COMMITTEE REPORT

SENATE

FURTHER:

4/16/86

Date 5/11/86

Mr. President

The Committee on FINANCE considered CSHB 485(JUD)

reltaing to powers and duties of guardians.

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

[✓] do pass

[ ] do pass with attached amendment(s)

[ ] replace with/or adopt CS for _____
[ ] new title
[ ] same title and recommends _____

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE
~~θ~~ H&SS

[ ] reports it back without recommendation

[ ] recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

Kelly
Rick Halford
Ferguson

MEMBERS HAVING
OTHER RECOMMENDATIONS

Paul Fisher NRec
McGlasson

Chairman

do pass
Chairman recommendation

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: 2/3/86

REQUEST

Bill/Resolution No.: HB 485
Title: An Act relating to powers and duties of guardians.

Sponsor: Sund & Gruenberg
Requestor:
Date of Request: 2/3/86

FISCAL DETAIL

Agency Affected: Health & Social Services
BRU: Social Services
Youth Services

Components:

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

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

ANALYSIS : Attach a separate page if necessary

n/a

Prepared by: Michael L. Price, Director Phone: 465-3170
Division: Family and Youth Services Date: February 4, 1986

Approved by Commissioner: John R. Pugh, Commissioner Date: 2/5/86
Agency: Health and Social Services

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

10/25/85

Offered: 2/26/86
Referred: Rules

Original sponsors: Sund and
Gruenberg

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 485 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to powers and duties of guardians."

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

* Section 1. AS 13.26.150(e) is amended to read:

(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 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 lifesaving [LIFE-SAVING] medical procedures; however, a guardian is not required to oppose the cessation or withholding of lifesaving medical procedures when those procedures will serve only to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure of or relief from the illness or condition being treated unless the ward has clearly stated that lifesaving medical procedures not be withheld; a guardian is not civilly liable for acts or omissions under this paragraph unless the act or omission constitutes gross negligence or reckless or intentional misconduct;

(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) consent on behalf of the ward to termination of the ward's parental rights;

(6) prohibit the ward from registering to vote or from casting a ballot at public election;

(7) prohibit the ward from applying for and obtaining a driver's license;

(8) prohibit the marriage or divorce of the ward.

CS for HB485 (Judiciary)- An act relating to powers and duties of guardians
Overview prepared by Rep. John Sund's office

SECTIONAL ANALYSIS
Section 1, subsection (3) is amended to allow guardians to accept a medical decision to withhold medical procedures from their wards, when the procedures would only prolong the imminent death of a ward and provide no hope of relief or cure.

The guardian cannot be held civilly liable for adhering to the provisions of the statute.

BACKGROUND
Current law is interpreted as requiring that guardians insist on the continuation of medical procedures, once begun, regardless of a medical judgment that those procedures will not provide relief or cure for a guardian's ward.

The bill does not require the guardians to advocate for the withdrawal of any procedure nor to accept the medical judgment to discontinue a procedure. Rather, it gives them permission to accept or reject that judgment as they see fit, just as a family member who is not a guardian would be able to.

Guardians are appointed by the court with the "same powers and duties respecting the ward that a parent has respecting an unemancipated minor child". Guardians have a duty to assure the care and comfort of their wards.

The concept of the bill is supported by the Alaska Health Association, the Ketchikan General Hospital administrator, Wrangell General Hospital's administrator, Providence Hospital, PADD (Protection and Advocacy for the Developmentally Disabled), and the Older Alaskans Commission.

POSITION PAPER
Bill No. HB485

The Office of Public Advocacy in the Department of Administration performs the duties of the Public Guardian under A.S. 13.26.360-13.26.410. Guardians provide informed medical consents for incapacitated persons (wards) directly impacting the ward's health and safety according to A.S. 13.26.150(c)(5) except as limited by (e) of this section.

PRESENT STATUTE:

A.S. 13.25.150(e) "A guardian may not...(d) consent on behalf of the ward to the withholding of life-saving medical procedures."

