Approved
Date: 3-29-02

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Senator Vratil at 9:42 a.m. on March 27, 2002 in Room 123-S of the Capitol.

All members were present.

Committee staff present:
Gordon Self, Revisor
Mike Heim, Research
Mary Blair, Secretary

Conferees appearing before the committee:
Sam Bruner, Chair, Guardianship and Conservator Advisory Committee, Kansas Judicial Council (KJC)
Donna Bales, President, Kansas Life Project (KLP)
Vicki Bailey, El Dorado
Jane Rhys, Kansas Council Development Disabilities (KCDD)
Paul Davis, Kansas Bar Association (KBA)
Donald Personett, Wyandotte County Disability Advocacy Group (WCDAG)
Kirk Lowrey, Topeka Independent Living (TIL)

Others attending: see attached list

The minutes of the March 26th, 2002 meeting were approved on a motion by Senator Schmidt, seconded by Senator Donovan. Carried.

Final action:

HB 2399–offender registration
Staffperson Self, at the request of the Chair, stated it was not necessary to add a previously proposed amendment to **HB 2399** which would give judges discretion in juvenile sex offender cases since current law already does that. Requested information from the KBI regarding the number of juveniles arrested under statutes covered by the Offender Registration act was distributed to Committee.(attachment 1) Following discussion, Senator Goodwin moved to pass the bill out favorably, Senator Schmidt seconded. Carried.

Hearing on:

Sub HB 2469–concerning guardians and conservators
Conferee Bruner testified in support of **Sub HB 2469**, a bill which recodifies the statutes relating to guardianship and conservatorship, repealing 25 sections of current law and adding 33 new sections. The Conferee presented historical background on the bill, defined key terms, and discussed the process and people involved in doing this "general rewrite of existing law."(see "You are invited to comment on the proposed Guardianship and Conservatorship Act", The Journal, June/July, 2001, pp.33-38) He referred to comments by the American Bar Association (attachment 2) and explained each of the proposed balloon amendments (attachment 3)

Conferee Bales testified in support of **Sub HB 2469** but opposed the language in section 26 (e)(7)(c) which was added in the substitute bill. She explained why the previous language best serves the interest of the wards of the state of Kansas.(attachment 4)

Conferee Bailey testified in support of **Sub HB 2469** but reiterated Conferee Bale's testimony opposing the same portion of section 26. She presented personal testimony regarding her 10 year role as a legal guardian to her neighbor who had Down's Syndrome and is now deceased.(attachment 5)

Conferee Rhys testified in support of **Sub HB 2469**. She briefly discussed the mission of KCDD and discussed the work done by the Kansas Judicial Task Force on Guardianship. She referred to her written testimony which bullet points the good qualities about the bill.(attachment 6)

Conferee Davis testified in support of **Sub HB 2469.** He discussed the KBA's comprehensive study of the proposed guardianship and conservatorship act and stated that they are supportive of the KJC's balloon amendments. He discussed two proposed amendments to the bill, the first dealing with the duties of guardians and conservators as stated in New Sections 26 and 29 of the bill and the second dealing with concern about the constitutionality of the extended conservatorship provisions in New Section 32.(attachment 7)

Conferee Personett testified as neutral on **Sub HB 2469**. He testified that he was the father of a son with Down's Syndrome and had concerns for his son's welfare should anything happen to him. He briefly stated that new rules are needed and that this bill "broadens what's needed for getting guardianship."(no attachment)

Conferee Lowry testified as neutral on **Sub HB 2469** but stated he had serious concerns about the bill and briefly discussed a number of proposed changes which would: add pleading requirements in the petition; add additional requirements in examination reports; add language limiting guardianship preference and notice of right to petition for termination, restoration or modification; add language dealing with involuntary commitment to a treatment facility; and expand the availability of restoration to capacity.(attachment 8) He recommended that due to the lateness of the bill it should be passed out and these issues could be dealt with next year.

Written testimony supporting **Sub HB 2469** was submitted by: Alzheimer's Association;(attachment 9) Midwest Bioethics Center;(attachment 10) Kansas State Nurses Association (attachment 11); and Association of Kansas Hospices (who supports the bill but requested certain language be changed "back to the language in HB 2469".)(attachment 12)

Following discussion and clarification by Conferee Bruner, Senator Goodwin moved to amend **Sub HB 2469** adding all of the amendments in the KJC's balloon, Senator Schmidt seconded. Carried. Senator Goodwin moved to pass the bill out favorably as amended, Senator Schmidt seconded. Senator Pugh discussed why he was voting nay. Carried.

The meeting adjourned at 10:30 a.m. There are no further meetings scheduled at this time although there will be a confirmation hearing on a date to be determined by the Chair.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-27-02

NAME	REPRESENTING
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Paul Davis	KBA
Donna Bales	L.I.F.E.
Vicki Bailey	Life Project
Lynara South	JJA
SAM Y. BRUNER	DIST. COURT
Jim Allen	AKG
Connie Burns	Whitney B. Damron, PA
Jeow Krahn	KGP
JOHN HOUSE	SRS/JUDICIAL COUNCIL
Jane Rhys	KCDD/Judicial Council
Brenda Harmon	KSC
Barb Tombs	KSC
Kirk Lowry	TILRC
Ami Hyten	JUDICIAL BRANCH
Jean Barton	KAOC
Christy Molzen	Judicial Council
Terry Gorman	KCDAA
Mike Beezley	KS Govt Consulting

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3/27/02

NAME	REPRESENTING
Kyle Smith	KBI

Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

Senate Judiciary Committee
Re: HB 2399 question on juvenile arrests

Chairman Vratil and members of the Committee,

Per your request, I had our I.T. personnel run the number of juveniles arrested under the 27 plus statutes covered by the Offender Registration act for the last three calendar years.

1999	**1,273 arrests**
2000	**1,397 arrests**
2001	**1,058 arrests**

Please remember that these are arrests, not convictions. Further, some juvenile arrests already result in registration due to being prosecuted and convicted as adults or as a condition of probation or diversion.

There was also a question on how names are removed from the offender registration list. Current law (K.S.A. 22-4906) requires some persons convicted of specified crimes to register for life, some for 10 years and still others only as a condition of probation or diversion. As the law hasn't been in existence for 10 years yet, the only terminations of the obligation to register have come from:

1. **Those doing so as a condition of probation or diversion,**
2. **Those who took advantage of a provision, since repealed, allowing courts to provide relief (K.S.A. 22-4908),**
3. **Those who fit the narrow exception under K.S.A. 22-4912.**

As to Paragraph 1, when the disposition is received by the KBI, we advise the C.S.O. involved to notify us of the successful termination of the probation/diversion. Once so notified, the person's changed status is noted in the file and they are removed from the KBI website and other public listing. Any court orders under paragraphs 2 and 3 are treated in the same manner.

Please advise if you have further questions.

Kyle Smith

Sen Jud 3-27-02 att 1

AMERICAN BAR ASSOCIATION

Commission on Legal Problems of the Elderly
740 15th Street, N.W., 8th Floor
Washington, D.C. 20005-1022
(202) 662-8690
Fax: (202) 662-8698
E-mail: abaelderly@abanet.org
www.abanet.org/elderly

December 6, 2001

Kansas Judicial Council
Suite 262
301 SW 10th Street
Topeka KS 66612-1507

Re: Proposed Guardianship and Conservatorship Act

This letter on behalf of the American Bar Association conveys comments based on ABA policy developed by the ABA Commission on Legal Problems of the Elderly on 2001 H.B. 2469, the proposed Kansas Guardianship and Conservatorship Act. The ABA Commission is a 15-member interdisciplinary group established in 1979 to examine law-related issues affecting older persons. The Commission has played a leading role in changes in adult guardianship and health care decision-making during the past 15 years, and annually tracks state legislation in both areas.

The comments below are based on extensive policy of the American Bar Association concerning adult guardianship law and practice. In 1986 the Association endorsed recommendations of the National Conference of the Judiciary on Guardianship Proceedings for the Elderly. In 1989 the Association endorsed many of the recommendations of the 1988 National Guardianship Symposium (the "Wingspread Conference"). In 1991, the Association endorsed recommendations of the National Conference on Court-Related Needs of the Elderly and Persons with Disabilities, including those on capacity and surrogate decision-making. In 1998, the Association endorsed the 1997 revisions to the Uniform Guardianship and Protective Proceedings Act.

The comments also rely on ABA policy on health-care decision-making, including approval in 1986 of the Uniform Rights of Terminally Ill Act (later replaced by the Uniform Health Care Decisions Act), and a 1990 resolution that "supports the principle that individuals who are capable of making health care decisions generally have the right to consent to and to refuse suggested health care interventions" and that "an appropriate surrogate

Jud 3-27-02 att 2

may exercise this right on behalf of an individual who is incapable of making such decisions."

The Commission commends the Kansas Judicial Council for undertaking such thorough and significant changes to current guardianship law. The proposal would markedly modernize and strengthen many existing provisions -- highlighting the rights while meeting the needs of respondents and wards, and adding welcome clarifications. Specifically, the ABA Commission supports: (1) the reliance on a functional determination of incapacity, as well as the requirement for a showing that guardianship is necessary and that no appropriate alternatives will suffice; (2) the use of new language to replace the outmoded and discriminatory term "disabled;" (3) the inclusion of more specific information in the petition and in the evaluation report; (4) the provisions addressing transfer of guardianship from another state; (5) provisions ensuring that cases will be heard in the county most appropriate to the circumstances of the proposed ward; (6) allowance for the proceeding to be conducted in a treatment facility or other place that might be more accessible and convenient for the proposed ward; (7) the required appointment of counsel for the proposed ward; and (8) the authority for the guardian/conservator to establish trusts to allow for qualification for public benefits.

However, the ABA Commission has specific comments and suggestions for possible improvement concerning: first, the guardian's authority to consent to the withholding and the withdrawing of life-saving medical care, treatment, services or procedures (59-3018b (e)(7) & (8)); and second, several procedural provisions outlined below.

