Approved February 4, 1983
Date

MINUTES OF THE SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE.

The meeting was called to order by Senator Jan Meyers at
Chairperson

10 a.m./~~p.m.~~ on February 3, 1983 in room 526-S of the Capitol.

All members were present ~~except~~

Committee staff present:

Emalene Correll, Norman Furse, and Bill Wolff

Conferees appearing before the committee:

Lorne Phillips, Alcohol and Drug Abuse Services, SRS
Ron Eisenbarth, Kansas Citizens Committee on Alcohol and other Drug Abuse
Petey Cerf, Kansans for Improvement of Nursing Homes, Inc.
Sylvia Hougland, Kansas Department on Aging
Al Bramble, representative of AARP, Coalition on Aging, and AART, Lawrence, Kansas
Stewart Entz, Kansas Association of Homes for the Aging
Charles Hamm, Attorney, SRS
Keith Landis, Christian Science Committee on Publication for Kansas

Others present: see attached list

SB 31 - authorizing Secretary of SRS to establish substance abuse treatment programs

Lorne Phillips, Commissioner, Alcohol and Drug Abuse Division, SRS, testified in support of SB 31, and distributed a memorandum suggesting certain changes in the bill. (Attachment #1). He stated that the establishment of substance abuse units within state hospitals may help with the accreditation process, and suggested that in line 27, the word "and" should be changed to "and/or". SRS recommends passage of SB 31, with the recommended change.

Ron Eisenbarth, Chairperson, Kansas Citizens Committee on Alcohol and other Drug Abuse, testified in support of SB 31. Mr. Eisenbarth stated that the Citizens' Committee feels that the Secretary of SRS needs this authority for the maintenance of a systematic and uniform approach to the development of a comprehensive statewide program to deal with the problems of alcohol and other drug abuse. (Attachment #2).

SB 11 - Concerning the act for obtaining a guardian or conservator, or both

Petey Cerf, KINH, testified in support of SB 11, and distributed a memorandum showing certain sections of the bill with which KINH agrees, and other sections about which they are concerned. (Attachment #3). Ms. Cerf stated that KINH is gratified by the addition of "clear and convincing evidence" as the standard of proof for establishing the need for guardianship. They also support the requirement for annual reporting by the guardian; a mandatory routine evaluation of the character and capabilities of the proposed guardian; the requirement that all guardianships be limited unless specifically extended to include full guardianship; a limitation to the number of wards any guardian might have; and full funding for KAPS. KINH opposes the concept of

voluntary guardianship, and believes that in evaluating a guardian, a physician's statement is not enough - there should be a second opinion. KINH does not believe it should be possible for a ward to be put in a nursing home without a full court review similar to a commitment proceeding.

Sylvia Hougland, Department on Aging, testified in support of SB 11, and stated that there is general agreement on most of the changes, and this bill has provided many new safeguards in the areas of long-standing concern. Ms. Hougland distributed a memorandum listing sections of the bill which KDOA supports, and sections which are of concern to KDOA. (Attachment #4). KDOA supports defining disability functionally rather than categorically; setting standard of proof; court consideration of work load and capabilities of guardians having more than 15 wards before making another appointment; mandating the guardian to file an annual report; mandating the court to review all cases every three years. KDOA is concerned with the section specifying duties and powers of guardians, and feels that this section needs to be strengthened. They also believe that the law should have specific reference to limited guardianships and the explicit limits on the guardian should be spelled out. Another concern is with the concept of voluntary guardianship, because of the lack of due process.

Al Bramble, representative of AARP, Coalition on Aging, and AART, Lawrence, Kansas, testified in support of SB 11, and stated reasons for his support of certain sections of the bill. Mr. Bramble said that the rights and needs of our elderly have been violated for too many years, and praised the efforts of the legislature to improve and make more definite the rights, duties and power of guardians. He stated his support for elimination of voluntary guardianship; provisions for limited guardianship, with such limitations established through court actions; accountability in conduct of guardianship; the provision that non-profit organizations be allowed to serve as guardians; annual court review of every ward under its jurisdiction; and reasonable limitation on the number of guardianships one person can fulfill. (Attachment #5).

Stewart Entz, Kansas Association of Homes for the Aging, said, if when a person was not disabled, he had made a living will, that the guardian be allowed to honor that request. He asked how this expanded role of guardian would interface with the "durable power of attorney".

Charles Hamm, Attorney, SRS, distributed to the committee a memorandum on "Comments and Concerns on How SB 11 May Be Affected By Current United States District Court Litigation Involving SRS". He stated that SB 11 had arisen almost independently of litigation concerns which have continued since 1978, and this may be the first opportunity for the joining of those concerns to considerations of SB 11. Mr. Hamm questioned if SB 11 is really well directed towards some of its announced goals, in light of such litigation. He asked how SB 11 will address the issues in the law suit and how it will affect various state facilities. (Attachment #6).

