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recognition that the prospective ward is unable to manage for himself and must therefore have someone else direct his life. . . . <sup>1/</sup>

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."<sup>2/</sup>

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

<sup>1/</sup> Delaware Court of Chancery, Manual for Guardians 48 (1975).

<sup>2/</sup> 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.<sup>3/</sup>

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 absence 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 exercise 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 judicial 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 judicially 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.<sup>4/</sup>

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 incapacitated 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.

1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • TELEPHONE: (202) 331-2242

November 28, 1979

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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.)

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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 judicially-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 1967 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 could 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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## CURRENT STATUS OF GUARDIANSHIPS

Facility	# Patients	# with Guardians	# with Private Guardians	# with Public or Disint. Guardians
<b>Southcentral Region</b>				
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
<b>Northern Region</b>				
Careage North	73	8	6	2
Hope Center	25	6	5	1
<b>Southeast Region</b>				
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
<b>TOTALS</b>	<b>665</b>	<b>125</b>	<b>89</b>	<b>36</b>
Percent of Total Facility Population		19%	13%	5%

## CURRENT NEED FOR GUARDIANS

Facility	# without Guardian	# which do not need Guardian	# needing Guardian	# needing Private Guardian	# needing Public Guardian
<b>Southcentral Region</b>					
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
<b>Northern Region</b>					
Careage North	65	38	27	21	6
Hope Center	19	4	15	12	3
<b>Southeast Region</b>					
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
<b>TOTALS</b>	<b>540</b>	<b>330</b>	<b>210</b>	<b>95</b>	<b>115</b>
<b>Percent of Total Facility Population</b>	<b>81%</b>	<b>50%</b>	<b>32%</b>	<b>14%</b>	<b>17%</b>

TOTAL UTILIZATION OF GUARDIANS

Facility	Total # of Guardians who could be in use now	# Private Guardians	# Public Guardians
<b>Southcentral Region</b>			
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
<b>Northern Region</b>			
Careage North	35	27	8
Hope Center	21	17	4
<b>Southeast Region</b>			
Island View Manor	43	43	0
Wrangell General (long-term care)	11	2	9
Gateway	5	2	3
St. Ann's	9	1	8
<b>TOTALS</b>	<b>335</b>	<b>184</b>	<b>151</b>
<b>Percent of Total Facility Population</b>	<b>50%</b>	<b>28%</b>	<b>23%</b>

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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
<b>TOTALS</b>	<b>463</b>	<b>152</b>	<b>87</b>	<b>65</b>
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:

	<u>FY 80 A</u>	<u>FY 80 B</u>	<u>FY 81 (2)</u>
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)
Commodities	1,200	1,200	1,320
Equipment	<u>2,439</u>	<u>2,439</u>	<u>          </u>
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.

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CONTRACTUAL SERVICES: continued

Psychiatric 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

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	141.01
Chair, Secy	92.72
Calculator	218.47
Transcriber	466.86
Dictating unit	466.86
	<u>\$7,439.43</u>

TOTAL PROJECTED FY 82 BUDGET REQUEST

\$233,217

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
	<u>41,244</u>
FICA-.06138 x \$37,228	2,282
PERS- 17.70%	7,300
Health Ins- 24 mm x \$141.32	3,392
	<u>\$54,218</u>

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
	<u>\$24,300</u>

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
	<u>\$18,545</u>

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

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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—

Reg. § 442.401 § 21,712

→ 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).

§ 21,713 Reg. § 442.402

##### [§ 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

1 For an Act entitled: "An Act relating to guardians of incapacitated persons and creating  
2 an office of public guardian."

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

4 \* Section 1. AS 13.26.005(1) is repealed and reenacted to read:

5 (1) "incapacitated person" means any person whose ability to receive and  
6 evaluate information and/or communicate decisions is impaired for reasons other than  
7 minority to the extent that he lacks the ability to meet the essential requirements for  
8 his physical health or safety without court-ordered assistance;

9 \* Sec. 2. AS 13.26.005(2) is renumbered as AS 13.26.005(5) and AS 13.26.005 is amended  
10 by adding new paragraphs to read:

11 (2) "meet essential requirements for physical health or safety" means those  
12 actions necessary to provide the health care, food, shelter, clothing, personal hygiene  
13 and protection without which serious physical injury or illness is more likely than not  
14 to occur;

15 (6) "partial guardian" means a guardian who possesses fewer than all of the  
16 legal rights and powers of a full guardian, and whose rights, powers, and duties have  
17 been specifically enumerated by court order;

18 (7) "full guardian" means a guardian who possesses all the legal rights and  
19 powers as set forth in AS 13.26.150(b).

20 (8) "visitor" means a person trained or experienced in law, medical care,  
21 mental health care, education, rehabilitation or social work who is an officer, employee  
22 or special appointee of the court with no personal interest in the proceedings.

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

24 Sec. 13.26.090. PURPOSE AND BASIS FOR GUARDIANSHIP.

25 Guardianship for incapacitated persons shall be used only as is necessary to promote  
26 and protect the well-being of the individual, shall be designed to encourage the develop-  
27 ment of maximum self-reliance and independence of the individual, and shall be ordered  
28 only to the extent necessitated by the individual's actual mental, physical and adap-  
29 tive limitations. An incapacitated person for whom a guardian has been appointed is

1 not presumed to be incompetent and retains all legal and civil rights except those  
2 which have been expressly limited by court order or have been specifically granted to  
3 the guardian by the court.

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

5 (e) Unless otherwise specified, a testamentary guardian initially has the powers  
6 and duties which the deceased parent or spouse held, but these powers and duties are  
7 subject to the authority of the court to modify the scope of guardianship or to be  
8 removed as guardian as provided in sec. 125 of this chapter.

9 \* Sec. 5. AS 13.26.105 is repealed and reenacted to read:

10 Sec. 13.26.105. PETITION.

11 (a) The person alleged to be incapacitated, the public guardian, or any  
12 person or private organization or agency interested in his welfare may petition for a  
13 finding of incapacity and the appointment of a guardian.

14 (b) The petition for appointment of a guardian shall state facts showing:

15 (1) The name, age, and address of the petitioner and relationship to the  
16 proposed ward;

17 (2) The name, age, and present address of the proposed ward;

18 (3) The name and address of the person or facility presently having  
19 care, custody, guardianship or conservatorship of or over the proposed ward, if  
20 any, and the existence of any other restrictions on the legal capacity of the  
21 proposed ward to act in his own behalf;

22 (4) The nature and degree of the alleged incapacity;

23 (5) The particular type and duration of appointment and the protection  
24 and assistance being sought;

25 (6) The names and addresses, unless they are unknown and cannot be  
26 reasonable ascertained, of the individuals most closely related to the proposed  
27 ward by blood or marriage;

28 (7) The facts and reasons supporting the allegations of incapacity and  
29 the need for appointment of a partial or full guardian;

1 (8) The names and addresses of persons known to the petitioner who have  
2 knowledge that might prove helpful in determining the capacity and needs of the  
3 proposed ward.

4 (c) The petition, may also nominate a guardian and include a request for  
5 temporary guardianship as provided in AS 13.26.140 if it appears that there is an  
6 imminent danger that the physical health or safety of the proposed ward will be seri-  
7 ously impaired during the pendency of the guardianship petition. A request for tem-  
8 porary guardianship must specify facts which cause the petitioner to believe that a  
9 temporary guardian is necessary.

10 \* Sec. 6. AS 13.26 is amended by adding new sections to read:

11 Sec. 13.26.106. INITIAL COURT PROCEDURES. (a) Upon the filing of a petition, the  
12 court shall set a date for a hearing on the issues of incapacity.