Withholding/Withdrawing of Life-Sustaining Treatment

The proposed changes take an important positive step to expand the breadth and flexibility of the guardian's authority to make decisions about end-of-life care. However, one conceptual and practical anomaly in the proposal runs contrary to the policy approach taken by all other states, model laws such as the Uniform Health Care Decisions Act, and the prevailing medical views on distinctions between withholding and withdrawing treatment. The anomaly arises in the list of exceptions to the prohibition against withdrawing or withholding life-saving medical care by a guardian in New Sec. 26 (e)(7). The section states that the guardian shall not have the power to consent to the withholding of life-saving medical care, treatment, services or procedures. The section goes on to provide four exceptions to this prohibition, paraphrased here:

1. If the living will says so.
2. If the power of attorney says so or gives the authority.
3. FOR DECISIONS TO "WITHHOLD" TREATMENT -- if treatment would not likely prolong the life other than by artificial means, nor would it likely restore or improve the ward's functioning (i.e., the patient is terminal).
4. FOR DECISIONS TO "WITHDRAW" TREATMENT -- if the patient is in a permanent vegetative state.

The problem here is the distinction made between withholding and withdrawing treatment. This is a problem for three reasons.

First, the legitimacy of a distinction between withholding and withdrawing treatment has been consistently criticized and rejected by medical, ethical, and legal authorities, including...

32

- The President's Commission for the Study of Ethical Problems in Medicine in its seminal report, *Deciding to Forego Life-Sustaining Treatment* in 1983,
- The Hastings Center *Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying* (1987);
- The Council on Ethical and Judicial Affairs of the American Medical Association (1986 &1989);
- The American Academy of Neurology policy statement (1988);
- The American Geriatrics Society policy statement (1987);
- The National Center for State Courts in its *Guidelines for State Court Decision Making in Authorizing or Withholding Life-Sustaining Medical Treatment* (1991).

Second, no state advance directive law or guardianship law that we are aware of incorporates such a distinction in this manner;

Third, mandating such a distinction is likely to distort medical practice and decisionmaking in negative ways. Professor Alan Meisel's discusses the medical and practical problems in his well-known textbook, *The Right to Die*:

> It is sometimes said that it is permissible to withhold treatment from a dying patient, but that once begun, treatment may not be withdrawn. This distinction is also referred to as the difference between "not starting" and "stopping" treatment. Regardless of the nomenclature, this distinction is a variation on the distinction between act and omission, and it is no more satisfactory in making distinctions between permissible and impermissible forgoings of life-sustaining treatment.
>
> There are a number of serious obstacles to the use of the distinction between withholding treatment as a satisfactory means for defining the boundaries of the right to die. First, there is the ambiguity inherent in characterizing conduct either as a "withholding" or a "withdrawing" similar to that which occurs in characterizing behavior as an act or omission. Perhaps more fundamentally, however, the distinction ignores the fact that withholding treatment may be culpable when there is a duty to provide it. Although sometimes there is a moral difference between withdrawing and withholding, this is not always the case.
>
> There is a serious practical difficulty with this distinction. It may entail especially pernicious consequences because it may encourage withholding treatment from a patient who may have benefited from it, out of fear that if such benefit does not materialize, the treatment cannot then be discontinued. Contemplating this problem, the New Jersey Supreme Court observed,
>
> > from a policy standpoint, it might well be unwise to forbid persons from discontinuing a treatment under circumstances in which the treatment could permissibly be withheld. Such a rule could discourage families and doctors form even attempting certain types of care and could thereby force them into hasty and premature decisions to allow patients to die.
>
> This is not merely a hypothetical concern. In *Tune V. Walter Reed Army Medical Hospital,* the patient could not be taken off a ventilator without a court order because a Department of the Army policy "precluded the withdrawal of life support systems once planned in operation". The court observed that if the doctors had known of the patients malignancy and lung disease, they would not have ordered her put on a respirator in the first place. This would have denied her the opportunity for recovery, a result that in fact did not materialize, but this could not have been known before the fact.
>
> Despite these problems with using the distinction between withholding and withdrawing treatment as a guide for the application of the right to die, there is an undeniable psychological difference between the two. Heath care professionals frequently subscribe to the view, expressed in *Satz v. Perlmutter,* "that (withdrawing treatment) appears more drastic because affirmatively, a mechanical device must be disconnected, as distinct from mere inaction." As a result, health care professionals are far more reticent about stopping treatment than withholding it at the outset. As true as this may be, the distinction was still rejected by the Perlmutter court, as it has been by others that have considered it. Nonetheless, the courts have generally concluded that the distinction between withholding and withdrawing treatment should not

2-3

be determinative of whether treatment may be foregone. Alan Meisel, THE RIGHT TO DIE §8.6 (2nd ed. 1995) (Footnotes omitted)

The most direct solution to this problem is to permit exceptions (3) and (4) in the proposed law to apply to BOTH withholding and withdrawal. That would also place the Kansas guardian's authority to make health care decisions on a par with that found in the majority of states.

An alternative, though less flexible, solution is to require the guardian to petition the court for single transaction authority to consent to a proposed decision to withhold or withdraw treatment. The difficulty with this solution is that it imposes a heavy and indiscriminate burden in terms of cost, time, emotional stress, and effort on *all* who serve as guardian. This burden may be appropriate for a guardian who has no pre-existing familial connection to the ward, but it may be inappropriate for close, familial guardians whose actions are guided by love and understanding. Furthermore, this kind of burden discourages guardians from petitioning in the first place, even where the withholding or withdrawal of treatment may be the ethically and medically appropriate course of action. Paradoxically, if all guardians successfully overcame the disincentive, the result would be a substantial new onus on the courts to hear these petitions and to adjudicate end-of-life care decisions.

One way to "fix" this alternative is suggested by a recent amendment to the Maryland guardianship law. (See 2001 Maryland Laws Ch. 189 (H.B. 127), approved April 20, 2001). The new Maryland law permits the court to grant authority to the guardian, at the time the guardianship is established, to make decisions regarding "medical procedures that involve a substantial risk to life" only if the guardian is:

- The spouse
- Adult child
- Parent
- Adult brother or sister, or
- Friend or other relative of the patient who is a relative or close friend who has maintained regular contact with the patient sufficient to be familiar with the patient's activities, health, and personal beliefs.

All other guardians must petition the court for approval at the time such a decision needs to be made. The Maryland approach provides a possible middle ground if the first alternative is not deemed acceptable.

Comments Concerning Specific Procedural Provisions

The ABA Commission applauds the thrust of many of the massive procedural changes proposed, but we have questions or comments about several specific areas, based on ABA policy and on our familiarity with other state statutes:

1. Petition. The 1989 ABA recommendations urge a "simplified but specific petition form." In Sec. 59-3009a, several additional items might be useful to the court.

- In item (6) the "factual basis" for the alleged incapacity could include examples of recent occurrences, showing the person's current lack of ability to meet basic needs.
- The petitioner also could be asked to name the specific reasons why the guardianship is requested, and what steps have been taken to find less restrictive alternatives. This would reflect the proposal's key theme that judicial involvement must be predicated on both an inability to meet essential needs and lack of other approaches to meet the needs.
- In item (9) concerning powers of attorney and other surrogates, representative payee could also be included. A recent Commission study on the Social Security representative payment system found that probate and other guardianship judges often are unaware that a representative payee has been appointed.
- In item (13), in addition to the name of the proposed guardian/conservator, the petitioner could include the qualifications.

2. Evaluation (59-3010a), (59-3011). The proposed law is predicated on the two-pronged test of impairment and necessity of the guardianship/conservatorship appointment. It requires examination and evaluation by one or more medical professionals who are to describe the individual's cognitive and functional abilities and limitations. However, these medical professionals might not assess how the person manages day-to-day in society, what alternatives have been explored or might work, and whether judicial involvement will make a difference. Yet Sec.(b)(7) asks for the opinion of the professional evaluator(s) as to whether the individual is "an adult with an impairment in need of a guardian or conservator" – essentially whether a guardian should be appointed. For years, one theme of reform has been to get away from conclusory medical statements. An evaluation report from a medical professional perhaps should not include an ultimate legal opinion – especially since the legal opinion requires not only a showing of the impairment but also a showing of necessity. This might well be beyond the knowledge of the medical professional (i.e., will a medical professional know whether the individual has established a trust or has a representative payee).

3. Investigation/representation. The ABA Commission supports use of a court visitor or guardian ad litem to be the "eyes and ears of the court" as well as counsel to serve as zealous advocate for the desires of the proposed ward if known. The Uniform Guardianship and Protective Proceedings Act requires a court visitor, and sets out two alternative provisions for the appointment of a lawyer – the first requiring appointment in selected circumstances; and the second, added at the behest of the Commission, requiring appointment in every case. The Kansas proposal allows discretionary court appointment of an investigator (Sec.59-3011), and requires mandatory appointment of an attorney (Sec. 59-3010(3)), but fails to delineate the roles. Does the proposal envision that if no investigator is appointed, the attorney could assume that role, reporting to the court on the full situation of the individual and the necessity of a guardian? Or is the attorney is to be strictly an advocate for the proposed ward? These questions might merit further examination, and addition of language that spells out the roles of the medical evaluator, investigator (and circumstances under which an investigator should be appointed) and attorney in the court's consideration of the two-pronged test of impairment and necessity.

4. Notice (59-3012). The section on notice to the proposed ward/conservatee does not address readability. Many respondents are elderly and may have vision problems or reading difficulties. State statutes often provide that the notice must be in plain language. Some address languages other than English. Some require that the print be in specific font sizes (such as 14 point type). Some have included the notice form within the statute. Also, the notice fails to inform the proposed ward/conservatee of the real meaning of the procedure – what rights may be lost as a result? Finally, the notice fails to inform the proposed ward/conservatee of rights he/she has during the proceeding, other than the very critical right to an attorney – such as the right to present and cross-examine witnesses.

5. Trial. The proposal would change the term "hearing" to "trial." Presumably the rationale is to show that the process is adversarial and to emphasize its use of formal procedural safeguards. But to a vulnerable, frightened elder or individual with a disability, it conveys a devastating message that the he/she is "accused" of wrongdoing. Most states, as well as the Uniform Guardianship and Protective Proceedings Act and the National Probate Court Standards use the more neutral and less agitating term "hearing."

6. Temporary guardianship. Sec.59-3017b clarifies provisions on temporary guardianship/conservatorship. It allows the court to enter an ex parte order appointing a temporary guardian or conservator, and states that the proposed card, attorney and others may request a hearing. While the commentary indicates that "the order must be served on the interested parties listed," the wording of Sec.5017b(c) does not appear to include notice prior to the order – only the opportunity to "request a hearing on the matter" within three days of the order. In Sec.(d), the court may set a hearing, but notice of the hearing is discretionary. Clarity and timing of notice is critical in temporary guardianship. In the landmark case of *Grant v. Johnson*, 757 F. Supp. 1127 (D. Or. 1991), a federal district court declared the Oregon temporary guardianship statute unconstitutional in that it did not provide minimum due process protections including specific notice. The UGPPA requires "reasonable notice" of a hearing, and notice within 48 hours following an ex parte emergency appointment.