PROPOSED AMENDMENT:

A.S. 13.25.150(e) "A guardian may not...(3) consent on behalf of the ward to the withholding of life-saving medical procedures; however, the guardian is not required to oppose the cessation or withholding of life-saving medical procedures when those procedures will serve only to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure of or relief from the illness or condition being treated;"

RATIONALE:

The current law could be interpreted as requiring the guardian to insist upon the continuation of "life-saving medical procedures" regardless of the values such procedures might offer the patient in terms of benefits received. The question which needs to be considered is whether the procedure offers relief or cure, versus simply prolonging the dying process by the use of heroic means.

PROBLEM AREAS IN THE PRESENT STATUTE:

(1) A literal reading of the statute would mean that life-saving medical procedures cannot be stopped once they are started. Hence the possibility may arise that non-beneficial and even harmful procedures could not be withdrawn. A further possible effect might be that a different standard of care would be used for wards than for other patients. Also those with guardians might be either overtreated since the treatment could not be stopped or undertreated because the treatment was not begun lest it could not be withdrawn.

(2) the meaning of "life-saving medical procedures" is not clear nor is it defined. An attempt to define the phrase defies the enumeration process, as does a list of the exceptions. Moreover, such a task borders on the impossible because of the nature of the words. The phrase focuses on "procedures" instead of the "relationship" of the treatment to the ward in terms of the benefits received. E.G., chemotherapy or a respirator is life-saving if it is helpful in the restoration of health of the ward, but it would be counterindicated if it simply prolonged the dying process.

(3) An attempt to solve these problems by having the health care provider act independently of the guardian would defeat the purpose of guardianship. Further, such actions by the health care provider would be destructive of the informed consent process.

(4) The statute can create difficulties in the decision-making process for the guardian, ward, physician, health care institution and its personnel, and other health care providers. In addition, it would often conflict with the philosophy of medical ethics.

SUPPORT/HB485:

(1) The amendment more clearly delineates the different types of medical/nursing care involved, thus allowing the guardian to carry out more adequately his/her responsibilities toward the ward.

(2) The amendment allows the guardian to not oppose the cessation or withholding of life-saving medical procedures where they are clearly ineffective and not beneficial to the ward from the perspective of the ward.

(3) The amendment facilitates and keeps open the communication process and dialogue among the guardian and health care providers at all times.

(4) There are no foreseen costs to the OPA with passage of HB485.

Brant McGee, Public Advocate
Office of Public Advocacy

2/3/86
Date

Commissioner Eleanor Andrews
Department of Administration

2/7/86
Date

health
association
of alaska

319 Seward St., Juneau, Alaska 99801

Mr. Chairman, I am Sister Barbara Haase, a member of the Sisters of St. Joseph of Peace, Administrator of Ketchikan General Hospital and former Chairman of the Health Association of Alaska. I am here today to speak on behalf of the Association as well as my own facility. The Health Association of Alaska represents hospitals and nursing homes in Alaska.

We support House Bill 485 by Representatives Sund and Gruenberg. This is a tightly drawn proposal which resolves a very specific and real problem. Under the current law "life saving procedures" may not be withheld from a ward under any circumstance. This is a substantial difference from the standard of medicine which is available to you and me. The guardianship law ought to work to protect the rights of an individual, not to deprive the person of rights.

The purpose of AS 13.26.150(e)(3) was to prevent situations where a guardian, who could benefit from the death of a ward, could decide whether or not the ward should die. It was thought that putting either a guardian or a ward in that position should be avoided. Unfortunately, there have been unforeseen consequences.

Life-saving procedures, once begun, cannot be stopped without a court order. Heroic treatment must always be applied, without regard to its ultimate usefulness. This results in prolonged useless medical treatment.

Let me offer you 2 examples: A 90 year old frail and deteriorating patient with a failing kidney. If the patient suffers acute renal failure, is hemodialysis appropriate? Probably not, unless you are a ward. If the patient goes into cardiac arrest, should defibrillation be administered? Probably not, unless you are a ward. In either case is there a realistic expectation of any positive or prolonged outcome? I would expect not.