13 (b) If the person alleged to be incapacitated does not have an attorney of  
14 his own choice, the court shall appoint an attorney to represent him in the proceeding.

15 (c) The court shall appoint a qualified person as defined in AS 13.26.005(8)  
16 to act as visitor who may but need not be an employee of the state, a municipality, or  
17 the court. This person shall arrange for evaluations to be performed and prepare a  
18 written report to be filed with the court. The court shall also appoint a person who  
19 has expertise in regards to the alleged incapacity of the proposed ward to investigate  
20 the issue of incapacity.

21 (d) The visitor shall interview the person alleged to be incapacitated and  
22 the person seeking appointment as guardian. The visitor shall conduct such interviews,  
23 visits, investigations as are necessary to prepare his report and shall arrange for the  
24 proposed ward to be examined by the court appointed expert. The expert's written  
25 report shall be incorporated into the visitor's report.

26 (e) Any interviews and examinations shall take place in the proposed ward's  
27 usual residence unless the proposed ward does not object to being examined or inter-  
28 viewed in a medical or mental health facility or, with the approval of the visitor, it  
29 is deemed necessary to conduct certain interviews or examinations in a medical or

1 mental health facility.

2 Sec. 13.26.108. NOTICE OF RIGHTS. (a) Upon appointment, the visitor shall  
3 promptly:

4 (1) explain to the <sup>person alleged to be incapacitated</sup> proposed ward, in a language or communication system  
5 he can understand, the purpose of the interview and possible consequences of the  
6 proceedings and the rights as noted in subsection (3);

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

8 (3) explain and provide to the proposed ward a written statement of the  
9 following:

10 (A) That he has the right to communicate with an attorney or an  
11 expert in the alleged incapacity before proceeding with the interview;

12 (B) That if he does not have an attorney, an attorney, whose name,  
13 address and telephone number are to be included in the statement, will be  
14 designated to advise and represent him prior to and at any judicial hearings,  
15 and that the attorney may arrange for an examination and consultation with an  
16 expert; and

17 (C) That he may, instead, employ an attorney and/or expert of his  
18 own choosing; and

19 *Add requirement for service on the person alleged to be incapacitated to be witnessed by 3rd party (4)*  
20 (b) No substantive interview of the proposed ward or other investigation  
21 shall be conducted as part of the visitor's duties until the above tasks have been  
22 fulfilled.

23 Sec. 13.26.109. VISITOR'S REPORT. (a) An evaluation report by the visitor shall  
24 be filed in court, together with proof of service to the proposed ward of the petition  
25 and proof of service of the report upon the proposed ward and his attorney and the  
26 petitioner, within ninety days of the date on which the petition was filed:

27 (b) The visitor shall, as part of this report, explain alternatives to guard-  
28 ianship and make a recommendation as to which alternatives are available to necessarily  
29 safeguard the proposed ward's essential requirements for physical health and safety.

1 Any recommendation as to personal guardianship is to be made only when the needs of the  
2 proposed ward cannot be made by other alternatives.

3 (c) The evaluation report shall:

4 (1) collect and provide medical and other tests and examinations per-  
5 formed which describe the proposed ward's mental, emotional, physical, and edu-  
6 cational condition, adaptive behavior and social skills and specify the data on  
7 which such description is based;

8 (2) offer recommendations regarding the types and extent of assistance,  
9 if any, necessary to meet the essential requirements for physical health and  
10 safety;

11 (3) offer recommendations as to whether the proposed ward is in need of  
12 mental health treatment and whether there is a substantial probability that avail-  
13 able treatment will significantly improve his mental condition;

14 (4) offer recommendations as to whether the proposed ward is in need of  
15 educational or vocational assistance or personal care and whether these can be  
16 made available to the proposed ward;

17 (5) offer recommendations regarding the probability that the extent of  
18 the proposed ward's incapacity, if any, may significantly lessen, and the type of  
19 services or treatment which will facilitate improvement in the respondent's con-  
20 dition or skills;

21 (6) list the names and addresses of all individuals who examined,  
22 interviewed or investigated the proposed ward's condition and the names and  
23 addresses of all persons contacted in preparation of the report and what informa-  
24 tion they supplied upon which the conclusions of the report are based;

25 (7) describe the alternatives to guardianship which were considered and  
26 recommended and why they are not feasible or adequate to meet the proposed ward's  
27 needs;

28 (8) describe the present home and living arrangement of the proposed  
29 ward and any other proposed placement and make a recommendation for the ward's

1 living arrangement that provides the least restrictive setting necessary to pro-  
2 tect the proposed ward from serious illness, injury or disease;

3 (9) specify the financial resources of the proposed ward and his en-  
4 titlements to insurance benefits and publicly operated or sponsored health, mental  
5 health and welfare assistance which might be employed in the provision of services  
6 to him; and

7 (10) if personal guardianship is recommended, propose a guardianship  
8 outline which includes recommendations as to

9 (A) the proposed guardian and any possible alternatives;

10 (B) the specific services necessary and available to protect the  
11 proposed ward from serious injury, illness or disease and, if incapacitated,  
12 to return the proposed ward to as full capacity as possible in handling his  
13 own affairs and the means by which they may be financed;

14 (C) the specific, least restrictive authorities needed by the  
15 guardian to provide those services;

16 (d) The petitioner and proposed ward have ten days after receipt to file  
17 responses to the evaluation report or additional time if requested and for good cause  
18 shown.

19 Sec. 13.26.110. EVALUATIONS: RIGHT TO REMAIN SILENT AND OBSERVORS: PROPOSED  
20 WARD'S EXPERTS. (a) A proposed ward shall have the right not to respond to questions  
21 in the course of examinations and evaluations, provided that he may be required to  
22 submit to interviews for the purpose of ascertaining whether he lacks the capacity to  
23 make informed decisions about care and treatment services.

24 (b) Statements of a proposed ward in the course of evaluations, examinations  
25 and treatment pursuant to this act are privileged and confidential and not admissible  
26 without the proposed ward's consent in any civil or criminal proceedings other than  
27 proceedings pursuant to this act. A proposed ward shall at all times have the right to  
28 refuse to answer questions when the answers may tend to incriminate him.

29 (c) During any interview or testing conducted under this act, the proposed

1 ward has the right to be accompanied by an attorney or expert of his own choosing.

2 (d) The court shall, if requested by a proposed ward in preparation for and  
3 in connection with any hearing provided in this act, appoint a reasonably available  
4 expert having expertise in regard to the alleged incapacity of the proposed ward to  
5 examine him and testify on his behalf. Requests for such appointments may be filed in  
6 court at least five days prior to such hearings.

7 Sec. 13.26.111. DUTIES OF PROPOSED WARD'S ATTORNEY. The principal duty of an  
8 attorney representing a person alleged to be incapacitated is to represent zealously  
9 that individual. At a minimum, this shall include:

10 (1) personal interviews with the proposed ward;

11 (2) explaining to the proposed ward in terms which that person can  
12 understand, the nature and possible consequences of the proceeding, the alterna-  
13 tives which are available, and the rights to which the individual is entitled;

14 (3) securing and presenting evidence and testimony and offering argu-  
15 ments to protect the individual's rights and further the individual's interests;  
16 To the maximum extent possible, the subject of the protective proceedings shall remain  
17 responsible for determining his interests. However, an attorney may seek appointment  
18 of a guardian ad litem when the circumstances of section 112 of this act apply.

19 Sec. 13.26.112. APPOINTMENT OF A GUARDIAN AD LITEM. (a) Upon request, the court  
20 shall appoint a guardian ad litem to protect the rights of a ward or proposed ward in  
21 any proceedings under this act if it is shown that because of impaired ability to  
22 receive and evaluate information effectively regarding the proceedings or because of  
23 impaired ability to communicate decisions regarding the proceedings, the ward or  
24 proposed ward cannot determine his own interests without assistance, and either:

25 (1) no guardian has been appointed;

26 (2) his interests and those of his guardian conflict, or

27 (3) the appointment is otherwise in the interests of justice.

