determination of incapacity to be based on the individual's ability to provide for his [her] physical health and safety without focussing on the medical diagnosis of the disability. It should provide for partial guardianship for those individuals who can meet some but not all of their own needs. Due process protections should be strengthened and ensure that the only legal rights a ward loses when a guardian is ordered are those specifically included in the court's guardianship order. A guardianship plan should be required which will make clear what the guardian's responsibilities and authorities are and thus provide clear direction for the guardian and help the court monitor the guardianship order. By prioritizing who can be a guardian guidance can be given to those seeking guardians to help ensure that appropriate individuals are routinely contacted to be guardians.

Guardianship and conservatorship are closely tied and provisions need to be made to make conservatorship procedures consistent with guardianship procedures. The special conservator's role should be expanded to make it equivalent to that of a limited guardian.

An office of public guardian is needed. This is extremely important to ensure that individuals not be denied guardians or guardianship services simply because private guardians cannot be found. Guardianship petitions have not been filed for many individuals because there is no agency charged to actively seek out private guardians. In addition to serving as a public guardian, this office should be given the responsibility to seek private guardians. The public guardian should be required to seek other guardians before the court appoints it to be the guardian. This would also ensure that an office of public guardian would not have a burgeoning caseload. Recent experience in the state of Delaware, where such a provision is included in state statute has shown that the public guardian is able to locate private guardians thus reducing the public guardian's caseload and reducing court work which would be required to change guardians.

The public guardian should act as a special resource to the court, social service agencies, the Attorney's General office and to private guardians in guardianship matters. If these guardianship support services are not included in the public guardian's duties, the current problems will continue with the result that the public guardian will be required to serve as the guardian for significantly more individuals than would otherwise be necessary. The current problems are failure to process cases, slow processing of cases, reluctance of individuals to serve as guardians because they are unsure of their duties, unfamiliar with preparing reports, and because they feel they have no readily available agency specializing in guardianship to advise them.

If an office of public guardian as described above is created, the number of persons who will be willing to act as private guardians is expected to increase since the public guardian will continually be searching for private persons to serve as guardians and will provide advice and assistance to lighten the burden anyone serving as a guardian may feel.

The placement of the public guardian office within the state government has been a subject of much discussion. As a result of meetings in October 1978 and a review of the efforts of the Attorney General in this area in regards to HB 63 of the Tenth Legislature, two possible locations were proposed: the Office of the Governor or the Court System in connection with the Public Administrator Office. These options were chosen because no other bodies of state government seemed appropriate. HB 63's amendment placed the office in the Department of Health and Social Services. The possible conflicts of interest that could arise resulting from the department being often the main provider of care to incapacitated persons requires that it be placed elsewhere.

The best option in many ways seems to be that the office be combined with that of the public administrator. The public administrator acts both as coroner and administrator of the estates of deceased persons. It is an appointive position for each judicial district, "when authorized by the

Supreme Court". AS 22.15.310. The administration of estates is already an area of expertise required by a public administrator and would suggest that the public administrator is the appropriate person to act as a public conservator. Further, at present, the public administrator is already acting as an ad hoc public guardian for several clients at Harborview and individuals at other nursing care facilities. Given this ad hoc procedure, the public guardian office would legitimize this role and provide for a budget that allows the public guardian to truly provide adequate guardianship services.

2. NEED

The number of individuals expected to require guardianship services equals half the total number of persons in nursing homes and other residential care or treatment facilities. In addition to those who would be served under existing law, it is estimated that there are 95 individuals for whom active assistance is needed to locate private guardians. Approximately 115 individuals are expected to need a public guardian.

The current backlog of guardianship cases totals about 105.

Therefore, the public guardian will need to have sufficient resources to service the pending or unprocessed cases in the first two years. The continuing average annual caseload is estimated to be:

100	public guardian
150	guardianship resource services
75	location of private guardians

See attached information on need gathered from a Council survey of agencies in 1979.

3. FUNDING

Based on court and associated costs and the time currently required for agencies to provide guardianship services, the annual cost of the bill is approximately $250,000. (See attached fiscal impact information.)

4. CONCLUSIONS

Because of the factors discussed above, the Governor's Council for the Handicapped and Gifted has reached the following conclusions:

1) The existing guardianship statute should be changed to

   a) base guardianship on individual's functional limitations rather than on medical diagnosis or existence of a disability such as mental retardation or other handicapping condition;

   b) provide due process protections to individuals who are thought to be incapacitated;

c) provide for partial or limited guardianship as well as full or plenary guardianship so that an individual's rights are modified only in those areas of incapacity;

d) strengthen court procedures and provide for a guardianship order and plan which specifically enumerates the responsibilities and powers of the guardian;

e) provide for an office of public guardian to serve as public guardian and to be a primary resource for locating private guardians and assisting private guardians in the performance of their duties. Care must be taken to ensure any proposed statutory change provides priorities for persons who should be contacted to be private guardians and provides for the resource functions of an office of public guardian to prevent it from becoming a handy "dumping ground" for those cases in which private guardians do not immediately appear to be available.

2) The office of public guardian should be administratively located with the public administrator since the functions and expertise of the public administrator are similar to those required of a public guardian. This would also ensure that there would be no possibility of conflict of interest which could arise if a social service agency providing care to an incapacitated person were acting as the person's guardian.

3) Funding is required at a minimum of $200,000 to provide necessary resources for the effective functioning of an office of public guardian. Additional funds may be required for the first and second years of operation to enable the public guardian to serve cases which have been backlogged over the last three years.

5. RECOMMENDATION

The proposed bill includes the provisions cited above and is recommended for passage by the Governor's Council for the Handicapped and Gifted.

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A

CURRENT STATUS OF GUARDIANSHIPS

Facility	# Patients	# with Guardians	# with Private Guardians	# with Public or Disint. Guardians
Southcentral Region				
Harborview	90	37	26	11
Hope Cottages	126	3	1	2
Valley	6	2	2	0
Wesleyan	61	2	0	2
Glenmore	158	16	4	12
Careage House	43	1	0	1
Northern Region				
Careage North	73	8	6	2
Hope Center	25	6	5	1
Southeast Region				
Island View Manor	43	43	43	0
Wrangell General (long-term care)	14	4	0	4
Gateway	5	1	1	0
St. Ann's	21	2	1	1
TOTALS	665	125	89	36
Percent of Total Facility Population		19%	13%	5%

B

CURRENT NEED FOR GUARDIANS

Facility	# without Guardian	# which do not need Guardian	# needing Guardian	# needing Private Guardian	# needing Public Guardian
Southcentral Region					
Harborview	53	38	15	11	4
Hope Cottages	123	111	12	6	6
Valley	4	3	1	0	1
Wesleyan	59	3	56	35	21
Glenmore	142	81	61	3	58
Careage House	42	37	5	4	1
Northern Region					
Careage North	65	38	27	21	6
Hope Center	19	4	15	12	3
Southeast Region					
Island View Manor	0	0	0	0	0
Wrangell General (long-term care)	10	3	7	2	5
Gateway	4	0	4	1	3
St. Ann's	19	12	7	0	7
TOTALS	540	330	210	95	115
Percent of Total Facility Population	81%	50%	32%	14%	17%

C

TOTAL UTILIZATION OF GUARDIANS

Facility	Total # of Guardians who could be in use now	# Private Guardians	# Public Guardians
Southcentral Region			
Harborview	52	37	15
Hope Cottages	15	7	8
Valley	3	2	1
Wesleyan	58	35	23
Glenmore	77	7	70
Careage House	6	4	2
Northern Region			
Careage North	35	27	8
Hope Center	21	17	4
Southeast Region			
Island View Manor	43	43	0
Wrangell General (long-term care)	11	2	9
Gateway	5	2	3
St. Anu's	9	1	8
TOTALS	335	184	151
Percent of Total Facility Population	50%	28%	23%

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PROJECTED NEED FOR GUARDIANSHIPS

Facility	Admissions (Approx. per yr.)	# needing Guardian	# needing Private Guardian	# needing Public Guardian
Southcentral Region				
Harborview	7	4	3	1
Hope Cottages	32	4	2	2
Valley	8	5	4	1
Wesleyan	38	36	22	14
Glenmore	36	17	1	16
Careage House	36	3	2	1
Northern Region				
Careage North	236	40	30	10
Hope Center	4	3	3	0
Southeast Region				
Island View Manor	17	17	17	0
Wrangell General (long-term care)	4	4	1	3
Gateway	0	0	0	0
St. Ann's	45	19	2	17
TOTALS	463	152	87	65
Percent of Total Admissions		33%	19%	14%

FISCAL IMPACT GUARDIANSHIP

As the present caseload in the courts for all guardianship cases is averaging 45-50 cases per month statewide, it is reasonable to assume the current backlog would more likely be dealt with over a two year period.

The budgeting alternative would be to provide funding as follows:

	FY 80 A	FY 80 B	FY 81 (2)
Personal Services	$ 54,218	$ 54,218	$ 58,013(1)
Travel	24,300	24,300	26,730
Contractual Services	151,055	85,430	136,961(3)
Commodoties	1,200	1,200	1,320
Equipment	2,439	2,439	
Total	$233,212	$167,587	$223,024

Funding would be general funds allocated to the Court System.

(1) FY 81 increase assumes maximum 7% increase in keeping with the President's guidelines.

(2) Basic inflation 10% all other costs.

(3) Assumes 170 cases (50% current backlog plus 65 projected additional).

While it is not feasible to identify specific amounts of federal funds which could be utilized to defray state costs, it is reasonable to assume certain programs would be appropriately billed for such costs, i.e.

Office of Ageing - under requirements for advocacy and legal services to those over 60.

Social Services - under protective care.

Other social services programs.

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

CONTRACTUAL SERVICES: continued

Physciatric or other evaluative testing is arbitrarily estimated at 2% of the total caseload. Current costs vary from $180-$390 per case.

$ 1,260

$151,055

COMMODITIES $ 1,200

EQUIPMENT $ 2,450

Desk, Executive	$ 280.96
Desk, Secy	345.16
Bookcase 3 shelf	81.85
Legal files (2 4 dwr)	349.54
Chair, Exec	141.91
Chair, Secy	92.72
Calculator	218.47
Transcriber	464.86
Dictating unit	464.86
	$2,439.45

TOTAL PROJECTED FY 89 BUDGET REQUEST $233,212

FISCAL IMPACT-GUARDIANSHIP

PERSONAL SERVICES — $54,218

Admin Officer II (Rg 19) $1265/mo	$26,916
Legal Secretary I (Rg 10) $1194/mo	14,328
	41,244
FICA-.0613% x $37,228	2,282
PERS- 17.70%	7,300
Health Ins- 24 mm x $141.32	3,392
	$54,218

TRAVEL — $24,300

Quarterly visits to wards and visitor inquiries estimated at 5 trips per month- 60 annually

Transportation- $225/trip	$13,500
Per Diem $60/day x 3 days/trip	10,800
	$24,300

Assumptions made:

(1) Quarterly visitation requirement would be delegated to Public Administrator at judicial district level.