Under current law there is no latitude in these cases. This is <u>not</u> the intent of the original law nor is it reasonable or humane treatment of individuals with proper concern for the dignity of the individual.

House Bill 485 offers a simple and realistic solution to this dilemma. It provides that a guardian can accept the advice of the medical community as it relates to the withholding of procedures when those procedures will only serve to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure of, or relief from, the illness or condition being treated. The ward remains protected by the provisions of the guardianship law. The guardian retains the obligation to act on behalf of the ward and to protect the rights of the ward. This measure simply includes the option, not a mandate, to accept medical advice.

We do not believe that the guardian is placed in an impossible situation in this bill. A guardian retains the obligation to review the recommendations and if, in the guardian's opinion, the recommendation is not appropriate, to object. This bill simply says that the objection is not mandated in law. It restores judgement where it should have always been and restores rights to a ward which we believe were unintentionally taken away with the passage of Alaska's guardianship law.

Mr. Chairman, I would like to thank you for this opportunity to testify. I would be pleased to answer any questions.

(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. (§ 1 ch 78 SLA 1978; am § 11 ch 83 SLA 1981)

Effect of amendments. — The 1981 amendment rewrote this section.

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. (§ 12 ch 83 SLA 1981)

Sec. 13.26.145. Who may be guardian; priorities. (a) The court may appoint a competent person, the public guardian, or a private association 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 the capacity as guardian;

(2) is, or is likely to become during the guardianship period, a creditor of the incapacitated person, other than in the 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 the person 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, 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, association, or nonprofit corporation 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. (§ 1 ch 78 SLA 1972; am § 13 ch 83 SLA 1981)

Effect of amendments. — The 1981 amendment rewrote this section.

NOTES TO DECISIONS

Cited in In re O.S.D., Sup. Ct. Op. No. 2744 (File No. 7041), 672 P.2d 1304 (1983).

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 duties and powers, the guardian shall encourage the ward to participate to the maximum extent of the ward's capacity in all decisions which affect the ward, to act on the ward's own behalf in all matters in which the ward is able, and to develop or regain, to the maximum extent possible, the capacity to meet the essential requirements for physical health or safety, to protect the ward's rights, and to manage the ward's financial resources.

(b) A partial guardian of an incapacitated person has only the powers and duties respecting the ward enumerated in the court order.

(c) A full guardian of an incapacitated person has the same powers and duties respecting the ward that a parent has respecting an

unemancipated minor child except that the guardian is not liable for the care and maintenance of the ward and is not liable, solely by reason of the guardianship, to a person who is harmed by acts of the ward. Except as modified by order of the court, a full guardian's powers and duties include, but are not limited to, the following:

(1) the guardian is entitled to custody of the person of the 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) the guardian shall assure the care, comfort, and maintenance of the ward;

(3) the guardian 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 the ward's needs for physical health and safety;

(4) the guardian 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) the guardian 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, the guardian may not apply the ward's money or property for the services as guardian or for room and board which the guardian, or the guardian's spouse, parent, or child has furnished the ward unless, before payment, the court finds that the ward is financially able to pay and that the charge is reasonable; notice of a request for payment approval shall be provided to at least one relative of the ward if possible; the guardian shall exercise care to conserve any excess money or property 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 guardian of a ward, for whom a conservator has also been appointed, shall have the custody and care of the ward and is entitled to receive reasonable sums for 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 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) consent on behalf of the ward to termination of the ward's parental rights;

(6) prohibit the ward from registering to vote or from casting a ballot at public election;

(7) prohibit the ward from applying for and obtaining a driver's license;

(8) prohibit the marriage or divorce of the ward. (§ 1 ch 78 SLA 1972; am § 28 ch 25 SLA 1973; am § 14 ch 83 SLA 1981)

Effect of amendments. — The 1981 amendment rewrote this section.