28 (b) The guardian ad litem shall assist the individual for whom the guardian  
29 ad litem has been appointed to determine his interests in regard to the legal pro-

1 proceedings in which he is involved. If the individual is wholly incapable of determining  
2 his own interests, the guardian ad litem shall make that determination and advise the  
3 court and counsel for all parties accordingly. In so doing, the guardian ad litem  
4 shall:

5 (1) inquire thoroughly into all the circumstances that a prudent indi-  
6 vidual, in the position of the person for whom the guardian ad litem has been  
7 appointed, would consider in determining his own interests in the proceedings; and

8 (2) encourage the individual being served to participate, to the maximum  
9 extent of that individual's capability, in all decisions and to act on his own  
10 behalf on all matters in which he is able.

11 (c) The guardian ad litem may also be the attorney for the ward or proposed  
12 ward if there is no other party readily available and able to serve as a guardian  
13 ad litem and whose interests would not conflict with those of the individual needing  
14 the guardian ad litem.

15 Sec. 13.26.113. HEARING. (a) A hearing shall be conducted within one hundred  
16 twenty days after the filing of the petition unless the time is extended by the court  
17 for good cause shown.

18 (b) At the hearing, the proposed ward shall have the following rights:

19 (1) to be represented by an attorney;

20 (2) to present evidence on his own behalf;

21 (3) to cross-examine witnesses who testify against him;

22 (4) to remain silent;

23 (5) to have the hearing open or closed to the public as he elects;

24 (6) to be present unless the court determines that his conduct in the  
25 courtroom is so disruptive that the proceedings cannot reasonably continue with  
26 him present;

27 (7) to a trial by jury on the issue of incapacity if requested by the  
28 proposed ward or his counsel.

29 (c) The burden of proof by clear and convincing evidence is upon the peti-

1 tioner and a determination of incapacity shall be made prior to any consideration of  
2 proper disposition;

3 (d) At the hearing, the court shall determine if the proposed ward is inca-  
4 pacitated and the extent of the incapacity and the feasibility of non-guardianship  
5 alternatives to meet the needs of the proposed ward if found to be incapacitated;

6 (e) If it is found that the person for whom a guardian is sought is not  
7 incapacitated or any incapacity can be feasibly met by non-guardianship alternatives,  
8 the court may dismiss the action or enter any other appropriate order;

9 (f) If it is found that the person for whom a guardian is sought is able to  
10 perform some, but not all, of the functions necessary to care for himself, and non-  
11 guardianship alternatives are either infeasible or inadequate to provide for aid to  
12 meet the needs of this person, the court may appoint a partial guardian to provide  
13 limited guardianship services, but may not appoint a full guardian;

14 (g) If it is found that the person for whom a guardian is sought is totally  
15 without capacity to care for himself and a combination of non-guardianship alternatives  
16 and the appointment of a partial guardian are inadequate to meet the needs of this  
17 person, the court may appoint a full guardian;

18 (h) Before a particular person is appointed as a guardian, the court shall  
19 inquire into the various possibilities for guardians with due consideration both for  
20 the priorities for guardians as provided in AS 13.26.145 and for the abilities of the  
21 various guardians to provide all the necessary services to the ward;

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

27 \* Sec. 7. AS 13.26.115 is renumbered as AS 13.26.119 and a new section, Sec. 13.26.115  
28 is reenacted to read:

29 Sec. 13.26.115. PSYCHOTROPIC MEDICATION INFLUENCING WARDS OR PROPOSED WARDS AT

1 JUDICIAL HEARINGS. (a) A ward or proposed ward has a right to participate in all  
2 judicial proceedings concerning him to the maximum extent possible, free from the  
3 influence of psychotropic medication.

4 (b) It is the responsibility of the attorney for the ward or proposed ward to  
5 determine if the ward is being given treatment with any psychotropic medication, the  
6 effects of which would continue during the course of the judicial proceedings and to  
7 inform the court in writing, a reasonable time before the hearing, if the attorney so  
8 discovers this to be the case.

9 (c) The court, upon receipt of such information, shall determine the advisa-  
10 bility of the continuance or suspension of such treatment for the duration of the  
11 judicial proceedings and make any appropriate order it deems necessary. The court in  
12 making its determination shall balance the interest in having maximum participation  
13 from the proposed ward in the hearings against the medical and habilitative needs of  
14 the proposed ward.

15 (d) If the ward or proposed ward is under the influence of psychotropic  
16 medication during the judicial proceeding determining incapacity, the trier of fact may  
17 take it into consideration in making its determination.

18 \* Sec. 8. AS 13.26 is amended by adding new sections to Article 3 to read:

19 Sec. 13.26.116. GUARDIANSHIP ORDER. (a) If it is determined that the proposed  
20 ward is incapacitated and the services of a guardian are advisable, the court shall  
21 enter an order which:

- 22 (1) names the guardian and establishes a guardian-ward relationship;  
23 (2) makes findings of fact which support each grant of authority to the  
24 guardian;  
25 (3) adopts a guardianship plan.

26 (b) The guardianship plan shall specify those authorities which the guardian  
27 will have with regard to:

- 28 (1) medical care for the ward's physical condition;  
29 (2) mental health treatment which the guardian may deem to be in the

1 ward's best interests;

2 (3) housing for the ward with consideration of the following: the  
3 wishes of the ward, the preferability of allowing the ward to retain local com-  
4 munity ties, and the requirement for services to be provided in the least restric-  
5 tive setting;

6 (4) personal care, educational and vocational services necessary for the  
7 physical and mental welfare of the ward and to return the ward to full capacity;

8 (5) application for health and accident insurance and any other private  
9 or governmental benefits to which the ward may be entitled to meet any part of the  
10 costs of medical, mental health or related services provided to the ward;

11 (6) physical and mental examinations as necessary to determine the  
12 ward's medical and mental health treatment needs; and

13 (7) the estate and income of the ward necessary to pay for the cost of  
14 services which the guardian is authorized to obtain on behalf of the ward.

15 (c) The guardianship plan shall be no more restrictive upon the liberty of  
16 the ward than is reasonably necessary to protect the ward from serious physical injury,  
17 illness or disease and to provide him with medical care and mental health treatment for  
18 his physical and mental health. The guardianship plan shall be designed to encourage  
19 wards to participate in all decisions which effect them and to act on their own behalf  
20 to the maximum extent possible. The court shall not assign a duty or power to a  
21 guardian unless the need for it has been proven and no less restrictive alternative or  
22 combination of alternatives will be sufficient to satisfy that need;

23 (d) The duration of the term of guardianship shall be determined by court  
24 order and the court may order a review hearing at any time that it determines such a  
25 hearing is in the best interests of the ward upon receipt of a report or other infor-  
26 mation that requires further consideration.

27 Sec. 13.26.117. GUARDIANSHIP IMPLEMENTATION REPORT. Within ninety days of  
28 appointment as a partial or full guardian, the guardian shall submit to the court a  
29 report for implementing the guardianship plan that has as its goal, to the extent

1 possible, to develop or regain the ward's abilities to handle his own affairs. The  
2 report shall consider housing, medical care, and educational and vocational needs and  
3 resources. In developing this report, the guardian shall consult with his ward to the  
4 maximum extent possible. The office of public guardian shall contact the full or  
5 partial guardian to offer assistance in preparing this report. The report shall  
6 specify the services which are necessary to meet the essential requirements for the  
7 ward's physical health or safety and the means for obtaining these services. It shall  
8 also specify the manner in which the guardian will exercise and share decision-making  
9 authority, and such other items as will assist in fulfilling the needs of the ward, the  
10 terms of the guardianship order and the duties of the guardian.