(2) Length of trip provides concurrent visitation with several wards.

(3) No distinction is made in cost for visitor requirements as it is presumed quarterly visitation to wards could not be fully complied with in initial year.

CONTRACTUAL SERVICES — $152,055

Basic telephone & long distance $600/month	$ 7,200
Postage- Routine correspondence $300/month	540
Certified estimated 15/mo @ $1.25	225
Copy machine-USAGE ONLY 10,000 copies @ $.25	2,500
Printing- Lettersets, envelopes	1,200
Forms requirements	2,500
Typewriter rental $365/mo	4,380
	$18,545

Professional fees & services- 219 current backlog of cases

Court system estimates on 188 cases in first 4 months of FY 79 reflects average cost of $525 per case. This provided approximately 14 hours attorney time and 2 hours of hearing time before a Standing Master

$110,250

Expert testimony- Rules of Court specifications $50/hr
Assumption: 2 hours per case. $ 21,000

=5 [illegible] option [illegible]

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

COURT INFORMATION ON GUARDIANSHIPS

District	1976*		1977*		1978**	
	Guardianships	Protective Proceedings	Guardianships	Protective Proceedings	Guardianships	Protective Proceedings
#1 (Juneau, Ketchikan, Sitka)	7	7	11	14	7	6
#2 (Nome)	1	2	1	1	1	2
#3 (Kodiak, Anchorage, Kenai)	10	100	5	88	2	83
#4 (Fairbanks, Barrow, Bethel)	0	16	2	23	0	15
TOTALS	18	125	19	126	10	106

* Calendar year
** First nine months

As redesignated (see the "Redesignation and Derivation Tables," beginning on page 8365), 43 F. R. 45175 (Sept. 29, 1978, effective Oct. 1, 1978).

[¶ 21,712]

§ 442.401 Definitions.

As used in this subpart:

"Ambulatory" means able to walk without assistance.

"Living unit" means a resident living unit that includes sleeping areas and may include dining and activity areas.

"Mobile nonambulatory" means unable to walk without assistance, but able to move from place to place with the use of a device such as a walker, crutches, a wheel chair, or a wheeled platform.

"Nonambulatory" means unable to walk without assistance.

"Nonmobile" means unable to move from place to place.

"Qualified mental retardation professional" means a person who has specialized training or 1 year of experience in treating or working with the mentally retarded and is one of the following:

(1) A psychologist with a master's degree from an accredited program.

(2) A licensed doctor of medicine or osteopathy.

(3) An educator with a degree in education from an accredited program.

(4) A social worker with a bachelor's degree in—

(i) Social work from an accredited program; or

(ii) A field other than social work and at least 3 years of social work experience under the supervision of a qualified social worker.

(5) A physical or occupational therapist as defined in § 405.1101 (m) or (q) of this chapter.

(6) A speech pathologist or audiologist as defined in § 405.1105(t) of this chapter.

(7) A registered nurse.

(8) A therapeutic recreation specialist who—

→ *Caution: See Redesignation and Derivation Tables, beginning on page 8365.*

(i) Is a graduate of an accredited program; and

(ii) If the State has a licensing or registration procedure, is licensed or registered in the State.

(9) A rehabilitation counselor who is certified by the Committee on Rehabilitation Counselor Certification.

"Resident living" means pertaining to residential services provided by an ICF/MR.

"Training and habilitation services" means those intended to aid the intellectual, sensorimotor, and emotional development of a resident.

.01 Source:

As redesignated (see the "Redesignation and Derivation Tables," beginning on page 8365), 43 F. R. 45175 (Sept. 29, 1978, effective Oct. 1, 1978).

ADMINISTRATIVE POLICIES AND PROCEDURES

[¶ 21,713]

§ 442.402 Philosophy, objectives, and goals.

(a) The ICF/MR must have a written outline of the philosophy, objectives, and goals it is striving to achieve that includes, at least—

(1) The ICF/MR's role in the State comprehensive program for the mentally retarded;

(2) The ICF/MR's goals for its residents; and

(3) The ICF/MR's concept of its relationship to the parents or legal guardians of its residents.

(b) The outline must be available for distribution to staff, consumer representatives, and the interested public.

.01 Source:

As redesignated (see the "Redesignation and Derivation Tables," beginning on page 8365), 43 F. R. 45175 (Sept. 29, 1978, effective Oct. 1, 1978).

[¶ 21,714]

§ 442.403 Resident's civil rights.

The ICF/MR must have written policies and procedures that insure the civil rights of all residents.

.01 Source:

As redesignated (see the "Redesignation and Derivation Tables," beginning on page 8365), 43 F. R. 45175 (Sept. 29, 1978, effective Oct. 1, 1978).

[¶ 21,715]

§ 442.404 Residents' bill of rights.

The ICF/MR must have written policies and procedures that insure the following rights for each resident:

(a) *Information.* (1) Each resident must be fully informed, before or at admission, of his rights and responsibilities and of all rules governing resident conduct.

(2) If the ICF/MR amends its policies on residents' rights and responsibilities and its rules governing conduct, each resident in the ICF/MR at that time must be informed.

(3) Each resident must acknowledge in writing receipt of the information and any amendments to it. A mentally retarded resident's written acknowledgement must be witnessed by a third person.

(4) Each resident must be fully informed in writing of all services available in the ICF/MR and of the charges for these services including any charges for services not paid for by medicaid or not included in the ICF/MR's basic rate per day. The ICF/MR must provide this information either before or at the time of admission and on a continuing basis as changes occur in services or charges during the resident's stay.

(b) *Medical condition and treatment.* (1) Each resident must—

(i) Be fully informed by a physician of his health and medical condition unless the physician decides that informing the resident is medically contraindicated;

(ii) Be given the opportunity to participate in planning his total care and medical treatment;

(iii) Be given the opportunity to refuse treatment; and

(iv) Give informed, written consent before participating in experimental research.

(2) If the physician decides that informing the resident of his health and medical condition is medically contraindicated, he must document this decision in the resident's record.

(c) *Transfer and discharge.* Each resident must be transferred or discharged only for—

(1) Medical reasons;

(2) His welfare or that of the other residents; or

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with changes 4/24/79

Draft #4

Governor's Council for the Handicapped and Gifted

For an Act entitled: "An Act relating to guardians of incapacitated persons and creating an office of public guardian."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 13.26.005(1) is repealed and reenacted to read:

(1) "incapacitated person" means any person whose ability to receive and evaluate information and/or communicate decisions is impaired for reasons other than minority to the extent that he lacks the ability to meet the essential requirements for his physical health or safety without court-ordered assistance;

* Sec. 2. AS 13.26.005(2) is renumbered as AS 13.26.005(5) and AS 13.26.005 is amended by adding new paragraphs to read:

(2) "meet essential requirements for physical health or safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and protection without which serious physical injury or illness is more likely than not to occur;

(6) "partial guardian" means a guardian who possesses fewer than all of the legal rights and powers of a full guardian, and whose rights, powers, and duties have been specifically enumerated by court order;

(7) "full guardian" means a guardian who possesses all the legal rights and powers as set forth in AS 13.26.150(b).

(8) "visitor" means a person trained or experienced in law, medical care, mental health care, education, rehabilitation or social work who is an officer, employee or special appointee of the court with no personal interest in the proceedings.

* Sec. 3. AS 13.26 is amended by adding a new section to read:

Sec. 13.26.090. PURPOSE AND BASIS FOR GUARDIANSHIP.

Guardianship for incapacitated persons shall be used only as is necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations. An incapacitated person for whom a guardian has been appointed is

not presumed to be incompetent and retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.

* Section 4. AS 13.26.095 is amended by adding a new subsection to read:

(e) Unless otherwise specified, a testamentary guardian initially has the powers and duties which the deceased parent or spouse held, but these powers and duties are subject to the authority of the court to modify the scope of guardianship or to be removed as guardian as provided in sec. 125 of this chapter.

* Sec. 5. AS 13.26.105 is repealed and reenacted to read:

Sec. 13.26.105. PETITION.

(a) The person alleged to be incapacitated, the public guardian, or any person or private organization or agency interested in his welfare may petition for a finding of incapacity and the appointment of a guardian.

(b) The petition for appointment of a guardian shall state facts showing:

(1) The name, age, and address of the petitioner and relationship to the proposed ward;

(2) The name, age, and present address of the proposed ward;

(3) The name and address of the person or facility presently having care, custody, guardianship or conservatorship of or over the proposed ward, if any, and the existence of any other restrictions on the legal capacity of the proposed ward to act in his own behalf;

(4) The nature and degree of the alleged incapacity;

(5) The particular type and duration of appointment and the protection and assistance being sought;

(6) The names and addresses, unless they are unknown and cannot be reasonable ascertained, of the individuals most closely related to the proposed ward by blood or marriage;

(7) The facts and reasons supporting the allegations of incapacity and the need for appointment of a partial or full guardian;

(8) The names and addresses of persons known to the petitioner who have knowledge that might prove helpful in determining the capacity and needs of the proposed ward.

(c) The petition, may also nominate a guardian and include a request for temporary guardianship as provided in AS 13.26.140 if it appears that there is an imminent danger that the physical health or safety of the proposed ward will be seriously impaired during the pendency of the guardianship petition. A request for temporary guardianship must specify facts which cause the petitioner to believe that a temporary guardian is necessary.

* Sec. 6. AS 13.26 is amended by adding new sections to read:

Sec. 13.26.106. INITIAL COURT PROCEDURES. (a) Upon the filing of a petition, the court shall set a date for a hearing on the issues of incapacity.

(b) If the person alleged to be incapacitated does not have an attorney of his own choice, the court shall appoint an attorney to represent him in the proceeding.

(c) The court shall appoint a qualified person as defined in AS 13.26.005(8) to act as visitor who may but need not be an employee of the state, a municipality, or the court. This person shall arrange for evaluations to be performed and prepare a written report to be filed with the court. The court shall also appoint a person who has expertise in regards to the alleged incapacity of the proposed ward to investigate the issue of incapacity.

(d) The visitor shall interview the person alleged to be incapacitated and the person seeking appointment as guardian. The visitor shall conduct such interviews, visits, investigations as are necessary to prepare his report and shall arrange for the proposed ward to be examined by the court appointed expert. The expert's written report shall be incorporated into the visitor's report.

(e) Any interviews and examinations shall take place in the proposed ward's usual residence unless the proposed ward does not object to being examined or interviewed in a medical or mental health facility or, with the approval of the visitor, it is deemed necessary to conduct certain interviews or examinations in a medical or

mental health facility.