Keith Landis, Christian Science Committee on Publication for Kansas, requested that SB 11 be amended on page 2, line 0048, and on page 18, line 0645, and distributed copies of the proposed amendments to the committee members. (Attachment #7).

Senator Meyers asked Randy Hearrell, Research Director, Kansas Judicial Center, to respond to questions about Section 20, concerning review every three years. She asked if the Judicial Council took it out of the bill because they foresaw problems with crowding and court time. And, if so, why did the Advisory Committee approve of court review. Mr. Hearrell said that he would review his notes and respond at a later date.

MINUTES OF THE SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE,

room 526-S, Statehouse, at 10 a.m./~~p.m.~~ on February 3, 1983.

Senator Meyers concluded the hearing on SB 11 and appointed a sub-committee to study the bill. The sub-committee members are Senator Meyers, Senator Ehrlich, Senator Morris, and Senator Johnston.

Senator Francisco moved approval of the minutes of February 2, 1983. Senator Hayden seconded the motion and it carried.

The meeting was adjourned.

SENATE

PUBLIC HEALTH AND WELFARE COMMITTEE

DATE 2-3-83

(PLEASE PRINT) NAME AND ADDRESS	ORGANIZATION
Petey Cruf	KINH
Lynne Backman Brown	Ks. Health Care Assn.
Janet Schalansky	KPCDO
Ron Eisenbath	Kans. Citizens Comm. on Alcohol + other Drug Abuse
Stu Entz	KAHA
Dean Edson	KAHA
Barry Swanson	Gov. Office
David Kahn	Gov Office
Al Brambles	KCOA, KCCA, SHL, AARP
Michael Hinds	Leg. Intern
[illegible]	SRS/ADAS
Robert Hayden	SRS
Carla Hamm	SRS
Bruce Kelly	SRS
Gene Johnson	KC ASAP Coordinator
[illegible]	SRS
Sylvia Haugland	KDOA
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Rudy Wylie	Visitor
Cassie Perkins	Constituent Services
Jerry R. Ruth	Topeka Legal Aid
Nickie Stein	KS St. Nurses' Assn.
Roger Miller	Uni. of Kansas Med Center
Ken Schuferman	KS Pharmacists Assc.

SOCIAL AND REHABILITATION SERVICES

Office of the Secretary

SENATE BILL 31

1. Short Title of Bill: An act authorizing the Secretary of SRS to establish and administer Substance Abuse Programs.

2. Purpose of the Bill: To allow the Secretary to establish, administer and supervise the maintenance and operation of substance abuse programs which may be located, maintained and operated in the state institutions.

3. Why the Bill: This bill was introduced by Senator Johnston by request of the SRS Review Commission. According to the Review Commission report, it appears that this bill is intended to allow the Secretary to establish substance abuse programs that could be located at the state institutions but that those units would not have to meet JCAH criteria for accreditation.

4. Background: See above.

5. Possible problems with the Bill: 1) It is not clear if JCAH would consider these units as being apart from the State Hospitals regarding the accreditation process. 2) The definition of "Substance Abuse" states the person must have an alcohol and drug problem. The word "and" on line 27 should be changed to "and/or".

6. SRS Recommendations: Recommend that the bill be passed with the above noted change.

Atch. 1

2-3-83 #1

2-3-83 2

Kansas Citizens Advisory Committee on Alcohol and other Drug Abuse

P.O. BOX 4052 TOPEKA, KANSAS 66604

February 3, 1983

TO: Senate Public Health & Welfare Committee

FROM: Ronald L. Eisenbarth, Chairperson Kansas Citizens Committee on Alcohol and other Drug Abuse

SUBJECT: Senate Bill 31

The Kansas Citizens Committee on Alcohol and other Drug Abuse is a twenty-five (25) member citizens committee with representation from the entire State of Kansas. This committee is designated by law to be advisory to the Commissioner of Alcohol and Drug Abuse Services on behalf of the Secretary of Social and Rehabilitation Services with regard to alcohol and other drug abuse programing in the State of Kansas.

I appear before you today on behalf of the Citizens Committee to offer our comments on Senate Bill 31.

As we understand this proposed legislation it would authorize the Secretary of Social and Rehabilitation Services to establish and maintain substance abuse programs throughout the state including the state institutions.

The Citizens Committee feels the Secretary of S.R.S. needs this authority if we are to maintain a systematic and uniform approach to the development and maintenance of a comprehensive statewide program to deal with the problems of alcohol and other drug abuse.