11 Sec. 13.26.118. REPORTING.

12 (a) A guardian shall submit a report to the court or request a visitor be  
13 sent to prepare a report at least annually and when:

- 14 (1) the court orders additional reports to be filed;
- 15 (2) there is a significant change in the capacity of the ward to meet  
16 the essential requirements for his health and safety or to protect his rights;
- 17 (3) the guardian resigns or is removed; and
- 18 (4) the guardianship is terminated.

19 This report shall be prepared by a visitor at least once every three years.

20 (b) The report at a minimum shall set out:

- 21 (1) the name and address of the ward and the guardian;
- 22 (2) the ward's current mental, physical and social conditions and  
23 present living arrangements;
- 24 (3) changes in the capacity of the ward to meet essential requirements  
25 for his physical health and safety;
- 26 (4) the services being provided to the ward;
- 27 (5) the significant actions taken by the guardian during the reporting  
28 period in regard to his ward;
- 29 (6) a financial accounting of the estate which has been subject to the

1 possession or control of the guardian;

2 (7) any other information requested by the court or necessary or desir-  
3 able in the opinion of the guardian or visitor.

4 \* Sec. 9. AS 13.26.120 is amended to read:

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

14 \* Sec. 10. AS 13.26.125 is amended to read:

15 Sec. 13.26.125. REMOVAL OR RESIGNATION OF GUARDIAN: CHANGE IN OR TERMINATION OF  
16 [INCAPACITY] GUARDIANSHIP. (a) On petition of the ward, the guardian, or any person  
17 interested in the ward's [HIS] welfare, the court may modify the provisions of the  
18 court order to change the guardianship plan or the responsibilities of the guardian,  
19 remove a guardian and appoint a successor, terminate the guardianship or review a  
20 decision of a guardian on behalf of his ward if less restrictive alternatives are able  
21 to assist the ward in meeting his essential requirements for physical health and safety.  
22 On petition of the guardian, the court may accept his resignation and make any other  
23 order which may be appropriate.

24 (b) The [AN ORDER ADJUDICATING INCAPACITY MAY SPECIFY A MINIMUM PERIOD, NOT  
25 EXCEEDING ONE YEAR, DURING WHICH NO PETITION FOR AN ADJUDICATION THAT THE WARD IS NO  
26 LONGER INCAPACITATED MAY BE FILED WITHOUT SPECIAL LEAVE. SUBJECT TO THIS RESTRICTION,  
27 THE] ward, the guardian, or any person interested in the ward's [HIS] welfare may  
28 petition for an order that [HE] the ward is no longer incapacitated or no longer  
29 incapacitated to the same degree, and/or for removal or resignation of the guardian,

1 termination of the guardianship, or for a change in the guardian's responsibilities.

2 A request for this order may be made by informal letter to the court or judge and any  
3 person who knowingly interferes with transmission of this kind of request to the court  
4 or judge may be adjudged guilty of contempt of court.

5 (c) Before removing a guardian, changing his responsibilities, accepting the  
6 resignation of a guardian, or ordering that a ward's [INCAPACITY HAS] guardianship be  
7 changed or terminated, the court, following the same procedures to safeguard the rights  
8 of the ward as apply to a petition for appointment of a guardian and applying the least  
9 restrictive alternative necessary to meet the needs of the ward and after consideration  
10 of non-guardianship services, may send a visitor to the residence of the present  
11 guardian and to the place where the ward resides or is detained to observe conditions  
12 and report in writing to the court.

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

17 (e) In the event of the death of the guardian, or if on the basis of a  
18 petition filed under this section or a report or other reliable information there is  
19 probable cause to believe a guardian is not performing his responsibilities effectively  
20 and there is an imminent danger that the physical health or safety of the ward will be  
21 seriously impaired, the court shall take whatever action is necessary to protect the  
22 ward including the dismissal of the present guardian and appointment of a temporary  
23 guardian ~~without a hearing.~~

24 \* Sec. 11. AS 13.26.130 is repealed and reenacted to read:

25 Sec. 13.26.130. COSTS IN GUARDIANSHIP PROCEEDINGS. The costs of the court  
26 appointed visitor and expert shall be borne by the state. The costs of the court-  
27 appointed attorney for the proposed ward, guardian ad litem and experts for the ward,  
28 if any, and other court and guardianship costs shall be borne by the proposed ward to  
29 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

1           Sec. 13.26.140. TEMPORARY GUARDIANS. (a) If during the pendency of an initial  
2           petition for guardianship <sup>or upon the termination, removal, resignation or change of guardianship</sup> it appears that services are needed immediately to prevent  
3           serious injury, illness or disease and the proposed ward is not capable of procuring  
4           services, the petitioner may request the appointment of a temporary guardian to author-  
5           ize such services. Such request shall state the reasons and factual basis for the  
6           request and shall immediately be filed with the court and copies immediately served on  
7           the proposed ward and his attorney. A hearing shall be conducted within seventy-two  
8           hours of the filing.

9           (b) At the temporary guardianship hearing, the proposed ward shall have the  
10          rights set forth in Sec. 13.26.114(b).

11          (c) The burden of proof at the hearing shall be by a preponderance of the  
12          evidence and shall be upon the party requesting that a temporary guardian be appointed.

13          (d) If the court determines that a temporary guardian should be appointed, it  
14          shall make the appointment and grant authorities that are least restrictive upon the  
15          liberty of the proposed ward consistent with ensuring that emergency services necessary  
16          to protect the proposed ward from serious injury, illness or disease.

17          (e) The temporary guardianship shall expire at the time of the appointment of  
18          a full or partial guardian or upon the dismissal of the petition for guardianship. <sup>or at the end of six months which ever is less</sup>

19          (f) If no guardianship petition is pending but the court is informed of a  
20          person who is apparently incapacitated and in need of emergency life-saving services,  
21          it can authorize such services upon determining that delay until a guardianship hearing  
22          could be held would entail a life-threatening risk to the proposed ward.

23          \* Sec. 14. AS 13.26 is amended by adding new sections to article 3 to read:

24                Sec. 13.26.141. EMERGENCY POWERS. Notwithstanding the limits of any temporary  
25                guardianship or guardianship order, temporary guardians and guardians shall at all  
26                times have the right to authorize the provision of emergency life-saving services.  
27                This shall include the power to authorize hospitalization without advance court approval.

28          \* Sec. 15. AS 13.26.145 is repealed and reenacted to read:

29                Sec. 13.26.145. WHO MAY BE GUARDIAN; PRIORITIES.

1 (a) Any competent person, the public guardian, or any private association  
2 organized solely to conduct an active guardianship program for incapacitated persons,  
3 may be appointed guardian of an incapacitated person.

4 (b) No person providing substantial services to the proposed ward in a pro-  
5 fessional or business capacity and no creditor of the proposed ward may be appointed.  
6 Also, no person may be appointed who is in the employ of any person, agency or cor-  
7 poration providing service to the proposed ward in a professional or business capacity  
8 or likely to provide the same during the guardianship period or having interests which  
9 may otherwise conflict with those of the proposed ward, except that a person so employed  
10 may be appointed if he is the spouse, adult child, parent or sibling of the proposed  
11 ward and the court determines that the potential conflict of interest is insubstantial  
12 and that the appointment would clearly be in the proposed ward's best interest.