Sec. 13.26.108. NOTICE OF RIGHTS. (a) Upon appointment, the visitor shall promptly:

(1) explain to the ~~proposed ward~~ person alleged to be incapacitated, in a language or communication system he can understand, the purpose of the interview and possible consequences of the proceedings and the rights as noted in subsection (3);

(2) serve a copy of the petition on the proposed ward;

(3) explain and provide to the proposed ward a written statement of the following:

(A) That he has the right to communicate with an attorney or an expert in the alleged incapacity before proceeding with the interview;

(B) That if he does not have an attorney, an attorney, whose name, address and telephone number are to be included in the statement, will be designated to advise and represent him prior to and at any judicial hearings, and that the attorney may arrange for an examination and consultation with an expert; and

(C) That he may, instead, employ an attorney and/or expert of his own choosing; and

Add requirement for ~~the~~ service on the ~~proposed~~ person alleged to be incapacitated ~~issued~~ to be witnessed by 3rd party

(4) offer assistance to the ward in contacting an attorney.

(b) No substantive interview of the proposed ward or other investigation shall be conducted as part of the visitor's duties until the above tasks have been fulfilled.

Sec. 13.26.109. VISITOR'S REPORT. (a) An evaluation report by the visitor shall be filed in court, together with proof of service to the proposed ward of the petition and proof of service of the report upon the proposed ward and his attorney and the petitioner, within ninety days of the date on which the petition was filed:

(b) The visitor shall, as part of this report, explain alternatives to guardianship and make a recommendation as to which alternatives are available to necessarily safeguard the proposed ward's essential requirements for physical health and safety.

Any recommendation as to personal guardianship is to be made only when the needs of the proposed ward cannot be made by other alternatives.

(c) The evaluation report shall:

(1) collect and provide medical and other tests and examinations performed which describe the proposed ward's mental, emotional, physical, and educational condition, adaptive behavior and social skills and specify the data on which such description is based;

(2) offer recommendations regarding the types and extent of assistance, if any, necessary to meet the essential requirements for physical health and safety;

(3) offer recommendations as to whether the proposed ward is in need of mental health treatment and whether there is a substantial probability that available treatment will significantly improve his mental condition;

(4) offer recommendations as to whether the proposed ward is in need of educational or vocational assistance or personal care and whether these can be made available to the proposed ward;

(5) offer recommendations regarding the probability that the extent of the proposed ward's incapacity, if any, may significantly lessen, and the type of services or treatment which will facilitate improvement in the respondent's condition or skills;

(6) list the names and addresses of all individuals who examined, interviewed or investigated the proposed ward's condition and the names and addresses of all persons contacted in preparation of the report and what information they supplied upon which the conclusions of the report are based;

(7) describe the alternatives to guardianship which were considered and recommended and why they are not feasible or adequate to meet the proposed ward's needs;

(8) describe the present home and living arrangement of the proposed ward and any other proposed placement and make a recommendation for the ward's

living arrangement that provides the least restrictive setting necessary to protect the proposed ward from serious illness, injury or disease;

(9) specify the financial resources of the proposed ward and his entitlements to insurance benefits and publicly operated or sponsored health, mental health and welfare assistance which might be employed in the provision of services to him; and

(10) if personal guardianship is recommended, propose a guardianship outline which includes recommendations as to

(A) the proposed guardian and any possible alternatives;

(B) the specific services necessary and available to protect the proposed ward from serious injury, illness or disease and, if incapacitated, to return the proposed ward to as full capacity as possible in handling his own affairs and the means by which they may be financed;

(C) the specific, least restrictive authorities needed by the guardian to provide those services;

(d) The petitioner and proposed ward have ten days after receipt to file responses to the evaluation report or additional time if requested and for good cause shown.

Sec. 13.26.110. EVALUATIONS: RIGHT TO REMAIN SILENT AND OBSERVORS: PROPOSED WARD'S EXPERTS. (a) A proposed ward shall have the right not to respond to questions in the course of examinations and evaluations, provided that he may be required to submit to interviews for the purpose of ascertaining whether he lacks the capacity to make informed decisions about care and treatment services.

(b) Statements of a proposed ward in the course of evaluations, examinations and treatment pursuant to this act are privileged and confidential and not admissible without the proposed ward's consent in any civil or criminal proceedings other than proceedings pursuant to this act. A proposed ward shall at all times have the right to refuse to answer questions when the answers may tend to incriminate him.

(c) During any interview or testing conducted under this act, the proposed

ward has the right to be accompanied by an attorney or expert of his own choosing.

(d) The court shall, if requested by a proposed ward in preparation for and in connection with any hearing provided in this act, appoint a reasonably available expert having expertise in regard to the alleged incapacity of the proposed ward to examine him and testify on his behalf. Requests for such appointments may be filed in court at least five days prior to such hearings.

Sec. 13.26.111. DUTIES OF PROPOSED WARD'S ATTORNEY. The principal duty of an attorney representing a person alleged to be incapacitated is to represent zealously that individual. At a minimum, this shall include:

(1) personal interviews with the proposed ward;

(2) explaining to the proposed ward in terms which that person can understand, the nature and possible consequences of the proceeding, the alternatives which are available, and the rights to which the individual is entitled;

(3) securing and presenting evidence and testimony and offering arguments to protect the individual's rights and further the individual's interests;

To the maximum extent possible, the subject of the protective proceedings shall remain responsible for determining his interests. However, an attorney may seek appointment of a guardian ad litem when the circumstances of section 112 of this act apply.

Sec. 13.26.112. APPOINTMENT OF A GUARDIAN AD LITEM. (a) Upon request, the court shall appoint a guardian ad litem to protect the rights of a ward or proposed ward in any proceedings under this act if it is shown that because of impaired ability to receive and evaluate information effectively regarding the proceedings or because of impaired ability to communicate decisions regarding the proceedings, the ward or proposed ward cannot determine his own interests without assistance, and either:

(1) no guardian has been appointed;

(2) his interests and those of his guardian conflict, or

(3) the appointment is otherwise in the interests of justice.

(b) The guardian ad litem shall assist the individual for whom the guardian ad litem has been appointed to determine his interests in regard to the legal pro-

ceedings in which he is involved. If the individual is wholly incapable of determining his own interests, the guardian ad litem shall make that determination and advise the court and counsel for all parties accordingly. In so doing, the guardian ad litem shall:

(1) inquire thoroughly into all the circumstances that a prudent individual, in the position of the person for whom the guardian ad litem has been appointed, would consider in determining his own interests in the proceedings; and

(2) encourage the individual being served to participate, to the maximum extent of that individual's capability, in all decisions and to act on his own behalf on all matters in which he is able.

(c) The guardian ad litem may also be the attorney for the ward or proposed ward if there is no other party readily available and able to serve as a guardian ad litem and whose interests would not conflict with those of the individual needing the guardian ad litem.

Sec. 13.26.113. HEARING. (a) A hearing shall be conducted within one hundred twenty days after the filing of the petition unless the time is extended by the court for good cause shown.

(b) At the hearing, the proposed ward shall have the following rights:

(1) to be represented by an attorney;

(2) to present evidence on his own behalf;

(3) to cross-examine witnesses who testify against him;

(4) to remain silent:

(5) to have the hearing open or closed to the public as he elects;

(6) to be present unless the court determines that his conduct in the courtroom is so disruptive that the proceedings cannot reasonably continue with him present;

(7) to a trial by jury on the issue of incapacity if requested by the proposed ward or his counsel.

(c) The burden of proof by clear and convincing evidence is upon the peti-

tioner and a determination of incapacity shall be made prior to any consideration of proper disposition;

(d) At the hearing, the court shall determine if the proposed ward is incapacitated and the extent of the incapacity and the feasibility of non-guardianship alternatives to meet the needs of the proposed ward if found to be incapacitated;

(e) If it is found that the person for whom a guardian is sought is not incapacitated or any incapacity can be feasibly met by non-guardianship alternatives, the court may dismiss the action or enter any other appropriate order;

(f) If it is found that the person for whom a guardian is sought is able to perform some, but not all, of the functions necessary to care for himself, and non-guardianship alternatives are either infeasible or inadequate to provide for aid to meet the needs of this person, the court may appoint a partial guardian to provide limited guardianship services, but may not appoint a full guardian;

(g) If it is found that the person for whom a guardian is sought is totally without capacity to care for himself and a combination of non-guardianship alternatives and the appointment of a partial guardian are inadequate to meet the needs of this person, the court may appoint a full guardian;

(h) Before a particular person is appointed as a guardian, the court shall inquire into the various possibilities for guardians with due consideration both for the priorities for guardians as provided in AS 13.26.145 and for the abilities of the various guardians to provide all the necessary services to the ward;

(i) A reasonable effort shall be made by the court, at the time a guardian is appointed, to acquaint the incapacitated person with his right to request, at a later date, his guardian's dismissal or a modification of the guardianship order, and a written statement shall be provided to him, explaining his rights and specifying the procedures to be followed in petitioning the court.

* Sec. 7. AS 13.26.115 is renumbered as AS 13.26.119 and a new section, Sec. 13.26.115 is reenacted to read:

Sec. 13.26.115. PSYCHOTROPIC MEDICATION INFLUENCING WARDS OR PROPOSED WARDS AT

JUDICIAL HEARINGS. (a) A ward or proposed ward has a right to participate in all judicial proceedings concerning him to the maximum extent possible, free from the influence of psychotropic medication.

(b) It is the responsibility of the attorney for the ward or proposed ward to determine if the ward is being given treatment with any psychotropic medication, the effects of which would continue during the course of the judicial proceedings and to inform the court in writing, a reasonable time before the hearing, if the attorney so discovers this to be the case.

(c) The court, upon receipt of such information, shall determine the advisability of the continuance or suspension of such treatment for the duration of the judicial proceedings and make any appropriate order it deems necessary. The court in making its determination shall balance the interest in having maximum participation from the proposed ward in the hearings against the medical and habilitative needs of the proposed ward.

(d) If the ward or proposed ward is under the influence of psychotropic medication during the judicial proceeding determining incapacity, the trier of fact may take it into consideration in making its determination.

* Sec. 8. AS 13.26 is amended by adding new sections to Article 3 to read:

Sec. 13.26.116. GUARDIANSHIP ORDER. (a) If it is determined that the proposed ward is incapacitated and the services of a guardian are advisable, the court shall enter an order which:

(1) names the guardian and establishes a guardian-ward relationship;

(2) makes findings of fact which support each grant of authority to the guardian;

(3) adopts a guardianship plan.