   Finally, Sec.3017b allows for temporary guardianship/conservatorship only after filing of a petition for permanent appointment; and sets no time limit, providing only that it "shall expire at the conclusion of the trial." This does not allow for appointment of a temporary guardian without a petition for permanent appointment, as would be permitted under the UGPPA. The UGPPA commentary following Sec. 312 states that "the drafting committee was concerned that requiring the filing of a petition for a permanent appointment would lend an air of inevitability that a permanent guardian should be appointed. Frequently, the need for an emergency guardian is temporary only and the respondent' long-term needs can be met by mechanisms other than guardianship." (Also note that the UGPPA uses the term "emergency guardian," reserving the term "temporary guardian" for a non-emergency situation in which a substitute guardian may be appointed to fill in for up to six months.)

7. Guardianship/conservatorship plan vs. limited guardianship. The Kansas proposal eliminates the concept of limited guardianship/conservatorship, substituting the use of

guardianship and conservatorship plans. The UGPPA, the National Probate Court Standards, the 1989 ABA recommendations, and the majority of state statutes all call for the court to consider limitations on the powers and duties of the guardian, in accordance with the specific areas of incapacity of the ward. Despite this, it appears that the use of limited guardianship is markedly limited. It is often seen as too cumbersome, time-consuming for the court, and difficult in implementation. Thus, the idea of finding a better way is intriguing. However, the proposal's use of a plan as a "back door" approach to limiting guardianship raises several questions that might bear further examination:

- What is the purpose of a plan? Use of a plan in the guardianship context goes back at least to 1979 Model Guardianship Statute by the ABA Commission on the Mentally Disabled. It was to specify necessary services, means for obtaining these services and the manner in which the guardian will exercise and share decision-making authority. It was to "encourage a goal-oriented rather than a maintenance approach" and "further assure accountability." The ABA conducted a comprehensive study of guardianship monitoring, and the resulting 1991 report urged the use of plans as a measuring tool for courts to assess guardian performance. The NCPJ Standards call for a plan to "help guardians perform their duties more effectively," and the UGPPA specifies that guardians should submit "plans for future care" as a component of their reports to the court. While the Kansas plan (Sec. 59-3018c & 59-3019b) could aid in these purposes, it also sets out the scope of the individual's autonomy to make important life choices, to consent to medical care, to associate with others, and to use earnings and financial assets. In essence, it could establish shared decision-making and limitations on decision-making outside the purview of the court order.

- How will the ward and interested third parties know about the plan and any limitations it specifies? While the plan is to be filed with the court and thus is theoretically available as a public document, notice of the plan is at the discretion of the court. The plan should be sent to the ward and all individuals listed in the petition.

- What happens when the circumstances of the ward suddenly change? How quickly would or should the plan be revised? Must a revision be submitted to the court, to the ward, and/or to interested third parties?

- Why is a plan discretionary with the court? The emphasis seems to be on use of a plan as a *de facto* limited guardianship, but not on use of a plan as a helpful blueprint and a means of measuring guardian actions – which is needed by all wards. A June/July journal article inviting comment on the Act states that "the Act does not contemplate that a guardianship or conservatorship plan will be required in every case. Cases involving wards who are severely impaired to such an extent that the guardian must make all decisions about their care will probably never need a guardianship plan." Yet those who are severely impaired clearly need a blueprint charting services and actions – and need a basis on which to measure guardian performance – as much or more than others.

8. Court review. Sec. 59-3026c & 59-3026d would dispense with the current requirement of a three-year periodic court review of the guardianship in favor of annual review upon the filing of a report or account. The section allows the court to hold a hearing. However, neither the current law nor the proposal make any provision for investigative resources to verify the report or account if warranted. The UGPPA section on guardian reports and court review (Sec. 317) provides that "the court may appoint a [visitor] to review a report, interview the ward or guardian, and make any other investigation the court directs."

We appreciate the opportunity to comment on the proposed Act, and would be glad to discuss these points further with the Judicial Council.

Sincerely,

Erica F. Wood

Charles P. Sabatino

Erica F. Wood
Associate Staff Director

Charles P. Sabatino
Assistant Director

Cc: Jean Krahn
Kansas Guardianship Program

Lillian Gaskin, ABA Governmental Affairs
Bruce Nicholson, ABA Governmental Affairs

2-8

PROPOSED BALLOON AMENDMENTS TO SUB. HB 2469

KANSAS JUDICIAL COUNCIL
MARCH 27, 2002

of the natural guardian's minor child and the right to exercise control over the person of the natural guardian's minor child as provided by law, unless a guardian has been appointed for the minor. The natural guardian of such minor has the right and responsibility to hold in trust and manage such person's estate for such person's benefit all of the personal and real property vested in such minor when the total of such property does not exceed $10,000 in value, unless a guardian or conservator has been appointed for the minor.

(b) Nothing in this act shall be construed to relieve a natural guardian of any obligation imposed by law for the support, maintenance, care, treatment, habilitation or education of that natural guardian's minor child.

New Sec. 5. (a) Any natural guardian, by last will, may nominate a conservator of only that portion of the estate of such guardian's minor child, whether born at the time of the execution of the will or afterwards, which is devised or bequeathed by such natural guardian to the child.

(b) A surviving natural guardian, by last will or by a trust instrument establishing an inter vivos trust, may nominate a guardian or conservator, or both, for any of such guardian's minor children, whether born at the time of the execution of the will or trust instrument or afterwards.

(c) The nominated guardian or conservator, if a fit and proper person, shall be appointed by the district court ~~to be appointed~~ pursuant to section 19, and amendments thereto, if it is found, during the trial held pursuant to section 18, and amendments thereto, that a guardian or conservator, or both, should be appointed for the minor child of the testator or settlor.

New Sec. 6. (a) Any court having either control over or possession of any amount of money not exceeding $100,000, the right to which is vested in a minor, shall have the discretion to authorize, without the appointment of a conservator or the giving of bond, and notwithstanding the authority of a natural guardian as provided for in section 4, and amendments thereto, the deposit of the money in a savings account of a bank, credit union, ~~or~~ savings and loan association, payable either to a conservator, if one shall be appointed for the minor, or to the minor upon attaining the age of 18 years.

or any other investment account that the court may authorize

(b) Any court having either control over or possession of any amount of money not exceeding $10,000, the right to which is vested in a minor, shall have the discretion to order the payment of the money to any person, including the natural guardian of the minor, or the minor. If the person is the conservator for the minor, the court may waive or recommend the waiver of the requirement of a bond. If the person is anyone other than the minor, the court shall order that person to hold in trust and manage such person's estate for such person's benefit.

(c) Any court having either control over or possession of any amount

2-22

act only in concert, or under what circumstances or with regard to what matter they may act independently and when they may act only in concert.

(2) If a jury has been demanded in the case of an adult and the jury finds by clear and convincing evidence that the proposed ward or proposed conservatee is unable to meet essential needs for physical health, safety or welfare, or is unable to manage such person's estate, then the court shall determine if the proposed ward or proposed conservatee is in need of a guardian or a conservator, or both, and if so, the court, pursuant to section 19, and amendments thereto, shall appoint a qualified and suitable individual or corporation as the guardian or conservator, or both, and shall specify what duties, responsibilities, powers and authorities as provided for in section 26, 27, 28, 29 or 30, and amendments thereto, the guardian or conservator shall have. If the court appoints co-guardians or co-conservators, or both, the court shall specify whether such co-guardians or co-conservators, or both, shall have the authority to act independently or whether they shall be required to act only in concert.

(3) If the court finds by clear and convincing evidence that the proposed conservatee is a person in need of an ancillary conservator, the court, pursuant to section 19, and amendments thereto, shall appoint a qualified and suitable individual or corporation as the ancillary conservator, and shall specify what duties, responsibilities, powers and authorities as provided for in section 29 or 30, and amendments thereto, the ancillary conservator shall have. If the court appoints co-ancillary conservators, the court shall specify whether such co-ancillary conservators shall have the authority to act independently or whether they shall be required to act only in concert.

(f) If the court does not find by clear and convincing evidence that the proposed ward or proposed conservatee is an adult with an impairment in need of a guardian or a conservator, or both, or a minor in need of a guardian or a conservator, or both, or a minor with an impairment in need of a guardian or a conservator, or both, or a person who has been previously adjudged as impaired in another state, or a person in need of an ancillary conservator, or does not find that the proposed ward or proposed conservatee is in need of a guardian or a conservator, even though the jury has determined that the proposed ward or proposed conservatee is unable to meet essential needs for physical health, safety or welfare, or is unable to manage such person's estate, because other appropriate alternatives exist and are sufficient to meet those needs of the proposed ward or proposed conservatee, then the court shall deny the requested appointments.

New Sec. 19. (a) The court in appointing a guardian or conservator shall give priority in the following order to:

(1) The proposed ward or proposed conservatee, if such nomination nominee of the

is made within any durable power of attorney;

(2) the nominee of a natural guardian;

(3) a minor who is the proposed ward or proposed conservatee, if over 14 years of age; the nominee of the minor is

(4) the spouse, adult child or other close family member of the proposed ward or proposed conservatee; or nominee of the

(5) the petitioner. nominee of the

(b) The court, in appointing a guardian or conservator, shall consider the workload, capabilities and potential conflicts of interest of the proposed guardian or conservator, or both, before making such appointment, and the court shall give particular attention in making such appointment to the number of other cases in which the proposed guardian or conservator, other than a corporation, is currently serving as guardian or conservator, or both, particularly if that number is more than 15 or more wards or conservatees, or both.

(c) In appointing a guardian for a person who is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing, the court shall consider, but shall not be limited to, the appointment of an individual as guardian who is sympathetic to and willing to support this system of healing.

New Sec. 20. (a) When the court appoints an individual or a corporation as a guardian, the court shall require that the individual or a representative on behalf of the corporation file with the court an oath or affirmation as required by K.S.A. 59-1702, and amendments thereto.

(b) When the court appoints an individual or a corporation as a conservator, except as provided for in subsections (c), (d) or (e), or in section 6, and amendments thereto, the court shall require that the individual or a representative on behalf of the corporation file with the court a bond in the amount of 125% of the combined value of the tangible and intangible personal property in the conservatee's estate and the total of any annual income from any source which the conservator may be expected to receive on behalf of the conservatee, minus any reasonably expected expenses, conditioned upon the faithful discharge of all the duties of the conservator's trust according to law, and with sufficient sureties as the court may determine necessary or appropriate.