13 (c) The following priorities shall guide the court in the selection of a  
14 guardian:

15 (i) Any person or association nominated by the proposed ward, if at the  
16 time of the nomination the proposed ward had the capacity to make a reasonably  
17 intelligent choice;

18 (ii) the spouse of the proposed ward;

19 (iii) an adult child or parent of the proposed ward;

20 (iv) any relative of the proposed ward with whom he has resided for more  
21 than six months during the year prior to the filing of the petition;

22 (v) any other relative or friend who has evidenced a sincere, long-  
23 standing interest in the welfare of the proposed ward;

24 (vi) the public guardian.

25 (d) The foregoing priorities shall not be binding and the court shall select  
26 that person or association who is best qualified and willing to serve. The court shall  
27 also give due consideration to any nomination by persons in priorities (i) through (vi)  
28 of this section, and to any nomination in the will of a deceased parent or spouse of  
29 the proposed ward.

1 \* Sec. 16. AS 13.26.150 is repealed and reenacted to read:

2 Sec. 13.26.150. GENERAL POWERS AND DUTIES OF A GUARDIAN.

3 (a) The guardian shall carry out the specific duties and powers assigned by  
4 the court diligently and in good faith. Every effort shall be made by the guardian to  
5 provide the ward with all those services to which he has a right as provided in AS  
6 13.26.160. In carrying out these duties and powers, such individuals shall encourage  
7 the ward to participate to the maximum extent of his capacity in all decisions which  
8 affect him, to act on his own behalf in all matters in which he is able to do so, and  
9 to develop or regain, to the maximum extent possible, his capacity to meet the essen-  
10 tial requirements for his physical health or safety, to protect his rights and, if  
11 impaired, his ability to manage his financial resources.

12 (b) A partial guardian of an incapacitated person shall have only those  
13 powers, rights, and duties respecting his ward as are enumerated in the court order.

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

20 (1) to the extent that it is consistent with the terms of any order by a  
21 court of competent jurisdiction relating to detention or commitment of the ward,  
22 he is entitled to custody of the person of his ward and shall assure that the ward  
23 has a place of abode in the least restrictive setting consistent with the essen-  
24 tial requirements for the ward's physical health and safety;

25 (2) he shall assure the care, comfort and maintenance of the ward;

26 (3) he shall assure that the ward receives the services necessary to  
27 meet the essential requirements for the ward's physical health and safety and to  
28 develop or regain, to the maximum extent possible, the capacity to meet his needs  
29 for physical health and safety;

1 (4) he shall assure through the initiation of court actions and other  
2 means that the ward enjoys all personal, civil and human rights to which the ward  
3 is entitled;

4 (5) he may give any consents or approvals necessary to enable the ward  
5 to receive medical or other professional care, counsel, treatment or services  
6 except as otherwise limited by subsection (e) of this section.

7 (6) If no conservator for the estate of the ward has been appointed, he  
8 may:

9 (A) support the ward or pay sums for the welfare of the ward to  
10 perform his duty;

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

18 (7) if a conservator has been appointed, all of the ward's estate re-  
19 ceived by the guardian in excess of those funds expended to meet current expenses  
20 for support, care, and education of the ward must be paid to the conservator for  
21 management as provided in sections 165-315 of this chapter, and the guardian must  
22 account to the conservator for funds expended.

23 (d) Any full guardian of a ward, for whom a conservator also has been ap-  
24 pointed, shall control the custody and care of the ward, and is entitled to receive  
25 reasonable sums for his services and for room and board furnished to the ward as agreed  
26 upon between him and the conservator, if the amounts agreed upon are reasonable under  
27 the circumstances. The guardian may request the conservator to expend the ward's  
28 estate for the ward's care and maintenance.

29 (e) A guardian shall not have the power:

1 (1) to place the ward in a facility or institution to which an individ-  
2 ual without a guardian would have to be committed under AS 47.30.070 other than  
3 through a formal commitment proceeding in which the ward has a separate guardian  
4 ad litem;

5 (2) to consent on behalf of the ward to an abortion, sterilization,  
6 psychosurgery, or removal of bodily organs except when necessary to preserve the  
7 life or prevent serious impairment of the physical health of the ward;

8 (3) to consent on behalf of the ward to the withholding of non-heroic  
9 life-saving medical procedures;

10 (4) to consent on behalf of the ward to the performance of any experi-  
11 mental medical procedure or participation in any medical experiment not intended  
12 to preserve the life or prevent serious impairment of the physical health of the  
13 ward;

14 (5) to prohibit the marriage or divorce of the ward;

15 (6) to consent on behalf of the ward to termination of the ward's  
16 parental rights.

17 \* Sec. 17. AS 13.26.195 is amended by adding a new subsection to read:

18 (d) The court shall explore all non-conservator alternatives and the use of a  
19 special conservator as provided in AS 13.26.205(c). A conservator shall only be appointed,  
20 if a less restrictive protective order or the services of a special conservator are  
21 inadequate to protect the estate of the protected person.

22 \* Sec. 18. AS 13.26.200 is amended by adding a new subsection to read:

23 (6) the court shall, to the extent possible, consult with the protected  
24 person in determining what protective action should be taken, and the court shall use  
25 the least restrictive alternative possible to provide the necessary protection.

26 \* Sec. 19. AS 13.26.205(c) is amended to read:

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

1 continuing protection of a conservator. If only certain powers need be given to  
2 the conservator or such services are needed only for a limited series of transactions,  
3 a special conservator may be appointed. The court may appoint a special conservator to  
4 assist in the accomplishment of any protective arrangements or other transactions  
5 authorized under this section who shall have the authority conferred by the order and  
6 serve until discharged by order after report to the court of all matters carried out  
7 pursuant to the order of appointment.

8 \* Sec. 20. AS 13.26 is amended by adding a new section in article 4 to read:

9 Sec. 13.26.218. PUBLIC BOND. The court, in all cases in which a public guardian  
10 is appointed as a conservator, shall waive individual bond as provided in AS 13.26.540.  
11 The court may order a bond as is required for a private individual acting as conser-  
12 vator purchased out of state funds if the conservator is unable to provide such a bond  
13 and it is in the best interests of the ward to provide for such bonding.

14 \* Sec. 21. AS 13.26 is amended by adding new sections to read:

15 Article 6. PUBLIC GUARDIANS

16 Section

17 505. Purpose

18 510. Office of Public Guardian

19 515. When Public Guardian May Be Appointed

20 520. Powers and Duties of the Public Guardian

21 525. Intervention

22 530. Delegation of Powers and Duties

23 535. Other Powers and Duties

24 540. Bond

25 545. Allocation of Costs

26 Sec. 13.26.505. PURPOSE. The legislature recognizes that many of its citizens,  
27 for reasons of incapacity or minority, are in need of a guardian. Often such persons  
28 cannot find others able and willing to render assistance. The legislature intends  
29 through this act to establish the office of public guardian for the purpose of fur-

1 nishing guaridanship and conservatorship services. It further intends by establishing  
2 this office to provide assistance to guardians throughout the state in securing neces-  
3 sary services for their wards and to assist the courts, attorneys, visitors, proposed  
4 guardians and proposed wards in the orderly and expeditious handling of guardianship  
5 proceedings.

6 Sec. 13.26.510. OFFICE OF PUBLIC GUARDIAN. There is created an Office of Public  
7 Guardianship in each judicial district in the Court System attached to the Public  
8 Administrator. By order of the court, the public guardian may act as full guardian,  
9 partial guardian, and/or conservator or special conservator for a minor or incapac-  
10 itated person and perform such other duties as provided under this chapter.

11 Sec. 13.26.515. WHEN PUBLIC GUARDIAN MAY BE APPOINTED. The court may appoint the  
12 public guardian to act as guardian or conservator when no person or private guardian-  
13 ship association is willing and qualified to act as guardian.