(b) The guardianship plan shall specify those authorities which the guardian will have with regard to:

(1) medical care for the ward's physical condition;

(2) mental health treatment which the guardian may deem to be in the

ward's best interests;

(3) housing for the ward with consideration of the following: the wishes of the ward, the preferability of allowing the ward to retain local community ties, and the requirement for services to be provided in the least restrictive setting;

(4) personal care, educational and vocational services necessary for the physical and mental welfare of the ward and to return the ward to full capacity;

(5) application for health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health or related services provided to the ward;

(6) physical and mental examinations as necessary to determine the ward's medical and mental health treatment needs; and

(7) the estate and income of the ward necessary to pay for the cost of services which the guardian is authorized to obtain on behalf of the ward.

(c) The guardianship plan shall be no more restrictive upon the liberty of the ward than is reasonably necessary to protect the ward from serious physical injury, illness or disease and to provide him with medical care and mental health treatment for his physical and mental health. The guardianship plan shall be designed to encourage wards to participate in all decisions which effect them and to act on their own behalf to the maximum extent possible. The court shall not assign a duty or power to a guardian unless the need for it has been proven and no less restrictive alternative or combination of alternatives will be sufficient to satisfy that need;

(d) The duration of the term of guardianship shall be determined by court order and the court may order a review hearing at any time that it determines such a hearing is in the best interests of the ward upon receipt of a report or other information that requires further consideration.

Sec. 13.26.117. GUARDIANSHIP IMPLEMENTATION REPORT. Within ninety days of appointment as a partial or full guardian, the guardian shall submit to the court a report for implementing the guardianship plan that has as its goal, to the extent

possible, to develop or regain the ward's abilities to handle his own affairs. The report shall consider housing, medical care, and educational and vocational needs and resources. In developing this report, the guardian shall consult with his ward to the maximum extent possible. The office of public guardian shall contact the full or partial guardian to offer assistance in preparing this report. The report shall specify the services which are necessary to meet the essential requirements for the ward's physical health or safety and the means for obtaining these services. It shall also specify the manner in which the guardian will exercise and share decision-making authority, and such other items as will assist in fulfilling the needs of the ward, the terms of the guardianship order and the duties of the guardian.

Sec. 13.26.118. REPORTING.

(a) A guardian shall submit a report to the court or request a visitor be sent to prepare a report at least annually and when:

(1) the court orders additional reports to be filed;

(2) there is a significant change in the capacity of the ward to meet the essential requirements for his health and safety or to protect his rights;

(3) the guardian resigns or is removed; and

(4) the guardianship is terminated.

This report shall be prepared by a visitor at least once every three years.

(b) The report at a minimum shall set out:

(1) the name and address of the ward and the guardian;

(2) the ward's current mental, physical and social conditions and present living arrangements;

(3) changes in the capacity of the ward to meet essential requirements for his physical health and safety;

(4) the services being provided to the ward;

(5) the significant actions taken by the guardian during the reporting period in regard to his ward;

(6) a financial accounting of the estate which has been subject to the

possession or control of the guardian;

(7) any other information requested by the court or necessary or desirable in the opinion of the guardian or visitor.

* Sec. 9. AS 13.26.120 is amended to read:

Sec. 13.26.120. TERMINATION OF GUARDIANSHIP FOR INCAPACITATED PERSON. The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in sec. 125 of this chapter, or upon the expiration of the period specified by court order for the duration of the guardianship. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect [HIS] the guardian's liability for prior acts nor his obligation to account for funds and assets of the [HIS] ward under his control.

* Sec. 10. AS 13.26.125 is amended to read:

Sec. 13.26.125. REMOVAL OR RESIGNATION OF GUARDIAN: CHANGE IN OR TERMINATION OF [INCAPACITY] GUARDIANSHIP. (a) On petition of the ward, the guardian, or any person interested in the ward's [HIS] welfare, the court may modify the provisions of the court order to change the guardianship plan or the responsibilities of the guardian, remove a guardian and appoint a successor, terminate the guardianship or review a decision of a guardian on behalf of his ward if less restrictive alternatives are able to assist the ward in meeting his essential requirements for physical health and safety. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(b) The [AN ORDER ADJUDICATING INCAPACITY MAY SPECIFY A MINIMUM PERIOD, NOT EXCEEDING ONE YEAR, DURING WHICH NO PETITION FOR AN ADJUDICATION THAT THE WARD IS NO LONGER INCAPACITATED MAY BE FILED WITHOUT SPECIAL LEAVE. SUBJECT TO THIS RESTRICTION, THE] ward, the guardian, or any person interested in the ward's [HIS] welfare may petition for an order that [HE] the ward is no longer incapacitated or no longer incapacitated to the same degree, and/or for removal or resignation of the guardian,

termination of the guardianship, or for a change in the guardian's responsibilities. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

(c) Before removing a guardian, changing his responsibilities, accepting the resignation of a guardian, or ordering that a ward's [INCAPACITY HAS] guardianship be changed or terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian and applying the least restrictive alternative necessary to meet the needs of the ward and after consideration of non-guardianship services, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained to observe conditions and report in writing to the court.

(d) If at any time the incapacitated person requests or indicates to his guardian, to the agency responsible for his care, or its employees that he desires a change in guardianship, the guardian or the agency providing care shall inform the court of the request.

(e) In the event of the death of the guardian, or if on the basis of a petition filed under this section or a report or other reliable information there is probable cause to believe a guardian is not performing his responsibilities effectively and there is an imminent danger that the physical health or safety of the ward will be seriously impaired, the court shall take whatever action is necessary to protect the ward including the dismissal of the present guardian and appointment of a temporary guardian without a hearing.

* Sec. 11. AS 13.26.130 is repealed and reenacted to read:

Sec. 13.26.130. COSTS IN GUARDIANSHIP PROCEEDINGS. The costs of the court appointed visitor and expert shall be borne by the state. The costs of the court-appointed attorney for the proposed ward, guardian ad litem and experts for the ward, if any, and other court and guardianship costs shall be borne by the proposed ward to the extent that the costs and fees do not deplete the income and estate of the proposed

ward, cause financial hardship, or cause the proposed ward to become financially dependent upon any governmental agencies or private agencies or persons. All costs not borne by the proposed ward shall be borne by the state.

* Sec. 12. AS 13.26.135 is amended to read:

Sec. 13.26.135. NOTICES IN GUARDIANSHIP PROCEEDINGS.

(a) In a proceeding for the appointment, change in responsibilities, [OR] removal of a guardian of an incapacitated person, or termination of guardianship, other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or proposed ward by the visitor as provided in Sec. 13.26.107;

(2) the spouse, parents and adult children of the proposed ward;

(3) any person who is serving as his guardian, conservator and/or who has his care and custody; and

(4) in case no other person is notified under (2) of this subsection, at least one of his closest adult relatives, if any can be found;

(5) the petitioner;

(6) any person who performed an evaluation for the visitor's report within the previous two years;

(7) the ward or proposed ward's attorney; and

(8) the ward or proposed ward's guardian ad litem if one has been appointed.

(b) Notice shall be served personally on the alleged incapacitated person's spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons shall be given as provided in AS 13.06.110.

(c) This notice shall set out the date, time, place, purpose and possible consequences of the hearing and the rights of the parties.

* Sec. 13. AS 13.26.140 is repealed and reenacted to read:

according to Sec. 13.26.120 and Sec. 13.26.125

Sec. 13.26.140. TEMPORARY GUARDIANS. (a) If during the pendency of an initial petition for guardianship or upon the termination, removal, resignation or change of guardianship, it appears that services are needed immediately to prevent serious injury, illness or disease and the proposed ward is not capable of procuring services, the petitioner may request the appointment of a temporary guardian to authorize such services. Such request shall state the reasons and factual basis for the request and shall immediately be filed with the court and copies immediately served on the proposed ward and his attorney. A hearing shall be conducted within seventy-two hours of the filing.

(b) At the temporary guardianship hearing, the proposed ward shall have the rights set forth in Sec. 13.26.114(b).

(c) The burden of proof at the hearing shall be by a preponderance of the evidence and shall be upon the party requesting that a temporary guardian be appointed.

(d) If the court determines that a temporary guardian should be appointed, it shall make the appointment and grant authorities that are least restrictive upon the liberty of the proposed ward consistent with ensuring that emergency services necessary to protect the proposed ward from serious injury, illness or disease.

(e) The temporary guardianship shall expire at the time of the appointment of a full or partial guardian or upon the dismissal of the petition for guardianship, or at the end of six months whichever is less.

(f) If no guardianship petition is pending but the court is informed of a person who is apparently incapacitated and in need of emergency life-saving services, it can authorize such services upon determining that delay until a guardianship hearing could be held would entail a life-threatening risk to the proposed ward.

* Sec. 14. AS 13.26 is amended by adding new sections to article 3 to read:

Sec. 13.26.141. EMERGENCY POWERS. Notwithstanding the limits of any temporary guardianship or guardianship order, temporary guardians and guardians shall at all times have the right to authorize the provision of emergency life-saving services. This shall include the power to authorize hospitalization without advance court approval.

* Sec. 15. AS 13.26.145 is repealed and reenacted to read:

Sec. 13.26.145. WHO MAY BE GUARDIAN; PRIORITIES.

(a) Any competent person, the public guardian, or any private association organized solely to conduct an active guardianship program for incapacitated persons, may be appointed guardian of an incapacitated person.

(b) No person providing substantial services to the proposed ward in a professional or business capacity and no creditor of the proposed ward may be appointed. Also, no person may be appointed who is in the employ of any person, agency or corporation providing service to the proposed ward in a professional or business capacity or likely to provide the same during the guardianship period or having interests which may otherwise conflict with those of the proposed ward, except that a person so employed may be appointed if he is the spouse, adult child, parent or sibling of the proposed ward and the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the proposed ward's best interest.

(c) The following priorities shall guide the court in the selection of a guardian:

(i) Any person or association nominated by the proposed ward, if at the time of the nomination the proposed ward had the capacity to make a reasonably intelligent choice;

(ii) the spouse of the proposed ward;

(iii) an adult child or parent of the proposed ward;

(iv) any relative of the proposed ward with whom he has resided for more than six months during the year prior to the filing of the petition;

(v) any other relative or friend who has evidenced a sincere, long-standing interest in the welfare of the proposed ward;

(vi) the public guardian.

(d) The foregoing priorities shall not be binding and the court shall select that person or association who is best qualified and willing to serve. The court shall also give due consideration to any nomination by persons in priorities (i) through (vi) of this section, and to any nomination in the will of a deceased parent or spouse of the proposed ward.

* Sec. 16. AS 13.26.150 is repealed and reenacted to read:

Sec. 13.26.150. GENERAL POWERS AND DUTIES OF A GUARDIAN.

(a) The guardian shall carry out the specific duties and powers assigned by the court diligently and in good faith. Every effort shall be made by the guardian to provide the ward with all those services to which he has a right as provided in AS 13.26.160. In carrying out these duties and powers, such individuals shall encourage the ward to participate to the maximum extent of his capacity in all decisions which affect him, to act on his own behalf in all matters in which he is able to do so, and to develop or regain, to the maximum extent possible, his capacity to meet the essential requirements for his physical health or safety, to protect his rights and, if impaired, his ability to manage his financial resources.