(c) When the court appoints an individual or a corporation as a conservator pursuant to a request for a voluntary conservatorship as provided for in section 7, and amendments thereto, and the person for whom the voluntary conservatorship is established has requested that the individual or corporation appointed not be required to file a bond, the court may waive the filing of a bond; provided that the court may later require the filing of a bond if circumstances so require.

(d) If, at the time of the appointment of a conservator, there is no

the standby conservator to assume the duties, responsibilities, powers and authorities of the conservator. Otherwise, the notice shall advise the court that proceedings pursuant to section 39, and amendments thereto, to appoint a successor conservator are required, or the notice may be accompanied by or include a petition requesting the appointment of a successor conservator. Upon receipt of such notice, the court may specify a bond that the standby conservator shall file with the court before assuming such duties, responsibilities, powers and authorities, or may authorize the standby conservator to assume such of the conservator's duties, responsibilities, powers and authorities as the court shall specify.

(g) Upon receipt of a notice as provided for in subsection (e) or (f), the court may set a hearing to review the circumstances of the ward or conservatee as provided for in section 35 or 36, and amendments thereto, or may otherwise proceed pursuant to section 39, and amendments thereto, to remove the guardian or conservator, or both, and to appoint a successor guardian or conservator, or both.

(h) If before proceedings pursuant to section 39, and amendments thereto, to remove the guardian or conservator, or both, or to appoint a successor guardian or conservator, or both, have been commenced, the guardian or conservator is able to reassume the duties, responsibilities, powers and authorities of such appointment, the guardian or conservator, or both, shall so notify the court, in writing, of that reassumption and appropriately shall report to the court within the next scheduled report or accounting as required pursuant to section 34, and amendments thereto. Such report or accounting may include or attach a report or accounting of the standby guardian or standby conservator.

New Sec. 26. (a) (1) The individual or corporation appointed by the court to serve as the guardian shall carry out diligently and in good faith, the general duties and responsibilities, and shall have the general powers and authorities, provided for in this section as well as any specific duties, responsibilities, powers and authorities assigned to the guardian by the court. In doing so, a guardian shall at all times be subject to the control and direction of the court, and shall act in accordance with the provisions of any guardianship plan filed with the court pursuant to section 27, and amendments thereto. The court shall have the authority to appoint counsel for the guardian, and the fees of such attorney may be assessed as costs pursuant to section 45, and amendments thereto.

(2) A guardian shall ~~strive to meet the following goals:~~ Become and remain personally acquainted with the ward, the spouse of the ward and with other interested persons associated with the ward and who are knowledgeable about the ward, the ward's needs and the ward's responsibilities. A guardian shall exercise authority only as necessitated by the ward's limitations. A guardian shall encourage the ward to participate in

3-5

(7) to consent, on behalf of the ward, to the withholding or withdrawal of life-saving or life sustaining medical care, treatment, services or procedures, ~~in the following order of priority~~:

(A) ~~Except~~ in accordance with the provisions of any declaration of the ward made pursuant to the provisions of K.S.A. 65-28,101 through 65-28,109, and amendments thereto; or

(B) ~~except~~ if the ward, prior to the court's appointment of a guardian pursuant to section 18, and amendments thereto, shall have executed a durable power of attorney for health care decisions pursuant to K.S.A. 58-629, and amendments thereto, and such shall not have been revoked by the ward prior thereto, and there is included therein any provision relevant to the withholding or withdrawal of life-saving or life-sustaining medical care, treatment, services or procedures, then the guardian shall have the authority to act as provided for therein, even if the guardian has revoked or otherwise amended that power of attorney pursuant to the authority of K.S.A. 58-627, and amendments thereto, or the guardian may allow the agent appointed by the ward to act on the ward's behalf if the guardian has not revoked or otherwise amended that power of attorney; or

(C) ~~unless approved by the court following a due process hearing held for the purposes of determining whether to approve such, and during which hearing the ward is represented by an attorney appointed by the court;~~

(8) to exercise any control or authority over the ward's estate, except if the court shall specifically authorize such. The court may assign such authority to the guardian, including the authority to establish certain trusts as provided in section 31, and amendments thereto, and may waive the requirement of the posting of a bond, only if:

(A) Initially, the combined value of any funds and property in the possession of the ward or in the possession of any other person or entity, but which the ward is otherwise entitled to possess, equals $10,000 or less; and

(B) either the court requires the guardian to report to the court the commencement of the exercising of such authority, or requires the guardian to specifically request of the court the authority to commence the exercise of such authority, as the court shall specify; and

(C) the court also requires the guardian, whenever the combined value of such funds and property exceeds $10,000, to:

(i) File a guardianship plan as provided for in section 27, and amendments thereto, which contains elements similar to those which would be contained in a conservatorship plan as provided for in section 29, and amendments thereto;

(ii) petition the court for appointment of a conservator as provided

except

in the circumstances where the ward's treating physician shall certify in writing to the guardian that the ward is in a persistent vegetative state or is suffering from an illness or other medical condition for which further treatment, other than for the relief of pain, would not likely prolong the life of the ward other than by artificial means, nor would be likely to restore to the ward any significant degree of capabilities beyond those the ward currently possesses, and which opinion is concurred in by either a second physician or by any "medical ethics" or similar committee to which the healthcare provider has access established for the purposes of reviewing such circumstances and the appropriateness of any type of physician's order which would have the effect of withholding or withdrawing life-saving or life sustaining medical care, treatment, services or procedures;

2-6

for in section 9, 10 or 11, and amendments thereto; or

(iii) notify the court as the court shall specify that the value of the conservatee's estate has equaled or exceeded $10,000, if the court has earlier appointed a conservator but did not issue letters of conservatorship pending such notification; and

(9) to place the ward in a treatment facility as defined in section 28, and amendments thereto, except if authorized by the court as provided for therein.

(f) The guardian shall file with the court reports concerning the status of the ward and the actions of the guardian as the court shall direct pursuant to section 34, and amendments thereto.

New Sec. 27. (a) At any time, the court may require the guardian ~~for good cause shown~~, or the guardian may at any time choose, to develop and file with the court a plan for the care of the ward. This plan shall be developed consistent with the provisions of subsection (a) of section 26, and amendments thereto. This plan may provide for, but need not be limited to providing for:

(1) Where the ward will reside, including any proposal to admit the ward to any nursing facility;

(2) what degree of autonomy the ward will have with regard to making choices concerning such matters as attending any educational or vocational training, employment, volunteering for any type of service or activity, traveling independently, and obtaining either routine or specified medical care without the guardian's consent, and what restrictions the guardian will place upon the ward with regard to such choices; and

(3) what restrictions, if any, the guardian will place on whom the ward may associate with, and if so, the names of any persons the guardian will restrict from association with the ward.

(b) If the court has not also appointed a conservator for the ward, the court may further require the guardian, or the guardian may choose, to include as a part of the guardian's plan, what restrictions, if any, the guardian will place upon the ward's use of the ward's financial assets or the ward's access to those assets. In any case, the court shall not approve any guardianship plan which does not comply with the provisions of subsection (e)(8) of section 26, and amendments thereto, if applicable.

(c) If required by the court, the court may set a date by which this guardianship plan shall be filed with the court. Otherwise, the guardian may at any time file a plan with the court. Upon the filing of a plan, the court may require the guardian to give notice thereof to such persons as the court directs. Any interested party may request that the court conduct a hearing concerning any plan filed with the court. The court may require the guardian to amend or withdraw any plan filed.

(d) Any guardianship plan filed with the court shall be effectuated by

(b) The petition may be accompanied by a report of an examination and evaluation of the proposed ward or ward conducted by an appropriately qualified professional, which shows that the criteria set out in K.S.A. 39-1803, subsection (e) of K.S.A. 2001 Supp. 59-2946 or K.S.A. 76-12b03, and amendments thereto, are met.

(c) Upon the filing of such a petition, the court shall issue the following:

(1) An order fixing the date, time and place of a hearing on the petition. Such hearing, in the court's discretion, may be conducted in a courtroom, a treatment facility or at some other suitable place. The time fixed in the order shall in no event be earlier than seven days or later than 21 days after the date of the filing of the petition. The court may consolidate this hearing with the trial upon the original petition filed pursuant to section 9, 10, 11 or 12, and amendments thereto, or with the trial provided for in the care and treatment act for mentally ill persons or the care and treatment act for persons with an alcohol or substance abuse problem, if the petition also incorporates the allegations required by, and is filed in compliance with, the provisions of either of those acts.

(2) An order requiring that the proposed ward or ward appear at the time and place of the hearing on the petition unless the court makes a finding prior to the hearing that the presence of the proposed ward or ward will be injurious to the person's health or welfare, or that the proposed ward's or ward's impairment is such that the person could not meaningfully participate in the proceedings, or that the proposed ward or ward has filed with the court a written waiver of such ward's right to appear in person. In any such case, the court shall enter in the record of the proceedings the facts upon which the court has found that the presence of the proposed ward or ward at the hearing should be excused. Notwithstanding the foregoing provisions of this subsection, if the proposed ward or ward files with the court at least one day prior to the date of the hearing a written notice stating the person's desire to be present at the hearing, the court shall order that the person must be present at the hearing.

(3) An order appointing an attorney to represent the proposed ward or ward. The court shall give preference, in the appointment of this attorney, to any attorney who has represented the proposed ward or ward in other matters, if the court has knowledge of that prior representation. The proposed ward, or the ward with the consent of the ward's conservator, if one has been appointed, shall have the right to engage an attorney of the proposed ward's or ward's choice and, in such case, the attorney appointed by the court shall be relieved of all duties by the court. Any appointment made by the court shall terminate upon a final determination of the petition and any appeal therefrom, unless the court continues

, subsection (b)(3) of K.S.A. 2001 Supp. 59-29b49

3-8

not necessary for the conduct of the proceedings may be excluded as provided for in those acts. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure. The court shall have the authority to receive all relevant and material evidence which may be offered, including the testimony or written report, findings or recommendations of any professional or other person who has examined or evaluated the proposed ward or ward pursuant to any order issued by the court pursuant to subsection (d). Such evidence shall not be privileged for the purpose of this hearing.

