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POSITION PAPER
GUARDIANSHIP
February 1981



THE GOVERNOR'S COUNCIL FOR THE HANDICAPPED AND GIFTED SUPPORTS THE PASSAGE OF SENAT BILL 3 "AN ACT RELATING TO GUARDIANS AND CONSERVATORS"

RATIONALE

The Council takes this supportive position for the following reasons (background information follows in more detail):

1. SB 3 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. SB 3 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. SB 3 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. SB 3 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 SB 3. 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. SB 3 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. SB 3 sets priorities for appointment of private guardians (Sec. 13.25.145(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. SB 3 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. SB 3 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. SB 3 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.

BACKGROUND INFORMATION ON NEED FOR A REVISED GUARDIANSHIP LAW IN ALASKA
(AS PROPOSED IN SB 3)

i. 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 extremely 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 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.

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.)

REFERENCES

- AMERICAN BAR ASSOCIATION, GUARDIANSHIP AND CONSERVATORSHIP: STATUTORY SURVEY AND MODEL STATUTE, 1979.
- N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY (1971).
- INTERNATIONAL LEAGUE OF SOCIETIES FOR THE MENTALLY HANDICAPPED (ILSMH), SYMPOSIUM ON GUARDIANSHIP OF THE MENTALLY RETARDED, 11 (1969).
- NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW (NCCUSL), UNIFORM PROBATE CODE (U.P.C.) Article V (4th Ed. 1975).
- ROTHMAN, THE STATE AS PARENT: SOCIAL POLICY IN THE PROGRESSIVE ERA, IN W. CAYLIN, I. GLASSER, S. MARCUS, & D. ROTHMAN, DOING GOOD: THE LIMITS OF BENEVOLENCE, 67, 70 (1978).
- E.g., THE PRESIDENT'S PANEL ON MENTAL RETARDATION (PPMR), REPORT OF THE TASK FORCE ON LAW (1963); PRESIDENT'S COMMITTEE ON MENTAL RETARDATION (PCMR), REPORT TO THE PRESIDENT -- MENTAL RETARDATION: CENTURY OF DECISION (1976); THE PRESIDENT'S COMMISSION ON MENTAL HEALTH (PCMH), REPORT TO THE PRESIDENT (1978); ILSMH (above); COUNCIL OF THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY (AAMD), POSITION PAPER ON GUARDIANSHIP FOR MENTALLY RETARDED PERSONS (1973); NATIONAL CENTER FOR SENIOR CITIZENS, MODEL GUARDIANSHIP, CONSERVATORSHIP AND POWER OF ATTORNEY LEGISLATION, IN U.S. SENATE SPECIAL COMMITTEE ON AGING PROTECTIVE SERVICES FOR THE ELDERLY: A WORKING PAPER, 75-110 (1977); GOVERNOR'S COMMISSION FOR REVISION OF THE MENTAL HEALTH CODE OF ILLINOIS, REPORT (1976).
- AMERICAN BAR ASSOCIATION COMMISSION ON THE MENTALLY DISABLED: EXERCISING JUDGEMENT FOR THE DISABLED, REPORT OF AN INQUIRY INTO LIMITED GUARDIANSHIP, PUBLIC GUARDIANSHIP, AND ADULT PROTECTIVE SERVICES IN SIX STATES. (September 1979)

alaska
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REPRESENTING ACUTE, LONG TERM AND OUTPATIENT FACILITIES

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Ketchikan General Hospital
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June 4, 1981

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Juneau

The Honorable Fred Brown
House of Representatives
Pouch V, State Capitol Bldg.
Juneau, Alaska 99811

Dear Representative Brown:

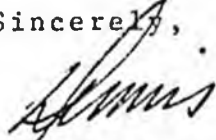
The Alaska State Hospital Association wishes to take this opportunity to indicate its support for CSSE 3 relating to guardians and conservators. The need for the revisions of the law pertaining to guardians and conservators is well documented. This Association, as well as others, has been before the legislature in recent years advocating this measure. We hope that success will be achieved this year.

While we support CSB 3, we believe two amendments (See enclosure) would substantially improve the bill by further protecting the rights of the respondent. Our first suggestion is to specifically limit the duration of a temporary guardianship to 6 months. This would preclude the possibility of an extended guardianship under a temporary guise solely because permanent appointment of a guardian was not pursued.