(b) A partial guardian of an incapacitated person shall have only those powers, rights, and duties respecting his ward as are enumerated in the court order.

(c) A full guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child except that the guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a full guardian has the following powers and duties, except as modified by order of the court:

(1) to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and shall assure that the ward has a place of abode in the least restrictive setting consistent with the essential requirements for the ward's physical health and safety;

(2) he shall assure the care, comfort and maintenance of the ward;

(3) he shall assure that the ward receives the services necessary to meet the essential requirements for the ward's physical health and safety and to develop or regain, to the maximum extent possible, the capacity to meet his needs for physical health and safety;

(4) he shall assure through the initiation of court actions and other means that the ward enjoys all personal, civil and human rights to which the ward is entitled;

(5) he may give any consents or approvals necessary to enable the ward to receive medical or other professional care, counsel, treatment or services except as otherwise limited by subsection (e) of this section.

(6) If no conservator for the estate of the ward has been appointed, he may:

(A) support the ward or pay sums for the welfare of the ward to perform his duty;

(B) receive money and property deliverable to the ward and apply the money and property for support, care and education of the ward; but, he may not use funds from his ward's estate for room and board which he, his spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the incapacitated ward, if notice is possible; he must exercise care to conserve any excess for the ward's needs;

(7) if a conservator has been apointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in sections 165-315 of this chapter, and the guardian must account to the conservator for funds expended.

(d) Any full guardian of a ward, for whom a conservator also has been appointed, shall control the custody and care of the ward, and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, if the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate for the ward's care and maintenance.

(e) A guardian shall not have the power:

(1) to place the ward in a facility or institution to which an individual without a guardian would have to be committed under AS 47.30.070 other than through a formal commitment proceeding in which the ward has a separate guardian ad litem;

(2) to consent on behalf of the ward to an abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary to preserve the life or prevent serious impairment of the physical health of the ward;

(3) to consent on behalf of the ward to the withholding of non-heroic life-saving medical procedures;

(4) to consent on behalf of the ward to the performance of any experimental medical procedure or participation in any medical experiment not intended to preserve the life or prevent serious impairment of the physical health of the ward;

(5) to prohibit the marriage or divorce of the ward;

(6) to consent on behalf of the ward to termination of the ward's parental rights.

* Sec. 17. AS 13.26.195 is amended by adding a new subsection to read:

(d) The court shall explore all non-conservator alternatives and the use of a special conservator as provided in AS 13.26.205(c). A conservator shall only be appointed if a less restrictive protective order or the services of a special conservator are inadequate to protect the estate of the protected person.

* Sec. 18. AS 13.26.200 is amended by adding a new subsection to read:

(6) the court shall, to the extent possible, consult with the protected person in determining what protective action should be taken, and the court shall use the least restrictive alternative possible to provide the necessary protection.

* Sec. 19. AS 13.26.205(c) is amended to read:

(c) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the

continuing protection of a conservator. If only certain powers need be given to the conservator or such services are needed only for a limited series of transactions, a special conservator may be appointed. The court may appoint a special conservator to assist in the accomplishment of any protective arrangements or other transactions authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters carried out pursuant to the order of appointment.

* Sec. 20. AS 13.26 is amended by adding a new section in article 4 to read:

Sec. 13.26.218. PUBLIC BOND. The court, in all cases in which a public guardian is appointed as a conservator, shall waive individual bond as provided in AS 13.26.540. The court may order a bond as is required for a private individual acting as conservator purchased out of state funds if the conservator is unable to provide such a bond and it is in the best interests of the ward to provide for such bonding.

* Sec. 21. AS 13.26 is amended by adding new sections to read:

Article 6. PUBLIC GUARDIANS

Section

505. Purpose

510. Office of Public Guardian

515. When Public Guardian May Be Appointed

520. Powers and Duties of the Public Guardian

525. Intervention

530. Delegation of Powers and Duties

535. Other Powers and Duties

540. Bond

545. Allocation of Costs

Sec. 13.26.505. PURPOSE. The legislature recognizes that many of its citizens, for reasons of incapacity or minority, are in need of a guardian. Often such persons cannot find others able and willing to render assistance. The legislature intends through this act to establish the office of public guardian for the purpose of fur-

nishing guaridanship and conservatorship services. It further intends by establishing this office to provide assistance to guardians throughout the state in securing necessary services for their wards and to assist the courts, attorneys, visitors, proposed guardians and proposed wards in the orderly and expeditious handling of guardianship proceedings.

Sec. 13.26.510. OFFICE OF PUBLIC GUARDIAN. There is created an Office of Public Guardianship in each judicial district in the Court System attached to the Public Administrator. By order of the court, the public guardian may act as full guardian, partial guardian, and/or conservator or special conservator for a minor or incapacitated person and perform such other duties as provided under this chapter.

Sec. 13.26.515. WHEN PUBLIC GUARDIAN MAY BE APPOINTED. The court may appoint the public guardian to act as guardian or conservator when no person or private guardianship association is willing and qualified to act as guardian.

Sec. 13.26.520. POWERS AND DUTIES OF THE PUBLIC GUARDIAN. (a) The public guardian shall have the same powers and duties as a private conservator or guardian, except as otherwise limited by law or court order.

(b) The public guardian in all cases in which it is appointed as conservator or guardian shall endeavor to find a suitable private guardian or conservator for the ward and shall continue such a search as long as it is practical. For each ward, the public guardian will report its efforts to find a private guardian to the court having jurisdiction of the ward at least bi-annually.

Sec. 13.26.525. INTERVENTION. The public guardian, may on his own motion or at the request of the court, intervene at any time in any conservatorship or guardianship proceeding by appropriate motion to the court; if he or the court deem such intervention to be justified because an appointed conservator or guardian is not fulfilling his duties, the estate is subject to disproportionate waste due to the costs of the guardianship or conservatorship, or it appears that a willing and qualified guardian is not available, or the best interests of the incapacitated or protected person require such intervention.

Sec. 13.26.530. DELEGATION OF POWERS AND DUTIES. The public guardian may employ staff and delegate to members of his staff or volunteers his powers and duties as conservator or guardian and such other powers and duties as are created by this act, although the public guardian retains ultimate responsibility for the proper performance of these delegated duties. All delegations shall be to people who meet the eligibility requirements of AS 13.26.145(b).

Sec. 13.26.535. OTHER POWERS AND DUTIES. The public guardian:

(1) Shall establish and maintain working relationships with other governmental bodies and public and private agencies, institutions, and organizations so as to assure the most effective conservatorship or guardianship program for each ward and protected person;

(2) Shall establish and maintain regular visitation to all wards and protected persons of the public guardian to monitor their welfare and at a minimum each ward and protected person shall be visited at least once every quarter;

(3) May contract for services necessary to carry out the duties of his office;

(4) May accept the services of volunteer workers or consultants and reimburse them for their proper and necessary expenses.

(5) Shall keep and maintain proper financial and statistical records concerning all cases in which the public guardian provides conservatorship or guardianship services;

(6) Shall provide information and referrals to the general public regarding guardianship and conservatorship proceedings;

(7) Assist guardians and court appointed visitors of incapacitated persons in the preparation and update of guardianship plans and reports;

(8) Assist guardians of incapacitated persons to understand disabilities and foster increased independence on the part of their wards;

(9) Assist guardians in securing the rights, benefits and services to which their wards are entitled;

(10) Develop and maintain a current knowledge of the full range of public and private medical, mental health, social advocacy, educational, rehabilitative, counseling, therapeutic, homemaking, recreational, and financial services and programs available to assist incapacitated or protected persons and their families;

Sec. 13.26.540. BOND. (a) The court system shall provide for one public bond to be held for all the conservatorship duties of the public guardian. The amount of the bond shall be dependent on the amounts of the estates in the control of the public guardian.

(b) The public guardian shall submit bi-annual reports on the amount of the estates under control. Upon receipt of the report, the court shall order the public bond to be adjusted according to the present amount of the estates.

Sec. 13.26.545. ALLOCATION OF COSTS. (a) Determination of costs.--If a public guardian is appointed conservator or guardian, the administrative costs of his services and the costs incurred in the appointment procedure shall not be charged against the income or the estate of the incapacitated person or minor, unless the court determines at any time that the person is financially able to pay all or part of such costs.

(b) Financial ability.--The ability of the income or estate of the incapacitated or protected person to pay for administrative costs of a public guardian or costs incurred in the appointment procedure shall be measured according to the person's financial ability to engage and compensate a private guardian. This ability is a variable dependent on the nature, extent and liquidity of assets; the disposable net income of the person; the nature of the conservatorship or guardianship; the type, duration and complexity of the services required; and any other foreseeable expenses.

(c) Investigation of financial ability.--The public guardian shall investigate the financial status of a person who requests the appointment of the public guardian as his guardian or for whom a court is considering such an appointment. The public guardian shall have the authority to require the ward or protected person to execute and deliver such written requests or authorizations as may be necessary under applicable law to provide the public guardian with access to records of public or pri-

vate sources, otherwise confidential, as may be needed to evaluate eligibility. The public guardian is authorized to obtain information from any public record office of the State or of any subdivision or agency thereof upon request and without payment of any fees ordinarily required by law.

(d) Claim against estate.--The reasonable value of the services rendered without cost to the ward or protected person shall be allowed as a claim against the estate upon the death of the person.

* Sec. 22. TRANSITION. All guardianships for incapacitated persons established prior to the effective date of this act shall be reviewed by the court within three years. Until the review, all guardians appointed prior to the effective date shall retain the powers assigned to them, unless a petition for modification under AS 13.26.125 has been granted. Prior to the review hearing, the guardian shall submit one report in the form prescribed in AS 13.26.118.

* Sec. 23. The effective date of this act shall be _____.

JN02 0013 13.35 JA01 0092 13.35 02/13/80
PRS
UPDATE TO MESSAGE SENT AT 13:19 -- THE DOS/CICS SYSTEM WILL BE DOWN F
OR
APPROXIMATELY ONE (1) HOUR.

THE OS/CICS SYSTEM IS CURRENTLY AT A STAND-STILL DUE TO THE CPU-B BEIN
G HARD
STOPPED FOR APPROXIMATELY 10 MINUTES. ALL SYSTEM FUNCTIONS SHOULD RET
URN AND
NORMAL PROCESSING WILL CONTINUE SHORTLY.

BOB WILSON, JUNEAU

LA11 2533 13.36 JA01 0093 13.36 02/13/80

TO JUNEAU T/C
FR KATHI

RE HOUSE JUDICIARY T/C, GUARDIANSHIP

THE FOLLOWING PEOPLE HAVE EXPRESSED A DESIRE TO TESTIFY
AT TODAY'S HEARING.