(f) Upon completion of the hearing, if the court finds by clear and convincing evidence that the criteria set out in K.S.A. 39-1803, subsection (e) of K.S.A. 2001 Supp. 59-2946 or K.S.A. 76-12b03, and amendments thereto, are met, and after a careful consideration of reasonable alternatives to admission of the proposed ward or ward to a treatment facility, the court may enter an order granting such authority to the temporary guardian or guardian as is appropriate, including continuing authority to the guardian to readmit the ward to an appropriate treatment facility as may later become necessary. Any such grant of continuing authority shall expire two years after the date of final discharge of the ward from such a treatment facility if the ward has not had to be readmitted to a treatment facility during that two-year period of time. Thereafter, any such grant of continuing authority may be renewed only after the filing of another petition seeking authority in compliance with the provision of this section.

, subsection (b)(3) of K.S.A. 2001 Supp. 59-29b49

(g) Nothing herein shall be construed so as to prohibit the head of a treatment facility from admitting a proposed ward or ward to that facility as a voluntary patient if the head of the treatment facility is satisfied that the proposed ward or ward at that time has the capacity to understand such ward's illness and need for treatment, and to consent to such ward's admission and treatment. Upon any such admission, the head of the treatment facility shall give notice to the temporary guardian or guardian as soon as possible of the ward's admission, and shall provide to the temporary guardian or guardian copies of any consents the proposed ward or ward has given. Thereafter, the temporary guardian or guardian shall timely either seek to obtain proper authority pursuant to this section to admit the proposed ward or ward to a treatment facility and to consent to further care and treatment, or shall otherwise assume responsibility for the care of the proposed ward or ward, consistent with the authority of the temporary guardian or guardian, and may arrange for the discharge from the facility of the proposed ward or ward, unless the head of the treatment facility shall file a petition requesting the involuntary commitment of the proposed ward or ward to that or some other facility.

(h) As used herein, "treatment facility" means the Kansas neurological institute, Larned state hospital, Osawatomie state hospital, Parsons

more than five years;

(8) to extend, except with the approval of the court, an existing mortgage which obligates the conservatee or the conservatee's estate, unless the extension agreement contains the same prepayment privileges, the rate of interest does not exceed the lowest rate in the mortgage extended, and the extension does not exceed five years; or

(9) to make any gift on behalf of the conservatee, except with the approval of the court upon a finding that:

(A) The conservatee had either in the past as a habit made similar gifts or declared an intent to make such a gift, or under the circumstances, would have made such a gift or gifts;

(B) sufficient funds and assets will remain in the conservatee's estate after the making of such a gift to meet the expected needs and responsibilities of the conservatee; and

(C) any person or entity who would have received the property to be gifted had the conservatee died at the time of the gift, but who is not the person or entity receiving the gift, has either consented to or agreed with the giving of the gift, in writing, or has received notice of the proposal to make the gift and been given the opportunity to request a hearing thereon by the court to be held prior to the court's approving the gift.

(g) The conservator shall file with the court, within 30 days of the court's issuance of letters of conservatorship as provided for in section 20, and amendments thereto, an initial inventory of all of the property and assets of the conservatee's estate, including any sources of regular income to the estate.

(h) The conservator shall file with the court accountings and other reports concerning the status of the estate and the actions of the conservator as the court shall direct pursuant to section 34, and amendments thereto.

New Sec. 30. (a) At any time, the court may require the conservator ~~for good cause shown~~, or the conservator may at any time choose, to develop and file with the court a plan for the administration of the conservatee's estate. This plan shall be developed consistent with the provisions of section 29, and amendments thereto. This plan may provide for, but need not be limited to providing for:

(1) What autonomy the conservatee will have with regard to keeping and utilizing any earnings from employment or gifts which the conservatee may have or receive; and

(2) what responsibility the conservator shall have with regard to protecting the eligibility of the conservatee for any type of public or other benefit.

(b) If required by the court, the court may set a date by which this conservatorship plan shall be filed with the court. Otherwise, the conser-

3-P

(3) the term of the trust will not extend beyond the lifetime of the conservatee or ward;

(4) the provisions of the trust will provide for the distribution of the trust estate for the benefit of the conservatee or ward for special needs not satisfied from governmental benefits and that such distributions made for special needs not satisfied from governmental benefits will only be made in similar manner and under similar circumstances as the conservatee's or ward's estate would otherwise have been distributed by the conservator or guardian for the benefit of the conservatee or ward had the trust not been established; ~~and~~

~~(5)~~ the provisions of the trust will provide that, upon termination of the trust, the remaining trust estate will first be expended to reimburse the governmental entities for the benefits which have been provided to the conservatee or ward, if required as a condition for the conservatee's or ward's qualification for such benefits, and then shall be paid over and assigned ~~to~~:

~~(A) The conservator, should this termination of the trust occur during~~ any time the conservatorship remains open, or the guardian, should this termination of the trust occur during any time the guardianship remains open;

(B) the conservatee or ward, should this termination of the trust occur during any time the conservatorship or guardianship has been terminated and the conservatee or ward restored to capacity; or

(C) the legal representative of the conservatee's or ward's estate, should this termination of the trust occur by virtue of the conservatee's or ward's death, then the court may grant to the conservator or guardian the authority to establish such a trust and to transfer specified property or assets from the conservatee's or ward's estate to the trust. The court shall order the conservator or guardian to report any such transfer within the conservator's or guardian's next accounting as required by section 34, and amendments thereto.

(f) The court may require as a condition of the court's granting to the conservator or guardian the authority to establish such a trust that the sole trustee of the trust be the court appointed conservator or guardian, and that the conservator or guardian, acting as the trustee, shall be subject to the same requirements and limitations as provided for in this act concerning conservatorships and shall report and account to the court concerning the trust estate the same as if the trust estate remained within the conservatee's or ward's estate.

New Sec. 32. (a) At any time after the 17th birthday of a minor conservatee who has not been adjudged to be a minor with an impairment in need of a guardian or conservator, or both, but before 30 days prior to the minor's 18th birthday, the conservator may file a verified petition

(5) if the provisions of the trust will provide for the authority to terminate the trust during the lifetime of the conservatee or ward, that such provisions shall preclude the exercise thereof if such termination of the trust will disqualify the conservatee or ward from being eligible for any governmental benefits; and

(6)

such reimbursement was ever

any remaining balance

as follows

(A) To the conservator, if the termination occurs during the lifetime of the conservatee and the conservatorship remains open, or to the guardian, if the termination occurs during the lifetime of the ward and the guardianship remains open, or to the conservatee or ward, in the event the conservatorship or guardianship has been terminated and the conservatee or ward restored to capacity; or

(B) If the termination of the trust occurs by virtue of the conservatee's or ward's death, as follows: i) if a testamentary power of appointment was granted to the conservatee or ward in the trust instrument, pursuant to the conservatee's or ward's valid exercise of such testamentary power of appointment which specifically references such power of appointment, or ii) in the absence of any such power of appointment or to the extent such power was not validly exercised by the conservatee or ward over the entirety of the trust assets, to (a) the devisees and legatees the trustee determines would have otherwise received such trust assets, and in the manner they would have received it, under the provisions of the conservatee's or ward's Last Will and Testament had such Last Will and Testament been admitted to probate and the trust assets constituted a portion of the conservatee's or ward's estate; (b) in the

absence of a valid duly-probated Last Will and Testament of the conservatee or ward, to the persons who would have received such trust assets, and in the manner they would receive it, under the intestacy laws of the state of residence of the conservatee or ward at the time of the death of the conservatee or ward had such trust assets constituted a portion of the estate of the conservatee or ward; or (c) to the duly appointed representative of the estate of the conservatee or ward,

then the court may grant to the conservator or guardian the authority to establish such a trust and to transfer specified property or assets from the conservatee's or ward's estate to the trust. The court shall order the conservator or guardian to report any such transfer within the conservator's or guardian's next accounting as required by section 34, and amendments thereto.

LIFE PROJECT

Living Initiatives For End-Of-Life Care

Helping all Kansans live with dignity, comfort and peace at the end of life

Testimony before the Senate Judiciary Committee
By Donna Bales, President/CEO, Kansas LIFE Project
Wednesday, March 27, 2002

The LIFE Project, Living Initiatives For End-of-Life Care, is a collaborative effort of over 70 organizations across the state. The LIFE Project works to help all Kansans live with dignity, comfort and peace at the end of life.

The state of Kansas entrusts wards to the care and oversight of guardians who must always have the best interests of the wards as first and foremost concern. All Kansans deserve good health care, including the right to choose appropriate health care services throughout their lives. Those of us who have decisional making capacities are free to choose to receive or deny health care interventions throughout our lives. We entrust guardians to make these same decisions for wards of the state. Our current statutes, however, deny the ward these same rights as they near the end of life.

The proposed amendments to 2001 HB 2469 revised Guardianship and Conservatorship Act, recommended by the Guardianship and Conservatorship Advisory Committee and Approved by the Judicial Council and submitted to the House Judiciary Committee had language that improved the ability of wards to live with dignity, comfort and peace at the end of life. The language that was submitted, as noted on page two of this testimony, was changed in the substitute for HB 2469. We believe that the wards' best interests are more fully considered by reverting to the language that Judge Sam Bruner and his committee had carefully adopted and that was approved by the Judicial Council.

Please allow the wards of the state to have the same rights you and I do – to have medical decisions carefully considered and administered in the context of the medical arena, with careful consultation with those most closely involved in their lives and with protections offered via second opinions and/or medical ethics committees. To do less is laborious, costly and time consuming at least and cruel and inhumane at most.

LIFE Project Foundation ♦ 1901 University ♦ Wichita, KS 67213-3325
Phone: 316-263-6380 ♦ Fax: 316-263-6542 ♦ Email: life@LIFEProject.org ♦ Website: www.LIFEProject.org
Statewide Consumer Toll-Free HelpLine: 888-202-LIFE (5433) ♦ Pain Management HotLine: 913-588-3692
The LIFE Project Foundation is a 501(c)3 non-profit organization.