The Kansas Citizens Committee on Alcohol and other Drug Abuse therefore supports Senate Bill 31.

Atch. 2 #2

2-3-83 #3

KINH

Kansans for Improvement of Nursing Homes, Inc.

927½ MASSACHUSETTS ST. #1 LAWRENCE, KANSAS 66044 842-3088 — Area Code 913

February 2, 1983

STATEMENT TO SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE REGARDING SENATE BILL 11 BY KANSANS FOR IMPROVEMENT OF NURSING HOMES.

KINH has followed with great interest the development of SB 11 from its inception in the Interim Committee. We appreciate the study and effort that has gone into this revision of the Kansas guardianship statute and find many things to commend in the bill as presented.

We are particularly gratified by the addition of "clear and convincing evidence" (Section 9) as the standard of proof for establishing the need for guardianship. That requirement, we hope, will help to assure a more thorough investigation of each guardianship petition.

We are pleased to support the requirement for annual reporting by the guardian (Section 19). We also strongly support regular court review of each guardianship to ascertain whether there is a continuing need for guardianship and whether the needs of the ward are being met (New Section 20). We would prefer, however, that the review be made oftener than every three years.

Voluntary guardianship, as provided in Section 2, seems to us a contradiction in terms. We can see a distinct possibility that an elderly person could very easily be persuaded to request a guardian without fully realizing the rights that are given up by the ward in that relationship. We believe that every guardianship should be subject to the full court procedure, including notice and hearing. KINH therefore opposes the concept of voluntary guardianship.

Section 6 sets out mandatory procedures for the court to follow upon receipt

Atch. 3 #3

of an application for guardianship. Among other procedures, Section 6 requires the court to order a mental evaluation unless the court shall determine that the statement of the physician, if any, filed with the application is a sufficient evaluation. KINH strongly believes that an evaluation should be required in every instance and that a physician's statement is not adequate. We note that the American Bar Association model law recommends evaluation in all cases.

We also believe that a routine evaluation of the character and capabilities of the proposed guardian should be mandatory rather than discretionary as in Section 7.

Section 10 somewhat limits the number of wards a single guardian may have by requiring the court to investigate the work load and capabilities of a guardian who has as many as 15 wards before assigning further wards to that guardian. We agree with the report of the Judicial Council that such an investigation should routinely be made before any guardianship is assigned. We would prefer an absolute limit to the number of wards any guardian might have, noting that the Kansas Advocacy and Protective Services Guardianship Project does not permit a guardian to have more than five wards. We suggest that the following sentence be included in Section 10: "The court shall give preference in selecting a guardian to a qualified person who has the fewest number of wards."

We support full funding for KAPS.

Section 13 delineates the powers and duties of a guardian unless otherwise limited by law or by court order. We read this to mean that all guardianships are full, or plenary, guardianships unless limited in very specific ways by the court. We would prefer that all guardianships be limited unless speci-

fically extended to include full guardianship. We do support the provision that the powers and duties of the guardian or conservator must be set out specifically in the orders and letters of guardianship or conservatorship.

We note in (a) (1) of Section 13 that "the guardian is entitled to custody of the person of the ward and may establish, as permission is granted by the court appointing a guardian, after hearing and notice thereof to the conservator, if any, and to such other persons in such manner as the court shall direct, the ward's place of abode within or without this state." We do not believe that it should be possible for a ward to be put in a nursing home without a full court review similar to a commitment proceeding.

KINH has not taken a position, as such, on corporate guardianship. If corporate guardianship is established, however, we are in full agreement with new Section 24 which provides that only private, non-profit corporations may qualify and that they must be carefully evaluated by the Secretary of Social & Rehabilitation Services for suitability to act in that capacity.

KINH appreciates this opportunity to appear before you on this important issue.

2-3-83 #4

SENATE BILL 11

Testimony

Kansas Department on Aging

Bill Brief: Interim Committee Bill Amending Existing Guardianship Statutes

Bill Provisions:

Sec. (3002) 1. Changes the term from "incapacitated" to "disabled".

(3002) a. Defines disability functionally rather than categorically.
--new language defines incapacity as "extent of impairment" so that the person lacks capacity to meet essential requirements for physical health or safety
--old wording - categorical definition such as "advanced age"

b. Changes general guardian responsibilities so that the guardian is to act on behalf of the ward (as opposed to exercising control over the person).

c. Allows for non-profit agencies to be appointed Guardians.

(3013) 2. Sets a Standard of Proof at clear and convincing evidence. (No standard was set out in previous statute.)

(3014) 3. Instructs the Court to consider the work load and capabilities of Guardians having more than 15 wards before making an appointment.