CLYDE FARRINGTON	EMPLOYMENT & TRAINING CENTER OF ANC
MACK KERSBERGEN	ALASKA HOSPITAL ASSOC.
ROGER VAN WAGNER	"
BEV HILTNER	"
BETTY HALSEY	
LUDMILLA JACOBS	MANY AGENCIES
NATALIE GOTTSTEIN	MENTAL HEALTH ASSOCIATION
JIM PARSONS	"
PAUL CHOQUETTE	"
GLADYS THOMPSON	
Kenneth Hennick	Satellite Home Program

I WILL GIVE YOU MORE NAMES AS WE RECEIVE THEM.
JAMES R. MOTTERSHEAD - Parent; AK. Assoc. of Retarded Citizens

LA11 2553 13.40 JA01 0094 13.40 02/13/80

HB 522 Feb 13, 1980

Laurie Grougen
(sp. ?)

FBX
staff

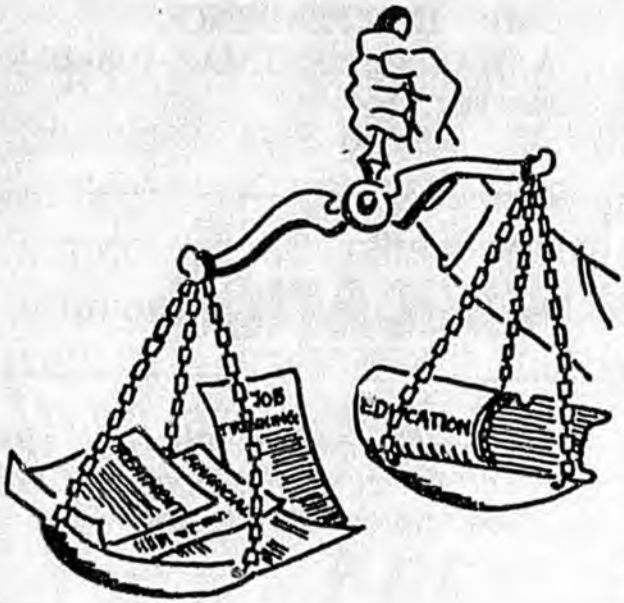
DEBORAH FROM MAXINE

THE FOLLOWING NAMES ARE PRE-SIGNED FOR TODAY'S TELECONFERENCE AT 1:30PM AST.

GLENN JOHNSON
DICK WILSON CAREAGE NORTH
ANGIE HAGIE ' (SP ?)
MARSHA SNYDER NATL ASSOC. OF SOCIAL WORKERS
THAT IS ALL AT THIS TIME. FBX/LIO/MW

HB572 Feb. 13, 1980

Are you Developmentally Disabled?



Know your rights

PADD, INC.

A DEVELOPMENTAL DISABILITY is a handicapping condition - mental or physical - that occurs before age 22.

A DEVELOPMENTAL DISABILITY includes, but is not limited to CEREBRAL PALSY, AUTISM, EPILEPSY, DYSLEXIA, and MENTAL RETARDATION.

It may also include HEARING and SPEECH IMPAIRMENTS and OTHER CONDITIONS which limit a person's ability for SELF-CARE, LEARNING, LANGUAGE, MOBILITY, and ECONOMIC INDEPENDENCE.

A DEVELOPMENTALLY DISABLED person has:

the right to
EDUCATION

All handicapped children in Alaska between the ages of 3-18 are entitled to a free, appropriate education.

the right to
TREATMENT

Everyone has a right to treatment, regardless of their financial situation. Treatment is not just medical; it includes full programming for persons in residential and other services.

If you have or know someone with one of these developmental disabilities, there are people willing to help you.

P.A.D.D., Inc. (Protection and Advocacy for the Developmentally Disabled), is a private, non-profit corporation established to help protect the rights of the developmentally disabled. If you believe you are not receiving the services you are entitled to, call us. We can arrange to see you in our office, your home, or other location. The service is available on a state-wide basis for all those needing information and referral concerning any aspect of developmental disabilities.

Know Your Rights

Our Staff:
Director: Marsha Schneider
Staff Advocate: Barbara Nelson Burns
Legal Information: Barbara Lattman

Call: Fairbanks 456-1070
State-wide Zenith 6600

Write: P.A.D.D., Inc.
1514 Cushman
Room 204
Fairbanks, AK 99707

the right to **LEGAL INFORMATION**

Information can be provided on subjects such as : guardianship, wills, personal rights, barrier-free architecture, and nondiscrimination in employment, housing, transportation and other services.

the right to **FINANCIAL HELP**

All those who fall below a certain income level are entitled to financial assistance. To apply for Supplemental Security Income (SSI) contact your local social security office. To apply for MEDICAID contact your local Public Assistance office.

the right to **JOB TRAINING**

Anyone with possible capabilities for working is entitled to job training. Contact your local Division of Vocational Rehabilitation for help in overcoming barriers to employment.

P.A.D.D., Inc.
1514 Cushman
Room 204
Fairbanks, AK 99701

PROTECTION AND ADVOCACY FOR THE DEVELOPMENTALLY DISABLED
1514 CUSHMAN ; ROOM 204 FAIRBANKS, ALASKA 99701 456-1070, Zc6000



POSITION PAPER

House Bill 339

Guardianship

The Board of Directors of P.A.D.D., Inc. support the overall concept of this bill.

This bill is needed. It clarifies the guardianship process, quarentees the implementation of partial guardianship (least restrictive alternatives), and provides for meaningful participation by incapacitated persons.

P.A.D.D. has been involved inguardianship issues since its inception in 1977 in the following ways:

1. Provided funding for the original draft of this bill.
2. Our goals and objectives include involvement in guardianship.
3. Provided information and referrel on guardianship. (seven cases since September 1979.)
4. Sponsored workshop on guardianship. (Juneau, 1979)
5. Staff training on guardianship.
6. Contact with Attorney General's Office and Legal Service regarding guardianship.

The following are major concerns regarding this bill:

1. For many developmentally disabled persons and their parents this bill seems to complicate and make the process more expensive. A balance must be met between safeguarding the persons rights and making it so expensive that legal parents, who are concerned for and supportive of their child, cannot easily become guardians when their child reaches majority.

   In the case of supportive parents the law should permit them to become guardians with a more limited judicial review than the current bill suggests. This would reduce the financial impact.

2. That the law prohibit persons from being guardians to more than one individual. A problem with the public guardian concept. A person is to easily treated as a number when one person becomes responsible for many.

3. The bill should prevent absentee guardianship. Again a problem with the public guardian. If a person is to be an active and participating advocate of his ward he must be located in the same area.

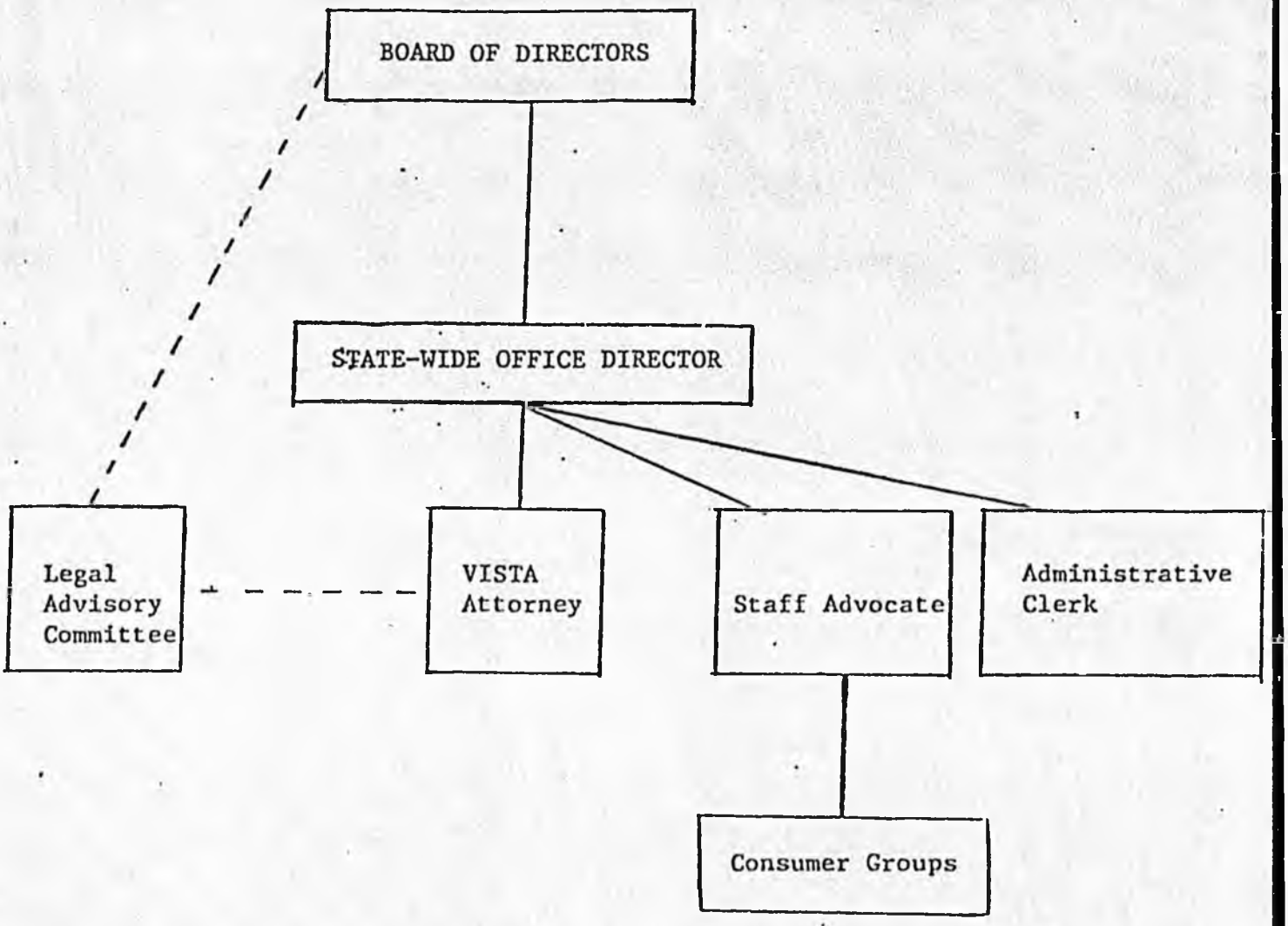
4. If there must be a public guardian, than put a time limit on it. It is difficult to accept that the state can effectively represent the interests of a person who is also a ward of the state.

P.A.D.D. is already providing many of the services that the public guardian is in this bill delegated to do. If this bill is passed, P.A.D.D. would be happy to provide whatever assistance we can. Given a more realistic budget P.A.D.D. can and will continue to expand its activities in relation to guardianship. We are an agency whose mandated role is to provide assistance to developmentally disabled persons and their parents or guardians in the area of guardianship, which is one aspect of our protection and advocacy function.