Legislative history reports. — For report on ch. 56, SLA 1973 (HCS SB 140), see 1973 Senate Journal Supplement No. 9; 1973 House Journal, p. 819.

NOTES TO DECISIONS

Sterilization of mental incompetents. — A superior court, as a court of general jurisdiction, does have, as part of its inherent parens patriae authority, the power to entertain and act upon a petition seeking an order authorizing the sterilization of a mental incompetent. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

Before sanctioning the sterilization of an incompetent, the court must take great care to ensure that the incompetent's rights are zealously guarded. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

The advocates of a proposed operation to sterilize an incompetent bear the heavy burden of proving by clear and convincing evidence that sterilization is in the best interests of the incompetent. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

The proponents of the sterilization of a mental incompetent must show that there is no less restrictive alternative to the proposed operation. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

Basic notions of procedural due process require that before an order for the sterilization of a mental incompetent is entered the incompetent be afforded a full judicial hearing at which medical testimony is presented and the incompetent, through a guardian ad litem, is allowed to present proof and cross-examine witnesses. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

Before an order for the sterilization of a mental incompetent is entered the court must assure itself that a comprehensive medical, psychological, and social evaluation is made of the incompetent. If it is

necessary in meeting this standard that independent advice be obtained then the court should, on its own motion, obtain such advice. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

Before an order for the sterilization of a mental incompetent is entered the court must first determine that the individual legally is incompetent to make her own decision whether or not to be sterilized and that this incapacity is in all likelihood permanent. It must then be established that the incompetent is capable of reproduction and that, as a result of her disability, she would be unable to adequately care and provide for her offspring. Next, it must be shown that sterilization is the only practicable means of contraception. To the extent possible, the court must also elicit testimony from the incompetent concerning her understanding and desire for the proposed operation and its consequences. Finally, the court must examine closely the motivation behind the petition. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

The guidelines set forth in this opinion for determining the procedure to be taken on a petition for an order to sterilize a mental incompetent are not intended to be an all-inclusive list of the various factors which the superior court should consider before ruling on a petition for sterilization. Rather, they set forth what are to be the minimum inquiries necessary to protect the constitutional rights of the incompetent. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

Although the individual's status as an "incapacitated person" prevents her expressed desires from being conclusive, this does not mean that her apparent preferences can be totally ignored. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

Upon the hearing of a petition for the sterilization of a mental incompetent, the incompetent's apparent preferences should be treated much the same as those of a child in a custody hearing. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

The weight to be accorded to an incompetent's preferences concerning a petition for her sterilization will depend upon the degree to which she appears to understand the purpose and significance of sterilization. K.C.M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

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)

COMMITTEE REPORT

SENATE

FURTHER: FINANCE

4/1/86

Date 4/15/86
read 4/16

Mr. President

The Committee on JUDICIARY considered CSHB 485(Jud)

~~relating to~~ powers and duties of guardians.

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

[X] do pass

[ ] do pass with attached amendment(s)

[ ] replace with/or adopt CS for _____
[ ] new title
[ ] same title and recommends _____

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE

[ ] reports it back without recommendation

[ ] recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

Jan Faulkner
Tim Kelly
Rick Halford
Zirkle

MEMBERS HAVING
OTHER RECOMMENDATIONS

Patrick Rodey
Chairman

do pass
Chairman recommendation

COMMITTEE REPORT

SENATE

FURTHER: JUDICIARY

3/24/86

Date 4-1-86

Mr. President

The Committee on HESS considered CSHB 485(Jud)
relating to powers and duties of guardians.

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

[X] do pass

[ ] do pass with attached amendment(s)

[ ] replace with/or adopt CS for _____
[ ] new title
[X] same title and recommends [redacted]

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE

[ ] reports it back without recommendation

[ ] recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

Joe Josephson
Chris Steinkruger
Edna Ulmer

MEMBERS HAVING
OTHER RECOMMENDATIONS

Paul Fischer N. Rec

Bettye Fahrenkamp Do Pass
Chairman

Chairman recommendation