SJud 3-27-02 att 4

Sub HB 2469

41

(7) to consent, on behalf of the ward, to the withholding or withdrawal of life-saving or life sustaining medical care, treatment, services or procedures, ~~in the following order of priority~~: except:

(A) ~~Except~~ in accordance with the provisions of any declaration of the ward made pursuant to the provisions of K.S.A. 65-28,101 through 65-28,109, and amendments thereto; or

(B) ~~except~~ if the ward, prior to the court's appointment of a guardian pursuant to section 18, and amendments thereto, shall have executed a durable power of attorney for health care decisions pursuant to K.S.A. 58-629, and amendments thereto, and such shall not have been revoked by the ward prior thereto, and there is included therein any provision relevant to the withholding or withdrawal of life-saving or life-sustaining medical care, treatment, services or procedures, then the guardian shall have the authority to act as provided for therein, even if the guardian has revoked or otherwise amended that power of attorney pursuant to the authority of K.S.A. 58-627, and amendments thereto, or the guardian may allow the agent appointed by the ward to act on the ward's behalf if the guardian has not revoked or otherwise amended that power of attorney; or

(C) ~~unless approved by the court following a due process hearing held for the purposes of determining whether to approve such, and during which hearing the ward is represented by an attorney appointed by the court;~~

(8) to exercise any control or authority over the ward's estate, except if the court shall specifically authorize such. The court may assign such authority to the guardian, including the authority to establish certain trusts as provided in section 31, and amendments thereto, and may waive the requirement of the posting of a bond, only if:

(A) Initially, the combined value of any funds and property in the possession of the ward or in the possession of any other person or entity, but which the ward is otherwise entitled to possess, equals $10,000 or less; and

(B) either the court requires the guardian to report to the court the commencement of the exercising of such authority, or requires the guardian to specifically request of the court the authority to commence the exercise of such authority, as the court shall specify; and

(C) the court also requires the guardian, whenever the combined value of such funds and property exceeds $10,000, to:

(i) File a guardianship plan as provided for in section 27, and amendments thereto, which contains elements similar to those which would be contained in a conservatorship plan as provided for in section 29, and amendments thereto;

(ii) petition the court for appointment of a conservator as provided

(C) in the circumstances where the ward's treating physician shall certify in writing to the guardian that the ward is in a persistent vegetative state or is suffering from an illness or other medical condition for which further treatment, other than for the relief of pain, would not likely prolong the life of the ward other than by artificial means, nor would be likely to restore to the ward any significant degree of capabilities beyond those the ward currently possesses, and which opinion is concurred in by either a second physician or by any "medical ethics" or similar committee to which the healthcare provider has access established for the purposes of reviewing such circumstances and the appropriateness of any type of physician's order which would have the effect of withholding or withdrawing life-saving or life-sustaining medical care, treatment, services or procedures.

The LIFE Project believes that the proposed amendments to 2001 HB 2469 revised Guardianship and Conservatorship Act, as recommended by the Guardianship and Conservatorship Advisory Committee and approved by the Judicial Council and submitted as HB 2469 to the House Judiciary Committee for 2002, utilizes language that best serves the interest of the wards of the state of Kansas. **Specifically, the LIFE Project believes that section 26 (e) (7) (C) of Substitute for HB 2469 does not best serve the needs of Kansas wards and should be changed as noted above.**

LIFE Project Foundation ♦ 1901 University ♦ Wichita, KS 67213-3325
Phone: 316-263-6380 ♦ Fax: 316-263-6542 ♦ Email: life@LIFEProject.org ♦ Website: www.LIFEProject.org
Statewide Consumer Toll-Free HelpLine: 888-202-LIFE (5433) ♦ Pain Management HotLine: 913-588-3692
The LIFE Project Foundation is a 501(c)3 non-profit organization.

4-2

Testimony to Senate Judiciary Committee
Substitute for HB 2469, Guardianship
Vicki Bailey, Guardian
3/27/02

I am here today as a person who has been a legal guardian for 10 years to a neighbor with Down Syndrome. When I began my guardianship in March of 1992, Elliot was 44 years old and was on his own for the first time in his life. The challenge at that time was to find living accommodations that could meet the needs of a person who was capable of fixing a simple meal, cleaning his own apartment, speaking clearly and comfortably before a group, writing a check, volunteering at his church, calling a cab.

It is at this stage in Elliot's life when the legal system was helpful to us...it helped to set up a trust that provided me with the money that allowed me to adequately meet Elliot's needs as his health deteriorated; it helped to provide the framework for my guardianship and for a separate conservatorship; it provided for a yearly accounting before a local judge. However, Elliot's health gradually deteriorated over the next 10 years. You need to know that for people with Down Syndrome, 100% of them will have Alzheimer's Disease if they live long enough. Such was the situation that Elliot and I and the various agencies and staff who provided him care over the years began to face.

SJud
3-27-02
Att 5

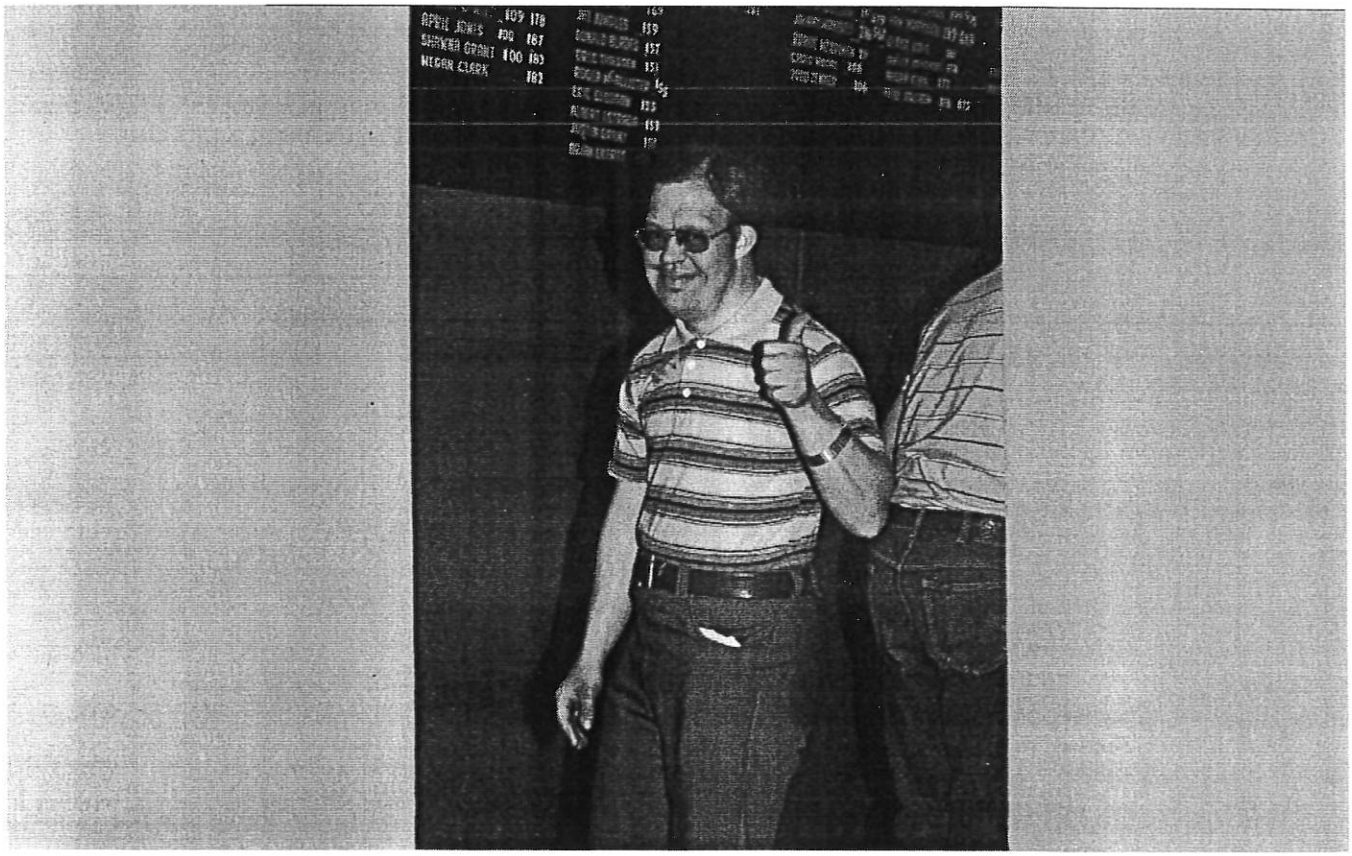
Elliot died on February 26th of this year. For many months preceding his death it became evident that he was facing the final stages of Alzheimer's. His body and brain no longer carried the messages about how to swallow or even how to breathe. He was on supplemental oxygen; his caregivers had been taught how best to feed a person whose throat could not remember how to swallow correctly.

I wanted "comfort care" and to let his body go peacefully in his own apartment with the caregivers who had been with him for 1-5 years. I then found out that guardians have no legal say about end-of-life issues for the people who have been in their care. Having been his legal guardian for 10 years, it never occurred to me that I would not be able to help him at the end of his life. I was informed by the agency providing his care that I could not sign "Do Not Resuscitate" orders (DNR's). Elliot had no living immediate family to sign for him. I called the judge I appeared before annually; a local SRS agency person even called their lawyers in Topeka to see if exceptions were possible. His doctor was certainly agreeing that Elliot was facing the end of his life as was the Hospice staff that were involved briefly. But there were no options regarding his dying that I could be a part of and since the agency Elliot received care from was not a medical facility, caregivers were required to call 911 and begin CPR if his heart stopped. At this point I would like for you to imagine not only that you are a dying person who is suddenly confronted with people pushing on your chest and noise and tubes coming at you, but also I want you to consider that the initial people giving you CPR are your caregivers...the people who know best that you are dying; that to "save you" only means that your brain will have a little more time to lose a little more of what little ability is left. I cannot even imagine how difficult it would be to be REQUIRED by my employer to give CPR to someone I have given care to for years and for whom I have seen the gradual loss of all abilities. What struck me so forcefully at the end of Elliot's life was the fact that this was the time when we needed medical expertise (doctors, Hospice nurses, trained caregivers) not the legal stresses of our current laws.

Elliot's birth precipitated services for developmentally disabled people both locally and statewide because of his parents' efforts. I am here because it is my hope that at his death there might also be increased understanding of important issues faced by such people and their guardians. Please change Substitute for HB 2469 section 26 (e)(7)(C) to allow this to happen. Please consider the needs of our wards and revert to language more like that recommended by the Guardianship and Conservatorship Advisory Committee and approved by the Judicial Council and submitted as HB 2469 to the House Judiciary Committee for 2002. Because Elliot had a guardian, current laws did not allow him to die peacefully at home. With your help, it does not have to be like this for others.

Thank you.

Vicki Bailey, El Dorado, Kansas
Legal Guardian for John Elliot Regier
March 1992 to March 2002



Kansas Council on Developmental Disabilities

BILL GRAVES, Governor
DAVE HEDERSTEDT, Chairperson
JANE RHYS, Ph. D., Executive Director

Docking State Off. Bldg., Room 141, 915 Harrison
Topeka, KS 66612-1570
Phone (785) 296-2608, FAX (785) 296-2861

"To ensure the opportunity to make choices regarding participation in society and quality of life for individuals with developmental disabilities"

SENATE JUDICIARY COMMITTEE

March 27, 2002

Testimony in Regard to House Bill 2469. An act concerning guardians and conservators.