For your information find attached the following:

1. What is P.A.D.D.?
2. Organizational chart
3. Legal Technical Assistance available to P.A.D.D.
4. Goals and objectives relating to guardianship from our State Plan
5. Definitions
6. Job Description of Staff Attorney
7. Analysis, Position Paper, and Information prepared by P.A.D.D.'s Legal Advisor

ORGANIZATIONAL CHART



WHO IS P.A.D.D.?

P.A.D.D., Inc., Protection and Advocacy for the Developmentally Disabled, is the designated agency by the Governor of the State of Alaska for the implementation of a system to protect and advocate the rights of the developmentally disabled as required by Section 113 under P.L. 94-103, amended by 95-602.

P.A.D.D., Inc. was established originally as a result of a coalition formed by the Developmental Disabilities Council, now called the Governor's Council for the Handicapped and Gifted.

The purpose of P.A.D.D., Inc., a nonprofit private corporation, is to implement a protection and advocacy system for the rights of the developmentally disabled.

The business affairs of the corporation will be managed by a Board of Directors consisting of not less than nine or more than twenty-one members who shall be qualified, nominated, elected or appointed as provided in the bylaws of the corporation.

The functions of the agency are as follows:

1. To promote the general welfare of developmentally disabled citizens of all ages in the State of Alaska.

2. To provide information and referral services regarding protection and advocacy to developmentally disabled persons, their families and other interested parties.

3. To render and assure advocacy and protective services to developmentally disabled persons and their families.

4. To provide advocacy training to developmentally disabled persons and their families.

5. To cooperate with and enlist the support of public, private religious, professional and other groups of agencies both local, state, and federal in the furtherance of agency objectives.

6. To solicit, receive and provide funds for the accomplishment of these purposes.

7. To provide information on issues concerning developmentally disabled individuals to the Governor's Council for the Handicapped & Gifted, the legislature, local government, and service agencies.

Organizational Relationships

The agency designated by the Governor is a private nonprofit corporation and is independent of all agencies in the State of Alaska which deliver services, treatment, or habilitation to developmentally disabled people.

LEGAL TECHNICAL ASSISTANCE AVAILABLE TO P.A.D.D.

Legal training will be provided by Technical and Training Assistance funding from Region X, Developmental Disabilities Office, Office of Health, Education & Welfare (HEW). Additional training is available through the Mental Health Law Project/DD Rights Center & the Center on Human Policy upon request by the agency. Several university-affiliated projects including the Developmental Disabilities Law Project at the University of Maryland Law School, Texas Tech University's Training and Research Center, and the Center for Development and Learning Disorders of University of Alabama have been funded by HEW to provide training for protection and advocacy staff. The budget for FY 80 includes a training fund to enable staff to obtain training from these university-affiliated projects if they do not provide transportation funding.

GUARDIANSHIP RELATED GOALS

To enable developmentally disabled individuals to protect their legal rights and solve their legal problems.

To educate the public about the legal rights of developmentally disabled individuals and how to be effective advocates for the developmentally disabled.

To ensure that the needs and views of developmentally disabled individuals are effectively presented to the Alaska legislature, service agencies, and the Governor's Council for the Handicapped & Gifted.

GUARDIANSHIP RELATED OBJECTIVES

Operate a legal aid referral system to include Alaska Legal Services, Alaska State Human Rights Commission, Attorney General's Office, Public Defender and the Ombudsman's Office.

Distribute information and materials to those requesting it on: (1) guardianship alternatives, (2) administrative remedies, (3) due process procedures of various agencies.

Research legal issues pertinent to the target population and individual cases.

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To provide training sessions to groups concerned or potentially concerned with the developmentally disabled people on the legal rights of developmentally disabled individuals and how to advocate on their behalf.

JOB DESCRIPTION

STAFF ATTORNEY

Duties

1. Protect the rights of 60 developmentally disabled persons by investigating cases and pursuing appropriate administrative and legal remedies.

2. Provide legal counsel in guardianship hearings.

3. Review legal component of other P & A systems and summarize findings in a report.

4. Prepare a handbook on the legal rights of the developmentally disabled.

5. Strengthen the delivery of legal services to the developmentally disabled by training attorneys in the public and private sectors on developmental disability legislation.

6. Recommend to the Governor's Council any changes in legislation, agency policies, service delivery systems and assist in drafting any needed legislation to protect the rights of the developmentally disabled.

Qualifications

1. Must be a graduate of an accredited law school and be able to practice law in Alaska.

2. Undergraduate background in social sciences preferred.

3. Must be interested in doing legal research, providing training to other attorneys and engaging in public education as well as pursuing litigation.

4. Must be willing to travel throughout the state of Alaska.

5. Experience in legal advocacy for the handicapped preferred.

Definition of Terms

Federal guidelines for the implementation of a P & A system include definitions of the following terms:

1. Administrative remedy pursuits
   Includes any internal system for appeal within an agency or facility or between agencies which do not involve a judicial adjudication.

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   Shall consist of the speaking for, pleading for, supporting, advising, espousing the rights of, or interceding on behalf of persons with developmental disabilities before any public or private individuals, agencies, organizations or institutions serving such people.

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   Title V of P.L. 95-602 changed the federal definition of developmental disability to a severe, chronic disability of a person which
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   (d) results in substantial functional limitations in three or more of the following areas of major life activity; (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic sufficiency and
   (e) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

*Adapted from the FY 80 State Plan of the Governor's Council for the Handicapped & Gifted

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Lionel Trilling

Few benevolent laws have greater potential for coercion than does guardianship. The protection provided those whose well-being requires it does not justify the unnecessary denial of self-determination which many other retarded individuals suffer. Legal control mechanisms must be used carefully, to facilitate participation by some mentally retarded citizens in their lives and in the life of society, rather than to limit it.

Guardianship deprives retarded individuals of more control than does any legal mechanism short of institutionalization, by installing a substitute decision-maker. Since many of these people can make decisions on their own or with advice, less drastic measures should be used where appropriate. When a retarded individual is going to inherit money or property a trust can be created specifying the restrictions attached to the inheritance, e.g., that the wealth be spent "reasonably". Then the trustee works with the beneficiary to assure compliance. With social secuity benefits, a "representative payee" analagous to a trustee can be designated to assure that the funds are expended "properly." Or a mentally retarded individual can create a trust with more extensive and explicit restrictions to help accomplish personal goals. In all cases, the retarded person retains control over his/her property.

Similar to the trustee-beneficiary relationship outlined above is the relationship of a "facilitator guardian" and a ward. Unlike a typical guardianship there is no substitute decision-making. The guardian simply assists the mentally retarded individual in achieving self-determined goals. If the ward wishes to use his/her contract power to purchase a car, lease an apartment, etc. the facilitator guardian accompanies the ward through the process, assuring fairness while using it as a teaching situation. Such a relationship can be created with more control, e.g., giving the facilitator guardianship veto power, or with less control, e.g., specifying a limited number of transactions in which he/she will play a part.

Little change need be made in the laws to avoid their coercive potential; rather an attitudinal change is needed. The principal of a right to the least restrictive alternative must be applied to this area, as well as to the rest of the laws affecting retarded and handicapped citizens.

Barbara Roberts, Legal Advisor
P.A.D.D., Inc., Fairbanks, AK
December 1979

ANALYSIS OF PROPOSED GUARDIANSHIP BILL

The guardianship legislation proposed by the Governor's Council seeks to modify the current statute as well as to enlarge it. The modifications have two basic themes; guaranteeing incapacitated persons meaningful participation in the appointment process and guaranteeing an order which is the least restrictive alternative.

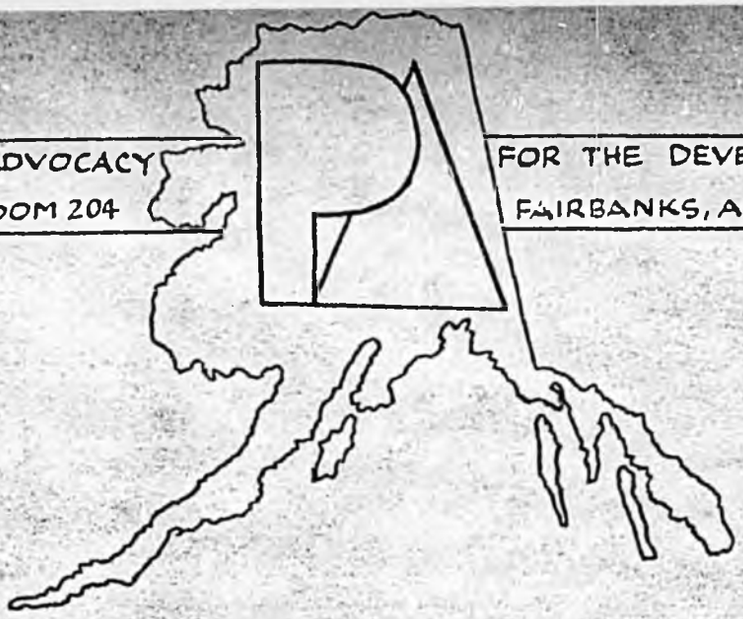
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The language of the current statute is broad enough to allow implementation of a less restrictive plan than full guardianship, but the proposed statute attempts to guarantee it. The visitor's evaluation report must explain the alternatives to guardianship and when appropriate, why each was rejected. If guardianship is recommended, there must be an outline of the specific, least restrictive authority which the guardian will need to function effectively. The court's determinations must include an assessment of the feasibility of non-guardianship alternatives, where it has been shown that the court may not appoint a full guardian. Within ninety days following the order and appointment the guardian must submit to the court an implementation report which "has as its goal, to the extent possible, to develop or regain the ward's abilities to handle his own affairs." Toward this end, the guardian is newly empowered to petition the court for state funds for treatment, etc. where no other satisfactory means of procuring necessary service is available. The proposed legislation also enumerates what a guardian can not do, e.g., cannot institutionalize where someone without a guardian would be entitled to a formal committment procedure.

There are changes incidental to these two themes. The contents of the already existent visitor's evaluation and order are specified in particularity. The priorities for selecting a guardian are modified to disallow any service providers, to make the reasonable choice of the ward of first priority, and to put the public guardian as new, albeit last, priority. The Office of Public Guardians is the enlargement referred to in the opening paragraph of this report. The draft bill by the Governor's Council proposes an Office of Public Guardians in each judicial district in the court system, attached to the Public Administration Department. Its purpose is two-fold, to serve as guardian to incapacitated persons for whom no other guardian can be found, and to protect the rights of those individuals subject to the guardianship system.