14 Sec. 13.26.520. POWERS AND DUTIES OF THE PUBLIC GUARDIAN. (a) The public guardian  
15 shall have the same powers and duties as a private conservator or guardian, except as  
16 otherwise limited by law or court order.

17 (b) The public guardian in all cases in which it is appointed as conservator  
18 or guardian shall endeavor to find a suitable private guardian or conservator for the  
19 ward and shall continue such a search as long as it is practical. For each ward, the  
20 public guardian will report its efforts to find a private guardian to the court having  
21 jurisdiction of the ward at least bi-annually.

22 Sec. 13.26.525. INTERVENTION. The public guardian, may on his own motion or at  
23 the request of the court, intervene at any time in any conservatorship or guardianship  
24 proceeding by appropriate motion to the court; if he or the court deem such inter-  
25 vention to be justified because an appointed conservator or guardian is not fulfilling  
26 his duties, the estate is subject to disproportionate waste due to the costs of the  
27 guardianship or conservatorship, or it appears that a willing and qualified guardian is  
28 not available, or the best interests of the incapacitated or protected person require  
29 such intervention.

1           Sec. 13.26.530. DELEGATION OF POWERS AND DUTIES. The public guardian may employ  
2 staff and delegate to members of his staff or volunteers his powers and duties as  
3 conservator or guardian and such other powers and duties as are created by this act,  
4 although the public guardian retains ultimate responsibility for the proper performance  
5 of these delegated duties. All delegations shall be to people who meet the eligibility  
6 requirements of AS 13.26.145(b).

7           Sec. 13.26.535. OTHER POWERS AND DUTIES. The public guardian:

8                   (1) Shall establish and maintain working relationships with other govern-  
9 mental bodies and public and private agencies, institutions, and organizations so  
10 as to assure the most effective conservatorship or guardianship program for each  
11 ward and protected person;

12                   (2) Shall establish and maintain regular visitation to all wards and  
13 protected persons of the public guardian to monitor their welfare and at a minimum  
14 each ward and protected person shall be visited at least once every quarter;

15                   (3) May contract for services necessary to carry out the duties of his  
16 office;

17                   (4) May accept the services of volunteer workers or consultants and  
18 reimburse them for their proper and necessary expenses.

19                   (5) Shall keep and maintain proper financial and statistical records  
20 concerning all cases in which the public guardian provides conservatorship or  
21 guardianship services;

22                   (6) Shall provide information and referrals to the general public  
23 regarding guardianship and conservatorship proceedings;

24                   (7) Assist guardians and court appointed visitors of incapacitated  
25 persons in the preparation and update of guardianship plans and reports;

26                   (8) Assist guardians of incapacitated persons to understand disabilities  
27 and foster increased independence on the part of their wards;

28                   (9) Assist guardians in securing the rights, benefits and services to  
29 which their wards are entitled;

1 (10) Develop and maintain a current knowledge of the full range of public  
2 and private medical, mental health, social advocacy, educational, rehabilitative,  
3 counseling, therapeutic, homemaking, recreational, and financial services and  
4 programs available to assist incapacitated or protected persons and their families;

5 Sec. 13.26.540. BOND. (a) The court system shall provide for one public bond to  
6 be held for all the conservatorship duties of the public guardian. The amount of the  
7 bond shall be dependent on the amounts of the estates in the control of the public  
8 guardian.

9 (b) The public guardian shall submit bi-annual reports on the amount of the  
10 estates under control. Upon receipt of the report, the court shall order the public  
11 bond to be adjusted according to the present amount of the estates.

12 Sec. 13.26.545. ALLOCATION OF COSTS. (a) Determination of costs.--If a public  
13 guardian is appointed conservator or guardian, the administrative costs of his services  
14 and the costs incurred in the appointment procedure shall not be charged against the  
15 income or the estate of the incapacitated person or minor, unless the court determines  
16 at any time that the person is financially able to pay all or part of such costs.

17 (b) Financial ability.--The ability of the income or estate of the incapac-  
18 itated or protected person to pay for administrative costs of a public guardian or  
19 costs incurred in the appointment procedure shall be measured according to the person's  
20 financial ability to engage and compensate a private guardian. This ability is a  
21 variable dependent on the nature, extent and liquidity of assets; the disposable net  
22 income of the person; the nature of the conservatorship or guardianship; the type,  
23 duration and complexity of the services required; and any other foreseeable expenses.

24 (c) Investigation of financial ability.--The public guardian shall investi-  
25 gate the financial status of a person who requests the appointment of the public  
26 guardian as his guardian or for whom a court is considering such an appointment. The  
27 public guardian shall have the authority to require the ward or protected person to  
28 execute and deliver such written requests or authorizations as may be necessary under  
29 applicable law to provide the public guardian with access to records of public or pri-

1 vate sources, otherwise confidential, as may be needed to evaluate eligibility. The  
2 public guardian is authorized to obtain information from any public record office of  
3 the State or of any subdivision or agency thereof upon request and without payment of  
4 any fees ordinarily required by law.

5 (d) Claim against estate.--The reasonable value of the services rendered  
6 without cost to the ward or protected person shall be allowed as a claim against the  
7 estate upon the death of the person.

8 \* Sec. 22. TRANSITION. All guardianships for incapacitated persons established prior to  
9 the effective date of this act shall be reviewed by the court within three years. Until the  
10 review, all guardians appointed prior to the effective date shall retain the powers assigned  
11 to them, unless a petition for modification under AS 13.26.125 has been granted. Prior to  
12 the review hearing, the guardian shall submit one report in the form prescribed in AS  
13 13.26.118.

14 \* Sec. 23. The effective date of this act shall be \_\_\_\_\_.

JN02 0013 13.35 JA01 0092 13.35 02/13/80

PR5

UPDATE TO MESSAGE SENT AT 13:19 -- THE DOS/CICS SYSTEM WILL BE DOWN FOR APPROXIMATELY ONE (1) HOUR.

THE OS/CICS SYSTEM IS CURRENTLY AT A STAND-STILL DUE TO THE CPU-B BEING HARD STOPPED FOR APPROXIMATELY 10 MINUTES. ALL SYSTEM FUNCTIONS SHOULD RETURN 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

MACK KERSBERGEN

✓ ROGER VAN WAGNER

✓ BEV HILTNER

✓ BETTY HALSEY

✓ LUDMILLA JACOBS

✓ NATALIE GOTTSSTEIN

✓ JIM PARSONS

PAUL CHOQUETTE

GLADYS THOMPSON

*Kenneth Hemrick*

EMPLOYMENT & TRAINING CENTER OF ANCHORAGE  
ALASKA HOSPITAL ASSOC.

"

"

MANY AGENCIES  
MENTAL HEALTH ASSOCIATION

"

"

*Satellite Home Program*

I WILL GIVE YOU MORE NAMES AS WE RECEIVE THEM.

*James R. Mothershead - Parent; AK. Assoc. of Retarded Citizens*

LA11 2553 13.40 JA01 0094 13.40 02/13/80

*HB 522 Feb 13, 1980*

Laurie Grongen  
(SP. ?)