Mr. Chairman, Members of the Committee, I regret that I am unable to appear today in person to testify on behalf of the Kansas Council on Developmental Disabilities regarding H.B. 2469, regarding guardians and conservators. The Kansas Council is a federally mandated, federally funded council composed of individuals who are appointed by the Governor, include representatives of the major agencies who provide services for individuals with developmental disabilities, and at least half of the membership is composed of individuals who are persons with developmental disabilities or their immediate relatives. Our mission is to advocate for individuals with developmental disabilities, to see that they have choices in life about where they wish to live, work, and what leisure activities they wish to do.

For the past three and a half years I have served on the Kansas Judicial Task Force on Guardianship. I would like to thank the Judicial Council for that opportunity and for their inclusion of individuals from the programmatic side of the issue as well as the legal side. This Task Force met the first Friday of each month and spent many hours carefully deliberating each aspect of this Act. In addition, we had individuals with expertise attend our meetings who presented different viewpoints. As a result, we tried very hard to balance sometimes opposing views and to find compromise on major issues. The end product provides clarification and changes that improve the ease of use and understanding of this process.

This bill has many good qualities that we, as advocates believe will greatly improve the guardianship and conservator ship in Kansas.

¥ First is the change in language from Disabled person to Adult with an impairment and a clarification in language requiring a two-prong question involved whenever guardianship is considered: (1) are the person s abilities impaired? and (2) is there a need for judicial involvement in the person s affairs?

SJud 3-27-02 att 6

- ¥ Second are the new requirements for an examination and evaluation to be conducted by a professional appointed by the court who is qualified to evaluate the proposed ward s alleged impairment. Such evaluation shall include the proposed ward s cognitive and functional abilities and limitations, including adaptive behaviors and social skills, and, as appropriate, educational and developmental potential; a prognosis for any improvement and, as appropriate, any recommendation for treatment or rehabilitation; and developmental potential; and several other requirements that will greatly enable the court to make a determination as to the need for guardianship.
- ¥ Issues related to guardians and or conservators in other states have also been given consideration.
- ¥ Timelines have been clarified of timelines to provide for a quick resolution of proceedings.
- ¥ The value of an estate not requiring judicial intervention is increased from $5,000 to $10,000 to reflect both the two-prong nature of the act and inflation.

I could list our many other excellent additions to this Act; however, I will spare you a catalogue. We support the efforts of the Guardianship Task Force and believe that the resulting Bill reflects best practices and is a great improvement in the statute.

As always, we greatly appreciate the opportunity of providing and I would be happy to answer any questions you may have via e-mail or in person when I return.

Jane Rhys, Ph.D., Executive Director
Kansas Council on Developmental Disabilities
Docking State Office Building, Room 141
915 SW Harrison
Topeka, KS 66612-1570
785 296-2608
jrhys@alltel.net

6-7

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (785) 234-5696
FAX (785) 234-3813
www.ksbar.org

LEGISLATIVE TESTIMONY

March 27, 2002

TO: CHAIRMAN JOHN VRATIL AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE

FROM: PAUL DAVIS, KBA LEGISLATIVE COUNSEL

RE: SUBSTITUTE FOR HOUSE BILL 2469 (GUARDIANSHIP AND CONSERVATORSHIP ACT)

Mr. Chairman and Members of the Committee:

My name is Paul Davis and I appear before you today on behalf of the Kansas Bar Association. The KBA has invested a great of time in studying House Bill 2469 and applauds the work of the Kansas Judicial Council Guardianship and Conservatorship Committee. Because of the importance of this legislation, we appointed a special committee to conduct a comprehensive study of the proposed act. Our special committee was chaired by Mike Dwyer of Overland Park and comprised of John Tillotson of Leavenworth, Stacey Gunya of Olathe, Tim O'Sullivan of Wichita, Bob Collins of Wichita, Bob Hughes of Wichita and Dan Lykins of Topeka.

We originally had a number of concerns about House Bill 2469, although we have always felt that it is a good overall product. We reduced our concerns into a series of amendments that we offered to a subcommittee of the House Judiciary Committee. The House Judiciary subcommittee approved many of our amendments. Several of the amendments that were not approved, we have been able to resolve in discussions with the Judicial Council committee. These agreed upon amendments are presented to you today in the Judicial Council's balloon. We are supportive of all the amendments offered in the Judicial Council's balloon.

However, there are two issues that we want to bring to your attention. The first issue is found in New Sections 26 and 29 and relates to the duties (or goals) of guardians and conservators. The original bill prescribed a list of affirmative duties for all guardians and conservators. Our special committee felt that the phrasing of responsibilities as "duties" was too stringent a requirement and could expose a guardian to civil liability. Therefore, we suggested to the House Judiciary subcommittee

SJud 3-27-02 att 7

that the word "duties" be changed to "goals." Although there evidently are some who believe a revisor's error may have occurred, our belief is that the House Judiciary Subcommittee made this policy change. We are simply asking that in order to be consistent with this change, the references to "a guardian shall" throughout New Section 26(a)(2) be deleted. This makes it clear that the list of responsibilities are in fact "goals that the guardian shall strive to meet" and not affirmative "duties" that could result in the imposition of civil liability.

Additionally, we are asking that the corresponding changes be made in New Section 29(a)(2), which is identical to New Section 26(a)(2) , except that is deals with conservators instead of guardians. We believe this change is technical if the policy change made in New Section 26(a)(2) is retained.

Lastly, we have concerns about the constitutionality of the extended conservatorship provisions found in New Section 32. The deletion of this section was the subject of an amendment offered on the floor of the House of Representatives. We acknowledge that many believe this provision is good public policy, however we find it to be constitutionally suspect.

Again, we thank the members of the Kansas Judicial Council Guardianship and Conservatorship Committee for their many, many hours of hard work on House Bill 2469 and for their willingness to discuss the concerns that the KBA has brought forward on this bill. Our proposed amendments are set out below. I thank you for your consideration and am pleased to stand for questions.

1) NEW SECTION 26(a)(2) (PAGE 38)

(a)(2) The guardian shall strive to meet the following goals: Become and remain personally acquainted with the ward, the spouse of the ward and with other interested persons associated with the ward and who are knowledgeable about the ward, the ward's needs and the ward's responsibilities; ~~A guardian shall~~ exercise authority only as necessitated by the ward's limitations; ~~A guardian shall~~ encourage the ward to participate in making decisions affecting the ward; ~~A guardian shall~~ encourage the ward to act on the ward's own behalf to the extent the ward is able; ~~A guardian shall~~ encourage the ward to develop or regain the skills and abilities necessary to meet the ward's own essential needs and to otherwise manage the ward's own affairs; ~~In making decisions on behalf of the ward, a guardian shall~~ consider the expressed desires and personal values of the ward to the extent known to the guardian *in making decisions on behalf of the ward;* ~~A guardian shall strive to~~ assure that the personal, civil and human rights of the ward are protected; ~~A guardian shall~~ *and* at all times act in the best interests of the ward and ~~shall~~ exercise reasonable care, diligence and prudence.

2) NEW SECTION 29(a)(2) (PAGE 47)

(a)(2) A conservator, in the exercise of the conservator's responsibilities and authorities, *shall strive to meet the following goals:* ~~should~~ become aware of the conservatee's needs and responsibilities*;* ~~A conservator shall~~ exercise authority only as necessitated by the conservatee's limitations*;* ~~A conservator shall~~ encourage the conservatee to participate in the making of decisions affecting the conservatee's estate*;* ~~A conservator shall~~ encourage the conservatee to manage as much of the conservatee's estate as the conservatee is able to manage*;* ~~A conservator shall~~ consider and, to the extent possible, act in accordance with the expressed desires and personal values of the conservatee*;* ~~A conservator shall~~ assist the conservatee in developing or regaining the skills and abilities necessary in order for the conservatee to be able to manage the conservatee's own estate*;* ~~A conservator shall strive to~~ assure that the personal, civil and human rights of the conservatee are protected*;* ~~A conservator shall~~ at all times act in the best interests of the conservatee and ~~shall~~ exercise reasonable care, diligence and prudence.

3) NEW SECTION 32 (PAGE 53)

This section permits the extension of a conservatorship beyond the age of majority. The KBA has strong concerns about the constitutionality of this section and recommends its deletion.

~~**59-3018. Guardian and limited guardian; rights, powers and duties.** (a) A guardian shall be subject to the control and direction of the court at all times and in all things. It is the general duty of an individual or corporation appointed to serve as a guardian to carry out diligently and in good faith the specific duties and powers assigned by the court. In carrying out these duties and powers, the guardian shall assure that personal, civil and human rights of the ward or minor whom the guardian services are protected.~~

~~(b) The guardian of a minor shall be entitled to the custody and control of the ward and shall provide for the ward's education, support and maintenance.~~

~~(c) A limited guardian shall have only such of the general duties and powers herein set out as shall be specifically set forth in the dispositional order pursuant to K.S.A. 59-3013 and amendments thereto and as shall also be specifically set forth in "Letters of Limited Guardianship" pursuant to K.S.A. 59-3014 and amendments thereto.~~

~~(d) A guardian shall have all of the general duties and powers as set out herein and as also set out in the dispositional order and in the letters of guardianship.~~

~~(e) The general powers and duties of a guardian shall be to take charge of the person of the ward and to provide for the ward's care, treatment, habilitation, education, support and maintenance and to file an annual accounting. The powers and duties shall include, but not be limited to, the following:~~

~~(1) Assuring that the ward resides in the least restrictive setting reasonably available;~~

~~(2) assuring that the ward receives medical care or nonmedical remedial care and other services that are needed;~~

~~(3) promoting and protecting the care, comfort, safety, health and welfare of the ward;~~

~~(4) providing required consents on behalf of the ward;~~

~~(5) exercising all powers and discharging all duties necessary or proper to implement the provisions of this section.~~

~~(f) A guardian of a ward is not obligated by virtue of the guardian's appointment to use the guardian's own financial resources for the support of the ward.~~

~~(g) A guardian shall not have the power:~~

~~(1) To place a ward in a facility or institution, other than a treatment facility, unless the placement of the~~

Topeka Independent Living Resource Center
Kirk W. Lowry
Attorney
501 S.W. Jackson Street
Topeka, Kansas 66603-3300
(785) 233-4572 Voice/TDD • Fax (785) 233-1561 • 1-800-443-2207

March 27, 2002

The Honorable John L. Vratil
Chair, Senate Judiciary Committee

Re: Substitute for HB 2469 Guardian & Conservator Bill

Chairman Vratil and Members of the Committee:

Just because a person has impairment does not mean they need a guardian or conservator. The state should never impose a guardianship on a person because of their physical disability alone. Guardianship should be used only for cognitive impairment. There is an inherent and recurring conflict in guardianship law between state paternalism and the civil liberties of people with disabilities. Just because someone may need help with making decisions does not mean they need a guardian or conservator. Imposition of a guardianship or conservatorship on a person with a disability is a serious infringement of fundamental rights of liberty, privacy, and due process.