(3018) 4. Specifies duties and power of Guardians.
--allows the court to specify responsibilities the guardian and ward shall share (some limiting of guardianship).

(3029) 5. Mandates guardian to file an annual report unless expressly waived by the court, and requires a final report....

Sec. 20 (new) 6. Mandates the court to review all guardianship cases within three years and specifies what the review must determine
--if needs are being met
--guardian performing ordered duties
--whether limits should be set on guardian
--if current limits are sufficient
--if guardianship should be terminated

Atch. 4 #4

TESTIMONY:

Introduction:

I'd like to thank the Committee for giving me this opportunity to testify.

Kansas Guardianship statutes afford many due process protections to proposed wards. There were a number of ways, however, in which Kansas law and procedures have failed to protect the proposed ward.

SB 11 has provided many new safeguards in areas of long standing concern to the Department and older Kansans.

The Interim Committee and SB 11 addressed many of the issues we feel are essential to protect the personal and civil rights of wards. KDOA supports the following items:

(3002) Defining disability functionally rather than categorically.

In the existing statute, there is a list of medical problems, including "advanced age" that were criteria to be used in determining incapacity. SB 11 defines disability in functional terms whereby the ability to evaluate information and make decisions is impaired to the extent that he or she lacks the capacity...to meet essential requirements for his physical health or safety -- and further defines those terms. Certainly this would help prevent a person being placed under guardianship due solely to advanced age.

It further defines guardian to include a non-profit corporation certified (by SRS), and changes the wording of the guardian as one appointed by the court to act "on behalf of a ward". Previous wording stated to "exercise control". KDOA supports this change because it supports the concept of working in the best interest of the ward.

(3013) SB 11 sets this standard of proof as clear and convincing evidence. Presently, no standard of proof is set out in statute. The standard of proof would require that the court find by clear and convincing evidence that a person is disabled. This standard of proof is also applied in the restoration process. There must be a showing by clear and convincing evidence that the ward is still a disabled person or the court shall restore them to capacity.

(3014) Instructs the court to consider the work load and capabilities of guardians having more than 15 wards before making another appointment. Although the Department would have preferred actual limits on the number of wards an individual could have, the intention of SB 11 is better than existing legislation.

(3029) Mandates guardians to file an annual report and a final report. Existing statute requires this of conservators only. A guardian, operating on behalf of a ward, should have no less of a responsibility than a conservator who is handling the person's money. This is a further measure to assure accountability.

New Sec. 20) Mandates the court to review all cases every three years.

The wording of this section is excellent in that it delineates what must be reviewed:

1) if needs are being met
2) if guardianship is performing ordered functions
3) if limits shall be changed
4) or if it should be terminated.

Existing statute does not provide for <u>any mandatory review</u>. This does not restrict the court from providing earlier reviews, but <u>mandates</u> that a ward must have some full review.

Without this provision, it could be possible that a full review to determine whether the ward is best served or the court's order is carried out might never happen. KDOA would have preferred a 2-year review, because that is the average length of a person's stay in a nursing home. Three years is acceptable when weighing cost with the safeguards provided.

(3018) There is one major area of concern. The Department strongly supports the concept of limited guardianship. Often persons need assistance with only one or two major areas. Section 3018 attempts to establish a form of limited guardianship by stating that the court <u>may</u> specify the authorities and responsibilities which the guardian and ward shall have.

However, KDOA feels this section needs to be strengthened in several ways:

1. The Court should be required to determine the extent the disabled person can make decisions, prior to making any type of determination on the type of guardianship.
2. If the determination is that the disabled person can make some decision, the court should be required to provide a limited guardianship. The Judicial Council noted that letters of limited guardianship should be issued.
3. Only after a determination that there is complete disability should a full guardianship be issued.

KDOA believes that the law should have specific reference to limited guardianships, and that the explicit limits on the guardian should be spelled out in the disposition letters.

The intent of the statute should be that the guardianship will be limited unless there is a finding otherwise. It is the concept of "least restrictive guardianship". The Judicial Council has provided some discussion of this concept in their testimony and we support their views.

Another concern is with the concept of voluntary guardianship, because of the lack of due process.

SB 11 is a significant protection for those Older Kansans most vulnerable and one of the most pivotal bills affecting older people this session. Although guardianship is not solely an aging issues, a recent survey in California showed that 80% of the persons with guardianships are people over 60. We must realize

a guardianship is taking control of the person and removing all his or her independence and dignity. Sometimes it is necessary to do this in order that the ward be protected.

Ultimately, the goal is to establish a personalized system with the greatest regard for the best interest of each person and his or her needs in the least restrictive setting.

The effort and commitment of the Interim Committee must be commended. If it had not been for these efforts, the changes would not be a possibility. I also want to note that there is general agreement on most of the changes.