Fbx  
stuff

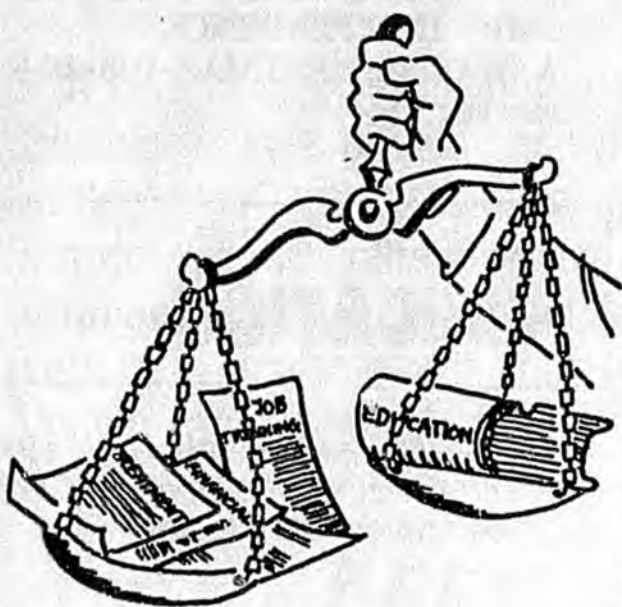
DEBORAH FROM MAXINE

THE FOLLOWING NAMES ARE PRE-SIGNED FOR TODAY'S TELECONFERENCE AT  
1:30PM AST.

✓ GLENN JOHNSON  
✓ DICK WILSON CAREAGE NORTH  
ANGIE HAGIE (SP ?)  
*MNESHIA 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.

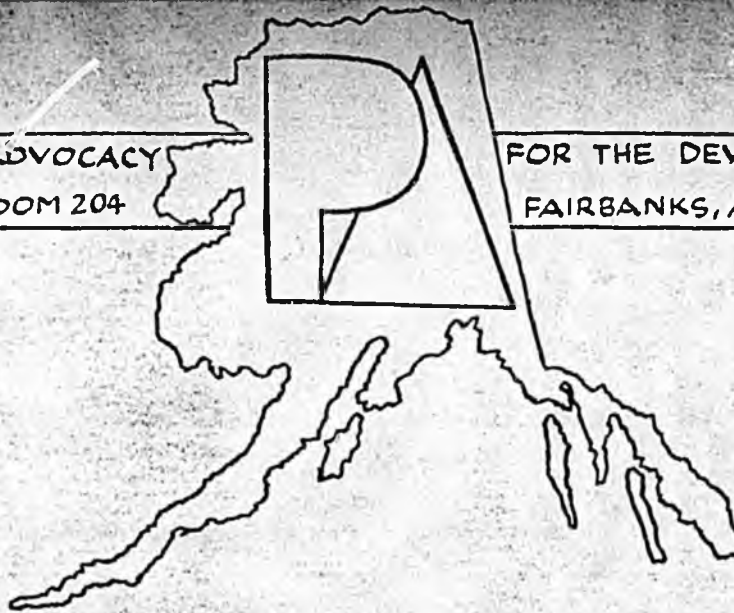
the right to  
**JOB TRAINING**

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., Inc.  
1514 Cushman  
Room 204  
Fairbanks, AK 99701

PROTECTION AND ADVOCACY  
1514 CUSHMAN ; ROOM 204

FOR THE DEVELOPMENTALLY DISABLED  
FAIRBANKS, ALASKA 99701 456-1070, 766000



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 referral 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.

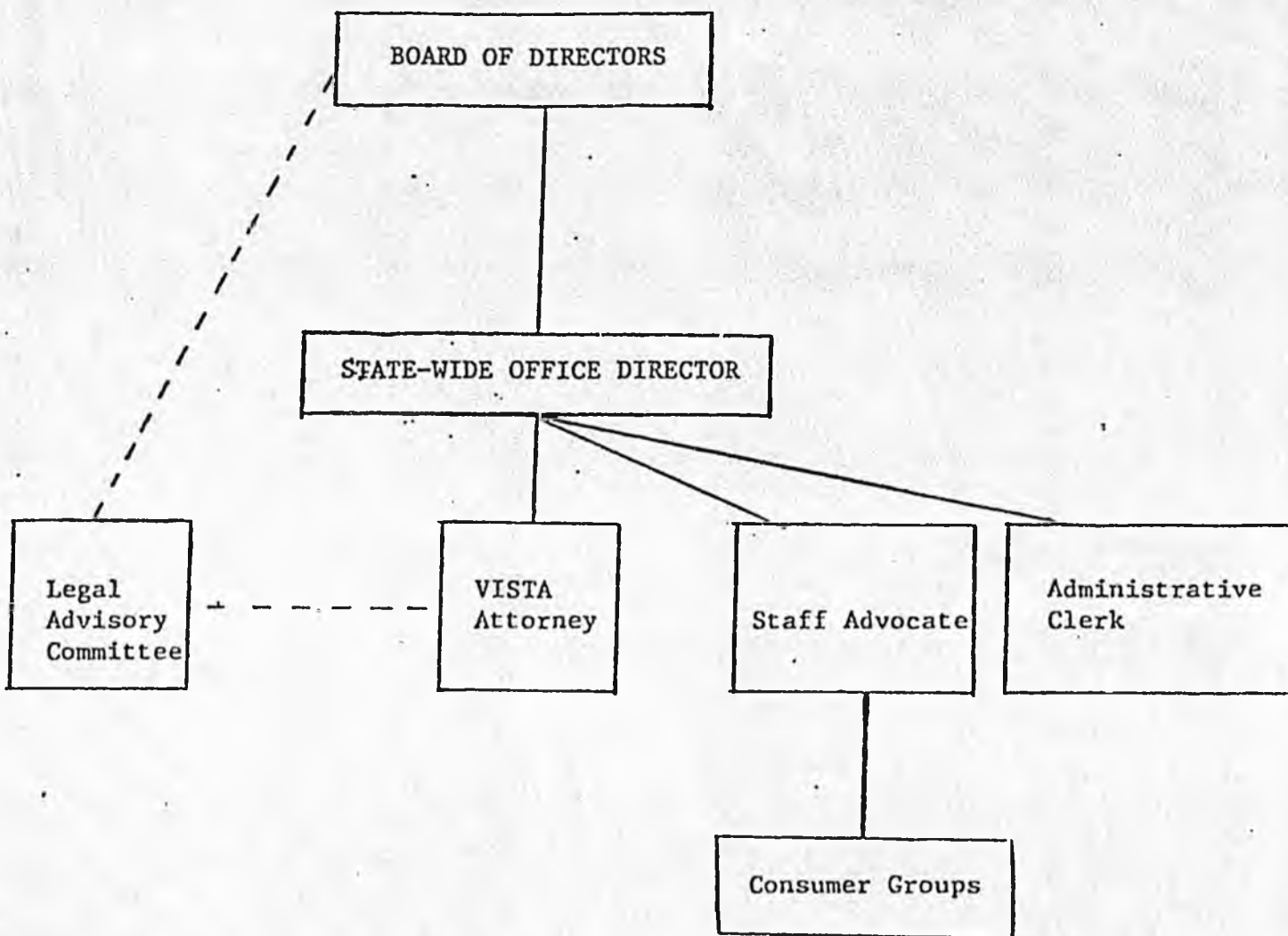
2. That the law prohibit persons from being guardians to more than one individual. A problem with the public guardian concept. A person is to easily treated as a number when one person becomes responsible for many.
3. The bill should prevent absentee guardianship. Again a problem with the public guardian. 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.

Provide legal counsel in 60 administrative, due process, and guardianship hearings.

Operate a legal aid referral system and follow-up activities.

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.
2. **Advocacy**  
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.
3. **Legal remedy pursuits**  
Pertains to that element of the protection and advocacy system devoted to the legal representation of the developmentally disabled in litigation in court processes concerned with rights, grievances, or appeals of such rights or grievances.
4. **Protective services**  
Constellation of services, preventive or supportive in nature, given with the purpose of preventing or alleviating neglect, abuse, or exploitation of children or adults who are substantially impaired in their capacity to protect their own self interest. The identifying element of protective services is that there is present a sanction for intervention readiness on the part of those rendering services to use professional authority to call legal authority into play, or legally sanctioned procedures on behalf of a client.
5. **Developmental disability \***  
Title V of P.L. 95-602 changed the federal definition of developmental disability to a severe, chronic disability of a person which
  - (a) is attributable to a mental or physical impairment or combination of mental and physical impairments;
  - (b) is manifested before the person attains age twenty-two;
  - (c) is likely to continue indefinitely;
  - (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, (v.) 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

"Some paradox in our nature leads us, once we have made our fellow men the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom ultimately of our coercion."