The second concern is in the area of malicious and frivolous petitions. We believe that the court should be specifically required to dismiss any petition immediately upon determination that such a petition is malicious or frivolous and assess the petitioner all cost incurred by the respondent as a result of the malicious or frivolous petition.

Thank you for your consideration in this matter.

Sincerely,



Dennis L. DeWitt
Executive Director

Enclosure

cc: Members of the House Judiciary Committee
Jack Buck, St. Ann's Nursing Home

Part
No

Amendment Number 1

Section 13.26.140 (e) Temporary Guardians
Page 21 Lines 9-11. Add the following sentence

"In no case, unless renewed by the Court, shall a
temporary guardianship exceed 6 months."

Amendment Number 2

Section 13.26.105 Petition
Page 4 after Line 28 add

"(e) if at any time during the proceedings the court
finds the petition to be frivolous or malicious, the
court shall immediately deny the petition and assess
the petitioner any and all costs incurred by the
respondent as a result of the frivolous or malicious
petition.

Part
No

POSITION PAPER

CS For Senate Bill No. 3 (Finance)

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

This bill provides a comprehensive revision of Guardianship statutes. It provides for the special needs of veterans as well as handicapped persons. It provides for partial guardianship orders when the ward does not need a total guardianship. Finally, it creates an office of Public Guardian which will enable more Alaskans who truly need guardians to get them.

The new features of this committee substitute are all appropriate. This bill is greatly needed by handicapped persons, veterans and their families.

POSITION: The Department of Health & Social Services supports this bill.

Recommended By: David Bruce
David Bruce,
Deputy Director
Division of Public Health

Recommended By: Vern Stjerner
Vern Stjerner
Director
Div. of Mental Health

Date: 6/1/81

Approved By: Helen Beirne
Helen Beirne
Commissioner

Date: 6/4/81

FISCAL NOTE

I. REQUEST
 Bill/Resolution No. CS For Senate Bill No. 3 (Finance)
 Title "An Act relating to guardians and conservators..."
 Requested by Helen D. Beirne Date June 1, 1981

II. FISCAL DETAIL
 Agency Affected Health and Social Services
 Program Category Affected Public Health
 BRU, Program, or Subprogram(s) Affected Family Health
 (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 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES	0	0	0	0	0	0
200 TRAVEL	0	0	0	0	0	0
300 CONTRACTUAL	0	0	0	0	0	0
400 COMMODITIES	0	0	0	0	0	0
500 EQUIPMENT	0	0	0	0	0	0
600 LAND & STRUCTURES	0	0	0	0	0	0
700 GRANTS, CLAIMS, ETC.	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER (Specify Fund Source)	0	0	0	0	0	0
	0	0	0	0	0	0
	0	0	0	0	0	0

POSITIONS

FULL TIME	0	0	0	0	0	0
PART TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

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

IV. DATE June 1, 1981 PREPARED BY David A. Spence, M.D.
 AGENCY Family Health
 PHONE 465-3100
 Original: Legislative Finance
 cc: Budget and Management
 Prime Sponsor (First Legislator Named) M&B Approval [Signature] Date 6/1

FISCAL NOTE

I. REQUEST

Bill/Resolution No. SB 3
 Title An Act Relating to Guardians and Conservators
 Requested by Senate Finance Date 5/20/81

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 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES		75.8	151.6	162.2	173.5	185.6
200 TRAVEL		15.0	30.0	32.1	34.3	36.7
300 CONTRACTUAL		45.0	90.0	95.4	102.0	109.1
400 COMMODITIES		1.0	2.0	2.1	2.2	2.3
500 EQUIPMENT		4.0	8.0	8.5	9.1	9.7
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		140.8	281.6	300.3	321.1	343.4

FUNDING (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
GENERAL FUND		140.8	281.6	300.3	321.1	343.4
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
FULL TIME		4.0	4.0	4.0	4.0	4.0
PART TIME						
TEMPORARY						

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

The funds will allow the guardians and conservators program to function at an efficient level with six month funding. The six month funding is necessary to allow for recruitment and placement of the program personnel. In addition, the time will be utilized to develop the program's administrative and functional capacities.

IV. DATE 5/20/81 PREPARED BY *[Signature]*
 AGENCY Legislature
 PHONE 465-4923
 Original: Legislative Finance
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)