SH:pal
2-2-83

Testimony on Guardianship - SB 11
February 3, 1983

I am Al Bramble.

At the outset, let me admit I am no authority on legal provisions or structures for guardianship. But I do claim some knowledge and considerable experience in the field of aging, and the aged are greatly affected by provisions for guardianship. I speak as one of them.

For the past 12 years I have been involved in and deeply concerned for the needs and rights of our elderly citizens; which rights have been violated too often by agencies and persons hurrying to impose upon many elderly, as well as on others, their ideas of what is best for them, and overlooking or discounting their abilities and desires to provide and do for themselves.

For these reasons, we who are the elderly applaud legislative efforts to improve and make more definite the rights, duties and power of guardians. For it is in this area that many older citizens are deprived of the right to make decisions for themselves - thus robbed of any sense of dignity, and denied their freedoms. This, despite the obvious fact that many among us do reach the point of disability that requires the care and decision making of guardians and conservators.

We elderly believe we have earned the right to a life of dignity, with freedom to choose for our own lives. If and when we do need the care and services of guardians and conservators, we want the certainty such is needed. Therefore we support elimination of "voluntary guardianship", for oft times we do not understand the words of another and can agree to a relationship that has not been thoroughly and clearly explained. We think our best welfare justifies and warrants a thorough examination and decision by the court. Every request for guardianship should be examined carefully and objectively.

And, because we have found that we can recover from disabling conditions and re-assume responsibility for our own lives, or, that some specific disability is not general or permanent, we support provisions for limited guardianship, with such limitations established through court actions.

Further, we strongly support accountability in conduct of guardianship. We elderly, especially, can become cantankerous and burdensome to our guardians, who under the burdens can become careless, inconsiderate or negligent. For this reason we support an annual court review of every ward under its jurisdiction to determine whether the disability may have ceased and to ensure that the guardian is discharging his or her responsibilities and duties.

And recognizing that our best interests require attention and time on the part of our guardians, and that one guardian can do only so much, we hope this committee will place some reasonable limitation on the number of guardianships one person can provide and adequately fulfill.

Finally, because we believe that our best welfare is served by those who are concerned for us because we are human beings, persons, we urge and support the provision that non-profit organizations be allowed to serve as guardians.

In summary, we ask that the provisions you establish governing guardianship and conservatorship respect our rights and dignity as human beings and citizens; that we, the potential wards, be the central concern and focus of your efforts and decisions.

I am confident this will be the case.

Al Bramble
1924 Louisiana
Lawrence, Kansas
66044

2-3-83

#6

COMMENTS AND CONCERNS ON
HOW SB11 MAY BE AFFECTED BY CURRENT
UNITED STATES DISTRICT COURT LITIGATION
INVOLVING S.R.S.

SB 11 has apparently thus far arisen almost independently of litigation concerns which have continued since 1978. And this may actually be the first real opportunity for the joining of those concerns to considerations of SB 11. When viewed in such light, it is questionable if SB 11 is really well directed towards some of its announced goals.

The litigation is styled as *Powell, et al., v. Harder as Secretary of Social and Rehabilitation Services, et al.* on file since 1978 in the United States District Court for the District of Kansas. The named plaintiffs (one of whom is now deceased) are former patients at Topeka State Hospital who were formerly admitted on voluntary applications by their guardians. The action has been certified for a plaintiff's class which includes all of the adult patients of institutions under SRS who are on voluntary admissions by their guardians. This involves hundreds of patients and the discovery under court orders of patient records has already been extensive. The plaintiffs have been represented by Legal Services attorneys: Larry Rute, Luis Mata, Joseph Willey and Lowell Powell. Dr. Harder and the other S.R.S. defendants are represented by S.R.S. Legal Division attorneys: Bruce Roby and Donald Frigon.

The *Powell* case attacks applications of the current K.S.A. 59-2905. This statute, now codified as K.S.A. 1982 Supp.

Attch. 6

59-2905, concerns voluntary admissions to treatment facilities. And we should digress to note that "treatment facility" as defined in Section 9(g) of Chapter 238 of the 1982 Session Laws:

> . . . means any mental health clinic, pyschiatric unit of a medical care facility, adult care home, physician or any other institution or individual authorized or licensed by law to give treatment to any patient.

So Although the *Powell* case focuses solely (over S.R.S. objections) on S.R.S. institutions, the coverage of treatment facilities receiving voluntary admissions under the challenged K.S.A. 59-2905 is vastly broader.