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 security benefits, a "representative payee" analogous 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.

To accomplish the former, changes are made in the duties owed by others to the proposed ward. The visitor, before beginning an interview, must explain the purpose and possible consequence of the interview, plus all the rights attendant to the entire proceeding. Minimum standards for legal representation are set, including the duty to see that no psychotropic medication is being given during the hearing unless the court deems it necessary. The court, if a guardian is appointed, must explain to the ward how he/she can request termination or modification of the appointment. Finally the due process protections which the current law provides for the hearing itself are extended to the evaluation process, i.e., the proposed ward has the right to an attorney, to exclude evidence, and to remain silent during the course of pre-hearing examinations.

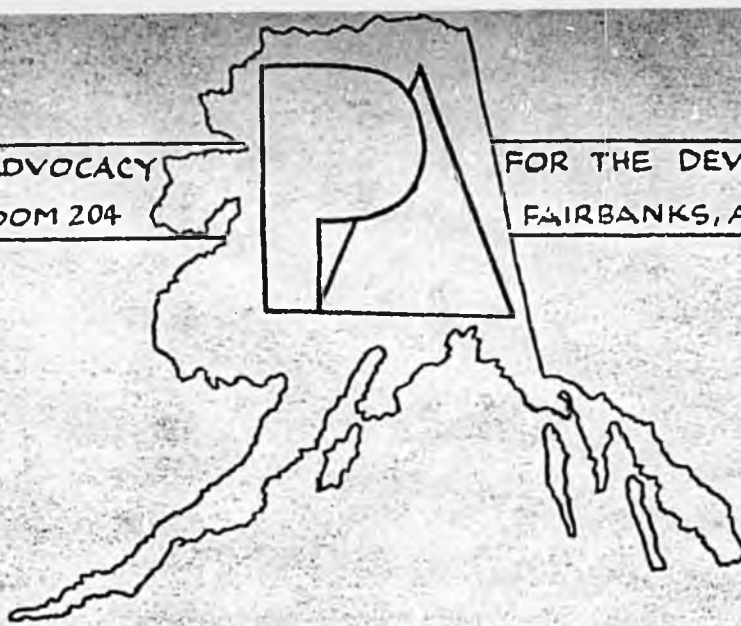
The language of the current statute is broad enough to allow implementation of a less restrictive plan than full guardianship, but the proposed statute attempts to guarantee it. The visitor's evaluation report must explain the alternatives to guardianship and when appropriate, why each was rejected. 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 commitment 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  
December 1979

PROTECTION AND ADVOCACY  
1514 CUSHMAN; ROOM 204

FOR THE DEVELOPMENTALLY DISABLED  
FAIRBANKS, ALASKA 99701 456-1070, 266000



"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.

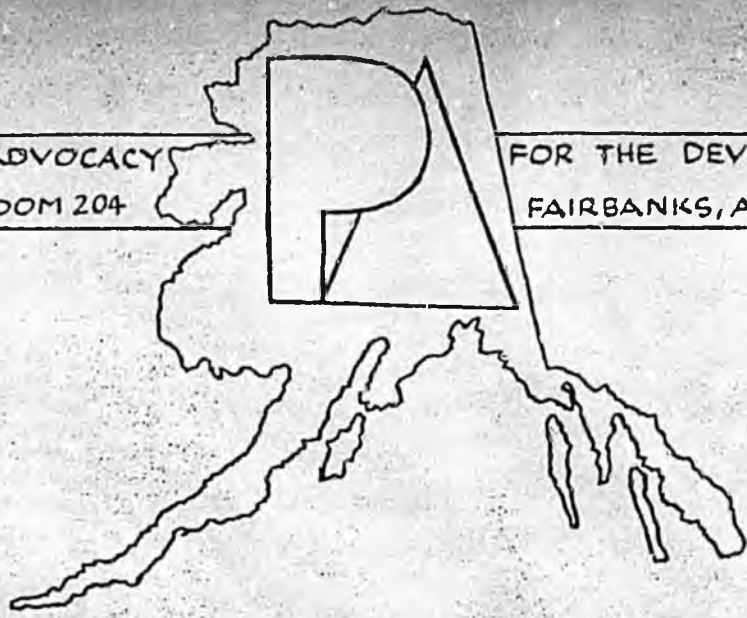
### B. Duties

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.

PROTECTION AND ADVOCACY  
1514 CUSHMAN ; ROOM 204

FOR THE DEVELOPMENTALLY DISABLED  
FAIRBANKS, ALASKA 99701 456-1070, Zebbo



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, guarantees the implementation of partial guardianship (least restrictive alternatives), and provides for meaningful participation by incapacitated persons.

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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 security benefits, a "representative payee" analogous 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.

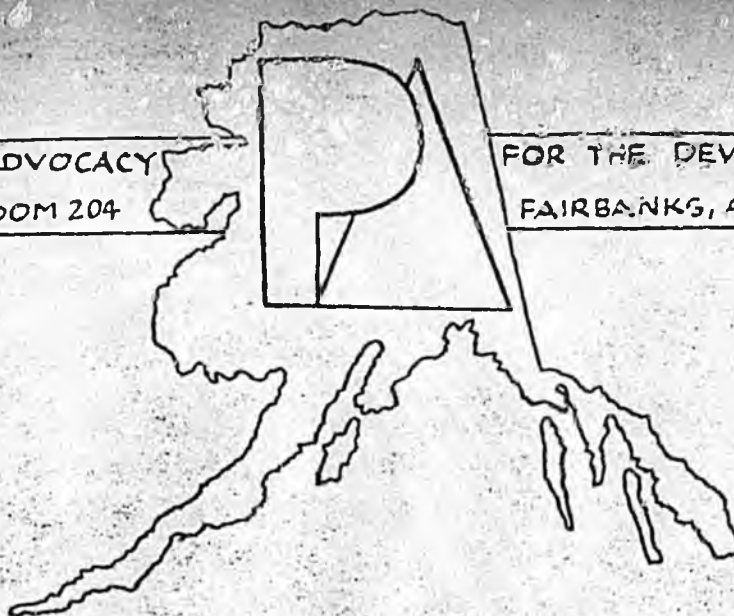
Similar to the trustee-beneficiary relationship outlined above is the relationship of a "facilitator guardian" and a ward. Unlike a typical guardianship there is no substitute decision-making. The guardian simply assists the mentally retarded individual in achieving self-determined goals. If the ward 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.

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December 1979

PROTECTION AND ADVOCACY  
1514 CUSHMAN: ROOM 204

FOR THE DEVELOPMENTALLY DISABLED  
FAIRBANKS, ALASKA 99701 456-1070, 766006



"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.

## 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.

To accomplish the former, changes are made in the duties owed by others to the proposed ward. The visitor, before beginning an interview, must explain the purpose and possible consequence of the interview, plus all the rights attendant to the entire proceeding. Minimum standards for legal representation are set, including the duty to see that no psychotropic medication is being given during the hearing unless the court deems it necessary. The court, if a guardian is appointed, must explain to the ward how he/she can request termination or modification of the appointment. Finally the due process protections which the current law provides for the hearing itself are extended to the evaluation process, i.e., the proposed ward has the right to an attorney, to exclude evidence, and to remain silent during the course of pre-hearing examinations.

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 commitment 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.

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