Barbara Roberts, Legal Advisor
P.A.D.D., Inc. - Fairbanks, AK
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PROTECTION AND ADVOCACY FOR THE DEVELOPMENTALLY DISABLED
1514 CUSHMAN ; ROOM 204 FAIRBANKS, ALASKA 99701 456-1070, Ze6000



"AN ADVOCATE, SIMPLY DEFINED, IS ONE WHO IS TRYING TO MAINTAIN OR PROMOTE A CAUSE .... ADVOCACY IS ACTING IN BEHALF OF, OR PLEADING A CAUSE, FOR ANOTHER. IT OFTEN INVOLVES FIGHTING FOR SOMEONE WHO CAN'T FIGHT FOR HIMSELF....

THE BASIC GOAL OF ALL ADVOCACY ACTIVITY IS TO IMPROVE THE QUALITY OF LIFE FOR SOME PERSON OR GROUP OF PERSONS."

SUMMARY OF GUARDIANSHIP PROCEDURE UNDER PRESENT LAW

A. Procedure

1. A parent or spouse of an incapacitated person can appoint a guardian in their will.

2. The court can appoint a guardian

   a. Anyone can file a petition with the court seeking an appointment.

   b. The court will then appoint an attorney to represent the alleged incompetent and to act like a guardian ad litem (unless the a.i. has an attorney).

   c. A court appointed doctor will examine the a.i.

   d. A court appointed visitor will:

      (1) Interview the a.i.

      (2) Interview the proposed guardian.

      (3) Visit the present residence.

      (4) Visit the proposed residence.

   e. There will be a hearing.

   f. The court will find the a.i. to be incompetent and will appoint a guardian, or will dismiss.

B. Duties

A guardian has the same role as a parent but without vicarious liability.

1. A guardian has custody of the ward and can determine where he/she will live.

2. A guardian cares for the person and the property of the ward, e.g. arranges education.

3. A guardian gives consent to medical or other treatments or counseling.

4. If there is no conservator, a guardian:

   a. Can sue on behalf of the ward for any sums or services owed to the ward, i.e. SSI.

   b. Can receive and spend money or property on behalf of the ward except to reimburse himself/herself for room and board provided the ward. (This requires court approval.)

5. A guardian agrees to appear in any court action related to the guardianship.

6. A guardian agrees to report to the court the ward's condition, as the court requires.

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POSITION PAPER

House Bill 339

Guardianship

The Board of Directors of P.A.D.D., Inc. support the overall concept of this bill.

This bill is needed. It clarifies the guardianship process, quarentees the implementation of partial guardianship (least restrictive alternatives), and provides for meaningful participation by incapacitated persons.

P.A.D.D. has been involved inguardianship issues since its inception in 1977 in the following ways:

1. Provided funding for the original draft of this bill.
2. Our goals and objectives include involvement in guardianship.
3. Provided information and referrel on guardianship. (seven cases since September 19 9.)
4. Sponsored workshop on guardianship. (Juneau, 1979)
5. Staff training on guardianship.
6. Contact with Attorney General's Office and Legal Service regarding guardianship.

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*Adapted from the FY 80 State Plan of the Governor's Council for the Handicapped & Gifted

WHO IS P.A.D.D.?

P.A.D.D., Inc., Protection and Advocacy for the Developmentally Disabled, is the designated agency by the Governor of the State of Alaska for the implementation of a system to protect and advocate the rights of the developmentally disabled as required by Section 113 under P.L. 94-103, amended by 95-602.

P.A.D.D., Inc. was established originally as a result of a coalition formed by the Developmental Disabilities Council, now called the Governor's Council for the Handicapped and Gifted.

The purpose of P.A.D.D., Inc., a nonprofit private corporation, is to implement a protection and advocacy system for the rights of the developmentally disabled.

The business affairs of the corporation will be managed by a Board of Directors consisting of not less than nine or more than twenty-one members who shall be qualified, nominated, elected or appointed as provided in the bylaws of the corporation.

The functions of the agency are as follows:

1. To promote the general welfare of developmentally disabled citizens of all ages in the State of Alaska.

2. To provide information and referral services regarding protection and advocacy to developmentally disabled persons, their families and other interested parties.

3. To render and assure advocacy and protective services to developmentally disabled persons and their families.

4. To provide advocacy training to developmentally disabled persons and their families.

5. To cooperate with and enlist the support of public, private religious, professional and other groups of agencies both local, state, and federal in the furtherance of agency objectives.

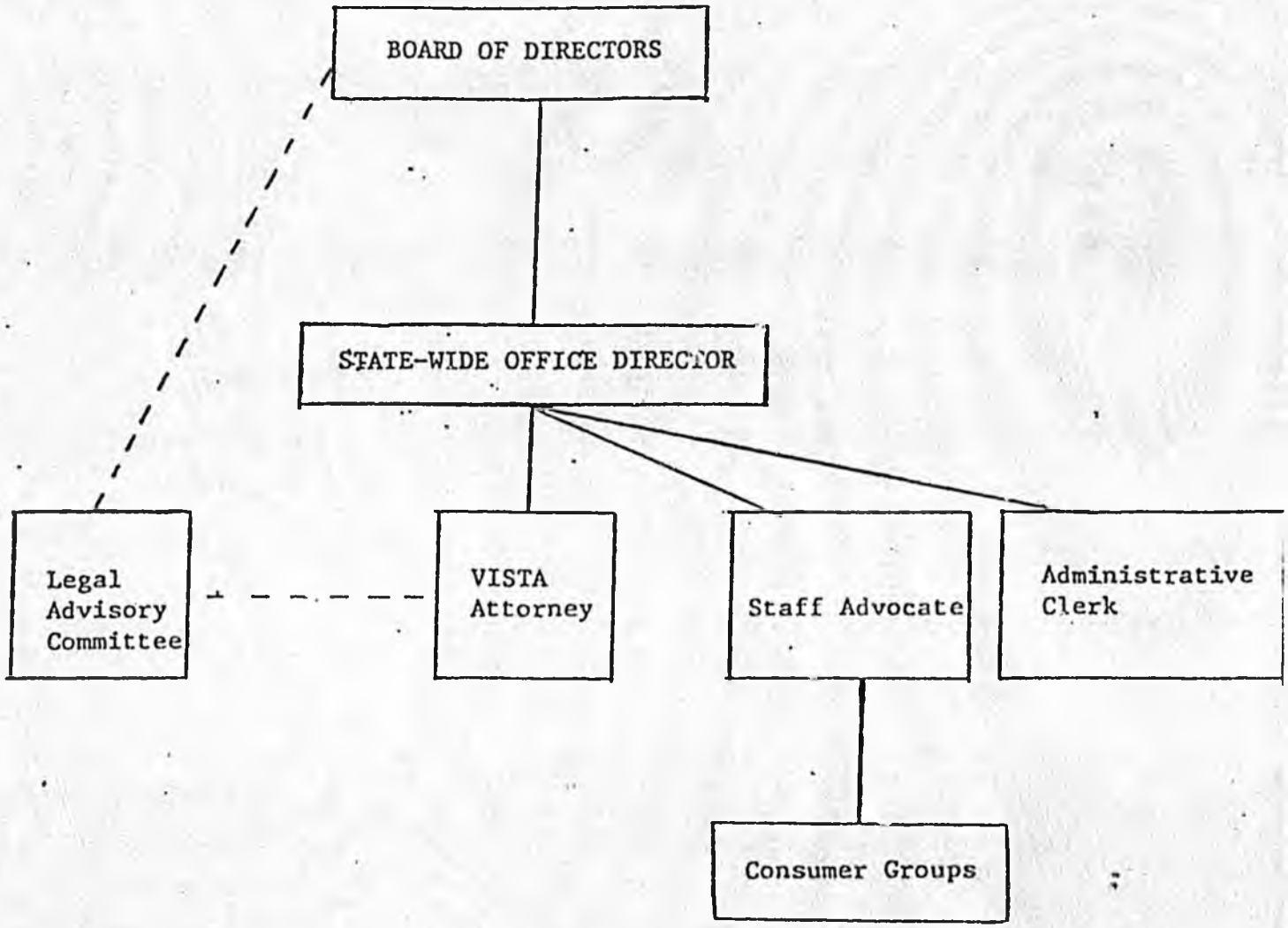
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Organizational Relationships

The agency designated by the Governor is a private nonprofit corporation and is independent of all agencies in the State of Alaska which deliver services, treatment, or habilitation to developmentally disabled people.

ORGANIZATIONAL CHART



The following are major concerns regarding this bill:

1. For many developmentally disabled persons and their parents this bill seems to complicate and make the process more expensive. A balance must be met between safeguarding the persons rights and making it so expensive that legal parents, who are concerned for and supportive of their child, cannot easily become guardians when their child reaches majority.

   In the case of supportive parents the law should permit them to become guardians with a more limited judicial review than the current bill suggests. This would reduce the financial impact.

2. That the law prohibit persons from being guardians to more than one individual. A problem with the public guardian concept. A person is to easily treated as a number when one person becomes responsible for many.

3. The bill should prevent absentee guardianship. Again a problem with the public guardian. If a person is to be an active and participating advocate of his ward he must be located in the same area.

4. If there must be a public guardian, than put a time limit on it. It is difficult to accept that the state can effectively represent the interests of a person who is also a ward of the state.

P.A.D.D. is already providing many of the services that the public guardian is in this bill delegated to do. If this bill is passed, P.A.D.D. would be happy to provide whatever assistance we can. Given a more realistic budget P.A.D.D. can and will continue to expand its activities in relation to guardianship. We are an agency whose mandated role is to provide assistance to developmentally disabled persons and their parents or guardians in the area of guardianship, which is one aspect of our protection and advocacy function.

For your information find attached the following:

1. What is P.A.D.D.?
2. Organizational chart
3. Legal Technical Assistance available to P.A.D.D.
4. Goals and objectives relating to guardianship from our State Plan
5. Definitions
6. Job Description of Staff Attorney
7. Analysis, Position Paper, and Information prepared by P.A.D.D.'s Legal Advisor

GUARDIANSHIP RELATED GOALS

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To educate the public about the legal rights of developmentally disabled individuals and how to be effective advocates for the developmentally disabled.

To ensure that the needs and views of developmentally disabled individuals are effectively presented to the Alaska legislature, service agencies, and the Governor's Council for the Handicapped & Gifted.

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JOB DESCRIPTION

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6. Recommend to the Governor's Council any changes in legislation, agency policies, service delivery systems and assist in drafting any needed legislation to protect the rights of the developmentally disabled.

Qualifications

1. Must be a graduate of an accredited law school and be able to practice law in Alaska.

2. Undergraduate background in social sciences preferred.

3. Must be interested in doing legal research, providing training to other attorneys and engaging in public education as well as pursuing litigation.

4. Must be willing to travel throughout the state of Alaska.

5. Experience in legal advocacy for the handicapped preferred.