The portions of K.S.A. 59-2905 under attack are principally the provisions that:

> . . . In any case, if such person is over eighteen (18) and has a guardian, the guardian shall make application. The head of the treatment facility or his or her designee may require a statement of such person's attending physicians or a statement of the local health officer of the area in which such person resides that such person is in need of treatment in a treatment facility . . .

So the status quo, before any decision from the *Powell* case and before any changes by SB 11, is that application for admission to a treatment facility by an adult with a guardian must presently be made by the guardian. The changes of this situation as proposed in SB 11 are less than clear as are its concerns for its own effects. Lines 615-617 (Sec. 13, page 17) provide that:

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

This would seem to comport well with the present K.S.A. 1982 Supp. 59-2905 provision as recited above.

But it is difficult to interpret those powers with the restrictions included in lines 670-678 (Sec. 13, pages 18-19), which are vague in both meaning and goals.

> (c) A guardian shall not have the power:
>
> (1) To place a ward in a facility or institution to which an individual without a guardian would have to be committed under the act for obtaining treatment for a mentlaly ill person or under Article 40 of Chapter 65 of the Kansas Statutes Annotated or acts amendatory of the provisions thereof or supplemental thereto, other than through a formal commitment proceeding in which the ward has independent counsel and a separate guardian ad litem.

We will briefly ignore the Article 40 of Chapter 65 restrictions and will return to them later. But, what does the rest still mean?

Is it an attempt to prohibit any voluntary admissions by guardians or wards who otherwise would have gone through involuntary admission proceedings? This on the surface may seem a laudable goal. But a number of major questions are still raised. Chapter 238 of the 1982 Session Laws amended the definition section of K.S.A. 59-2902 as to "Mentally ill person" as:

> . . . means any person who is mentally impaired to the extent that such person is in need of treatment and who is dangerous to self or others and . . .

(lines 1079 - 1094 of Sec. 23, pages 29-30, merely continue that definition) Obviously a great many wards with guardians will not meet the requirement of dangerousness even though they may, still within the definition, be "in need of treatment". So, is

there any intent here to simply deny treatment to non-dangerous wards who have guardians? Would those wards be better off avoiding guardianship so they can still sign voluntary admissions? But, what then of mentally retarded wards who cannot communicate in oral or written form in the first place?

Or, is the intent to still allow guardians to make application for non-dangerous wards since such wards would not fully meet the Chapter 238 definition of mentally ill person and thus not be under the restrictions of lines 670-678. But can the guardian then just assume non-dangerousness or does it first take an unsuccessful attempt at an involuntary commitment to show the exclusion?

And when the restriction of lines 67-678 do apply, what or which proceeding is required to meet the standard of:

> through a formal commitment proceeding in which the ward had independent counsel and a separate guardian ad litem;

Is that only satisfied by an involuntary committment proceeding (K.S.A. 59-2912 and 13 *et seq.*)(in which we are potentially back to the problem of any non-dangerous ward who still needs treatment)? Or is the provision met through some sort of special proceedings as might be implied from lines 639-642, 645 and 647-648 (all in Sec. 13, page 18) of SB 11?

> (b) At the time of appointment of a guardian or at a later time, the court making the appointment may specify the authorities and responsibilities which the guardian and ward, acting together or separately, shall have with regard to:
> . . .
> (2) arranging for medical care for the ward;
> (4) giving necessary consent, approval or releases on behalf of the ward;

This might satisfy the dilemma of some of the situations expressed above of a non-dangerous ward who is still in need of treatment. But from the standpoint of the likelihood of the *Powell* litigation spreading to an attack on such provisions, some of its benefits may be illusory. These extra judicial powers are provided without standard, criteria, or guidance. Although the need for guardianship must be on clear and convincing evidence, the standard is not expressed again for any medical or institutional consents. And such a provision supplants guardian (including parents or natural guardians) powers for direct judicial authorities or state action. The powers of lines 639-642, 645 and 647-648 have the potential to open up a whole new alternative of judicially ordered involuntary committments. And if these powers are applied on a different standard from the Chapter 238 definitions, a whole new series of due process and equal protection questions may arise.

And, of course, if any of the above restrictive interpretations are applied then SB 11 would then conflict with the present guardian application provisions of K.S.A. 1982 Supp. 59-2905 and the discharge provisions of K.S.A. 1982 Supp. 59-2907 without yet making provision to amend them.

The mention of K.S.A. 1982 Supp. 59-2907 should also bring up some other potential problems of its current language. It includes that provision related to discharge from a treatment facility that:

> . . . If, however, such voluntary patient is

> over eighteen (18) years of age and has a guardian, such discharge shall be conditioned only upon the consent of the guardian . . .

It should perhaps be indicated that "conditioned only upon the consent of the guardian" should not be elevated from a notice provision to any power that a guardian could countermand medical decisions for discharge when no further treatment was found necessary. In other words the provision should be made clearly subservient to K.S.A. 59-2906 and its provision that:

> The head of the treatment facility shall discharge any informal or voluntary patient whose treatment therein such head of the treatment facility determines to be no longer advisable. The head of the treatment facility shall give written notice of such discharge to the patient and, where appropriate, to such patient's parent, guardian or person in loco parentis.

The same type of conflicts with other current statutory provisions also potentially occur as related to the lines 670-678 restrictions as related to the Article 40 of Chapter 65 provisions. K.S.A. 65-4025(a) still allows a legal guardian to make application for an alcoholic for voluntary treatment.

And beyond the questions raised above, does SB 11 intend to restrict emergency applications which a guardian might otherwise make under K.S.A. 1982 Supp. 59-2912 as to mental illness or K.S.A. 65-4028 as to intoxication or incapacity by alcohol?

All of this reduces to a request for clarity of goals and considerations. Exactly which treatment application and placement powers of guardians are to be changed and is there a full awareness of the effects on the wards, courts, guardians,

treatment facilities, and the communities? And, if from such changes large numbers of mentally ill or mentally retarded persons with guardians are to no longer be eligible to continue current treatments at treatment facilities, what timetable is to be adopted for their discharge?

In other words, we view all of the above mentioned provisions of SB 11 with extreme concern. SB 11 may potentially, and without clear, present goals affect or curtail medical treatment and especially institutional treatment of hundreds of persons without any clear alternatives. SB 11 may also effect the current litigation by substituting statutory conflicts and changes which are even less clear in direction that the current situation.

Without apparent clear goals for what SB 11 is really intended as to changing to completely curtailing treatment admissions for large numbers of persons, we are unable to recommend simple line changes to the bill.

This does not represent any campaign by S.R.S. for adoption or rejection of greater or lesser powers of guardians. Indeed S.R.S. does not relish its central position in the current litigation on the subject. S.R.S. is concerned that the intents of the legislature be made clear so that they can be represented. And along that line S.R.S. would even welcome any intervention in the *Powell* case of the Legislative Counsel as the legislature may wish to request or authorize.

Bruce A. Roby
S.R.S. Legal Division

ADDENDUM

The foregoing comment on SB 11 is extremely abbreviated as to some of the underlying issues concerning guardianship powers. This addition is provided as a further, brief overview of some of them.

A corallary issue to whether a guardian should arrange medical treatment for a ward is whether a guardian should, acting on previous wishes of a ward, refuse treatment (eg. life support measures) on behalf of the ward. An example of this situation is found *In re Severns*, 425 A.2d 156 (Del. 1980).

> I have no doubt but that an incompetent may exercise his or her right to privacy by the substantial judgment of one acting on his or her behalf. Superintendent of Belchertown v. Saikerwisz, 373 Mass. 728, 370 N.E.3d 417 (1977), and that were a guardian, as here, not permitted to act for an incompetent and assert such incompetent's right to privacy, then such right becomes meaningless. In the Matter of Spring, Mass. Supr. ___ Mass. ___, 405 N.E.2d 115 (1980). Furthermore, there is Delaware precedent for the proposition that a guardian may be authorized to carry out the previously expressed intent of an infirm person, and it has been noted earlier in this opinion that Mrs. Severns prior to her accident had expressed a wish that she not be kept alive in a vegetative sate, In re Irénee du Pont, Del Ch., 194 A2d 309 (1963). (See also Matter of Storns, 420 N.E.2d 64 (N.Y. 1981).)

So restrictions on a guardian's consent powers as to medical treatment may cut both ways. The guardian may then acquire less treatment for the ward. And the guardian is then less able to refuse some treatment on behalf of the ward.

In re Severns represents an instance of a guardian acting on previous wishes expressed while a ward was still competent.

But what of wishes expressed by ward while incompetent as to medical treatment? This and some other problems of limited guardianship provisions are discussed by William L.E. Dussault in "Guardianship and Limited Guardianship in Washington State " Application for Mentally Retarded Citizens" in 13 Gonzaga Law Review 585, 613-614:

> The amendments to RCW 11.92.040(3) present guardians with a substantial problem and an amomalous situation. If a person who has been determined incompetent decides that he or she does not want to go to a residential facility which provides mental health treatment, observation or evaluation, the only way that person may be placed in such a facility is through the state's involuntary commitment law. On the one hand, a person has been declared incompetent and unable to manage his or her person and affairs. That individual who has now been determined incompetent can make no statement of any legal force or effect. The only exception is that the same incompetent person may decide he or she does not need residential placement services. Such residential placement services may be the most important and necessary means to the continued health and welfare of that incompetent individual. Further, the term mental health treatment observation and evaluation is undefined. All residential placements could potentially be included by a court using a broad definition of the term. A guardian could then be prohibited from making any residential placements.
>
> The guardian is charged with the duty of "caring for and maintaining" but under this new provision the guardian is prohibited from acting in some areas. The statements of a person who has already been declared incompetent will control the determinations of the court. Thus, a moderately or severly retarded individual with no ability to live independently in the community, absent round-the-clock residential placement and assistance, can completely defeat the efforts of a well intentioned guardian to place the incompetent mentally retarded person in a facility merely by saying that he or she does not wish to go. The only way that the placement might occur is through the state's involuntary

commitment act. Unfortunately, there is no indication that the mentally retarded individual, though incompetent, is "a danger to him or herself or other, and/or gravely disabled", as is required by the involuntary commitment act.

An interesting attack on unlimited guardianship provisions and an interesting general analysis is found in the article by Lawrence A. Frolik of "Plenary Guardianship : An Analysis, a Critique and a Proposal for Reform" in 23 Arizona Law Review 600. Professor Frolik's comments on incompetents are interesting:

> Society seems quite capable of providing day-to-day supervision of an incompetent without the need to resort to formal guardianship. Adult incompetents who are housed in state institutions often have their lives subjected to almost complete dominance and control without their having been formally adjudicated incompetent. Adult incompetents who reside with their parents have even less need for a legal guardian as the parents tend to act as if the incompetent were still a minor and thus subject to their control. As long as a parent survives, individuals and institutions who deal with an incompetent will often accept parental consent as sufficient, even though the parents are not the guardian of their adult incompetent child and, therefore, lack legal capacity to grant consent. (23 Arizona L R 650)

This may be contrasted with the decision in *Baker v. Martin*, 160 Cal. Rptr. 619 (1980), which is summarized as follows:

> Petitions were filed for commitment to state hospital of individuals who were considered developmentally disabled and who had been residing in Stockton state hospital either voluntarily or as a nonprotesting resident for varying lengths of time without judicial commitment. The Superior Court of San Joaquin County, Bill Dozier, J., sustained subjects' demurrers without leave to amend, and appeal was taken. The Court of Appeal, Sparks, J., assigned, held that: (1) statutory procedure for admitting nonprotesting mentally retarded persons who are not under conservatorship is facially unconstitutional as constituting a

> de facto commitment without judicial review; 92) no mentally retarded person may be accepted in a state hospital unless he has been judicially committed, is competent enough to voluntarily commit himself or has been placed there by his conservator; and (3) respondents and those similarly situated were not entitled to immediate release but were entitled to a prompt judicial hearing.

One final note is that the extent of judicial prescription on the guardian's powers may affect the immunities offered in potential civil rights or other litigation over a guardian's action. See *eg. Holmes v. Silver Cross Hospital of Joliet, Illinois*, 340 F.Supp. 125 (1972).

Christian Science Committee on Publication For Kansas

820 Quincy Suite K
Topeka, Kansas 66612

Office Phone
913/233-7483

To: Senate Committee on Public Health and Welfare

Re: SB 11

It is requested that Senate Bill 11 be amended by adding the following words, beginning on page 2, line 0048:

> "A person shall not be considered to be disabled or to lack capacity to meet the essential requirements for physical health or safety for the sole reason he relies upon or is being furnished treatment by spiritual means through prayer in lieu of medical treatment in accordance with the tenets and practices of a recognized church or religious denomination of which said person is a member or adherent."

The following language, based on a provision in the Model Health Care Consent Act which has been adopted by the American Bar Association, would be an acceptable alternative:

> "A person shall not be considered to be disabled or to lack capacity to meet the essential requirements for physical health or safety for the sole reason that he relies consistently on treatment by spiritual means through prayer for healing in accordance with his religious tradition and is being furnished such treatment."

Either of the above suggested amendments should provide needed protection to the individual who chooses to rely on treatment by spiritual means through prayer in lieu of medical treatment. A finding that the individual is a disabled person could not be based solely on the individual's choice of treatment.

It is further requested that line 0645 on page 18 be amended by adding "or other non-medical remedial care" after "medical care." That line would then read:

"(2) arranging for medical care or other non-medical remedial care for the ward;"

This change would allow the guardian and ward to cooperate in choosing the method of treatment for the ward and would be similar to the provision in lines 0615-0617 on page 17 which permits the guardian alone to give consents for "medical or other professional care, counsel, treatment, or service."

We are grateful for the provision added by the interim committee in lines 0503-0508 on page 14 and are confident that the retention of that provision plus the addition of the two amendments requested above will adequately provide for those who rely on spiritual means through prayer for healing.

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