The Topeka Independent Living Resource Center is a private, not-for-profit, civil and human rights organization whose mission is to advocate for justice, equality, and essential services for a fully integrated and accessible society for people with disabilities. With that mission in mind, we have reviewed the proposed guardianship law. This first major change in the code since 1965 presents an excellent opportunity to make guardianships and conservatorships available when needed, but only used when absolutely necessary, and in the least restrictive manner. Guardianships are costly to the state and costly to people's civil rights. The definition of incapacity or impairment should be restricted. Pleading requirements should be expanded. Guardian and conservator powers should be limited. Finally, a ward should have easy access to court to request restoration to capacity.

SJud 3-27-02 att 8

Proposed changes:

1. Add Pleading Requirements in the Petition.

Add new pleading requirements to New Section 9(b) on page 8 at line 22. New Section 9(b)(16) a description of the functional limitations over time;
(b)(17) current physical and mental condition of proposed ward;
(b)(18) steps taken to find less restrictive alternatives to guardianship or conservatorship;
(b)(19) guardianship powers being requested;
(b)(20) if an unlimited guardianship is requested, why a limited guardianship is not appropriate;
(b)(21) qualifications of the proposed guardian or conservator; and
(b)(22) why the guardianship is needed.
(Model Code Section 304.)

2. Additional Requirements in Examination Reports.

Add this sentence to subsection (a) in New Section 15 on page 18 at line 36: The proposed ward shall be presumed to have capacity until proven otherwise by clear and convincing evidence. The proposed ward shall have the right for counsel to be present at all examinations and hearings.

Insert in New Section 15, page 19, line 42 new subsection (b)(9) a description of all functional limitations directly caused by the impairment;
(b)(10) the effect of the limitations on the person's instrumental activities of daily living;
(b)(11) the person's use or the availability of auxiliary aids, services, personal attendants or other mitigating measures.

The evaluation of a proposed ward in a strictly medical model is narrow-minded and archaic. Independent Living Centers are created by the Rehabilitation Act of 1973, 29 U.S.C. §§ 721-727. They are run by a majority of people with disabilities. One of their primary purposes is to get people out of institutions, keep them out, and help them live independent, productive lives. Many practitioners of the medical model have been taught to diagnose and admit. People with stable medical conditions and

8.2

substantial long-term care needs often do not need to be institutionalized. Nor do they need a permanent, full guardian. The independent living model is a much more efficient use of limited state resources in the judiciary and in the long-term care social services. The proposed statute focuses on the person's impairment. The focus should be on their abilities with accommodation and assistance. The focus should on what the can do, not on what they cannot do.

3. Final Orders of the Court after Trial: Limited Guardianship Preference and Notice of Right to Petition for Termination, Restoration, or Modification.

The State should strongly and clearly prefer a limited guardianship. Therefore, in New Section 18, on page 26, line 41, section (e)(1), should be added, "The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence. Within 14 days after appointment, a guardian shall send or deliver to the ward and to all other persons given notice of the hearing on the petition, a copy of the order of appointment, together with a notice of the right to request termination, restoration to capacity, or modification."

(Model Code Section 311.)

4. Involuntary Commitment to a Treatment Facility

Additional pleading requirements should be included in any petition to involuntarily institutionalize a person. This is the number one complaint of people with disabilities who have been institutionalized. Many people have said they would rather die than go back to a state hospital. Insert in New Section 28 on page 43, line 43, new subsection (a)(7) A description of the functional limitations over time;

(a)(8) Current physical and mental condition of the proposed ward;

(a)(9) Steps taken to find treatment in the least restrictive environment and why it is not possible;

(a)(10) That without admission to a treatment facility there is a clear and present danger of substantial harm to self or others.

The legislature should make it mandatory that both courts and guardians have ruled out the least restrictive alternatives before institutionalizing a person. If a person is poor and disabled they are qualified for Medicaid. The courts and guardians should rule out the Medicaid Waiver Home and Community Based Services before institutionalizing a person. The Waivers generally are two to ten times less expensive than institutional care. Nursing facilities cost about $40,000 a year, ICF-MRs cost about $100,000 a year. Nursing Facilities for Mental Health and State Mental Health Institutions cost from $100,000 to $133,000 a year. HCBS programs cost and average of about $9,700 a year on the Frail Elderly waiver and $12,000 on the Physical Disability Waiver. The State spends about $300 million dollars SGF on Medicaid. We must ensure that HCBS is used.

Independent Living Centers have not done a good enough job letting judges and doctors know that they exist, what they do, what services are available, and how people with disabilities almost never need to be involuntarily institutionalized or subjected to a guardian.

Any state action that unnecessarily institutionalizes a person with a disability is a violation of the Americans with Disabilities Act, 42 U.S.C. § 12132, 28 C.F.R. § 35.130(d), and the Rehabilitation Act, 29 U.S.C. § 794.

5. Expand the Availability of Restoration to Capacity

New Section 41 on page 68, line 17 allows for a ward to petition the court for restoration to capacity. Restoration to capacity should be expanded and made easy for a ward to apply. Delete current subsection (a) and replace it to read: (a) At the request of the ward or conservatee, a guardian or conservator shall file a verified petition requesting the court restore the ward or conservatee to capacity. A ward or conservatee may file a request in writing, in any form, requesting restoration to capacity.

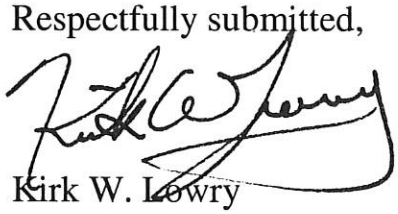
The proposed statute on page 68, line 19, uses the word "impaired" as the issue for restoration. The issue is not whether a person is impaired, but whether the person is an adult with an impairment in need of a guardian.

The requirement for an initial probable cause review in subsection (c) on line 33, page 68 should be eliminated. The person with a disability should not have to jump an initial probable cause finding based on the petition alone. How is a judge to make that determination based on a petition alone?

8-4

A person with a disability should have a right to a trial on restoration. Testimony has been received that very few petitions for restoration are ever filed. They are not a big burden on the courts. Guardianships are a big complaint of people with disabilities. It should be the policy of the state to make it as easy as possible to try to get restored to capacity.

Respectfully submitted,



Kirk W. Lowry

8.5

ALZHEIMER'S® ASSOCIATION
Someone to Stand by You

Sunflower Chapt
347 S. Laura
Wichita, Kansas 67211-1518
(316) 267-7333 • Fax (316) 267-6369

Written Testimony before the Senate Judiciary Committee
Alzheimer's Association Sunflower Chapter
Wednesday, March 27, 2002

The Alzheimer's Association Sunflower Chapter, based in Wichita, Kansas, is a not-for-profit voluntary health organization dedicated to providing support, education and advocacy to those dealing with Alzheimer's disease and related disorders in 49 counties.

We support the proposed amendment that allows for a physician, in conjunction with another physician or medical ethics committee, to withhold or withdraw life-saving measures or life-sustaining care at the end of life.

Many of those suffering from Alzheimer's disease have legal guardians, entrusted with making decisions regarding their care. These decisions should include end-of-life issues as well. Medical technology today allows us to keep people alive well past the point where quality of life is present. As a patient moves into the end-stages, there is not always time to access the legal system and financial resources are often not available to cover the costs.

The Substitute for HB 2469 does not serve the best interests of Kansas wards as they near the end of life. Please change section 23(e)(7)(C) to recognize that critical medical decisions need to be made by those most closely involved with the care of the wards and within a system of checks and balances. The Alzheimer's Association Sunflower Chapter believes that the proposed amendments to 2001 HB 2469 revised Guardianship and Conservatorship Act, as recommended by the Council and Submitted as HB 2469 to the House Judiciary Committee for 2002, utilizes language that best serves the interest of the wards of the state of Kansas.

Laurel Alkire
Laurel Alkire, Executive Director

Suzanne Meeker
Suzanne Meeker, Board of Director's

Sr Jud
3-27-02
att9

MIDWEST BIOETHICS CENTER
1021-1025 Jefferson Street
Kansas City, MO 64105-1329

816-221-1100
1-800-344-3829
fax 816-221-2002
bioethic@midbio.org
www.midbio.org

COMMUNITY-STATE PARTNERSHIPS
to Improve End-of-Life Care

A national program supported by The Robert Wood Johnson Foundation with direction and technical assistance provided by Midwest Bioethics Center

Wednesday, March 27, 2002

To: Senator Vratil and the Senate Judiciary Committee

By: Midwest Bioethics Center
Myra J. Christopher, President & CEO, and
Don Reynolds, Director of Special Projects

Re: Substitute HB 2469 §26(e)(7)(C)
Guardian's authority to consent on a ward's behalf to withdrawing and withholding life-saving and life-sustaining medical care

---

Midwest Bioethics Center regularly works with Kansas guardians, wards, families of wards, advocates for people with disabilities, healthcare professionals, and healthcare providing organizations to address the end-of-life healthcare decision-making needs of people who rely on court appointed guardians to give or withhold consent to their healthcare. We appreciate this opportunity to support with written testimony the proposed amendment to Substitute HB–2469 §26(e)(7)(C) that has been offered by the Kansas Judicial Council's Guardianship & Conservatorship Advisory Committee.

§59-3018(g)(4) of the Kansas guardianship law generally prohibits guardians from consenting to the withdrawal or withholding of a ward's life-prolonging healthcare.

As recommended by the Kansas Judicial Council, New Sec. 26(e)(7)&(8) of HB–2469 would have permitted guardians to consent to the withdrawal or withholding of a ward's life-prolonging healthcare in some circumstances and with some ward protecting safeguards. Withdrawal or withholding would have been permitted when treatment was unlikely to prolong a ward's life or restore a ward's physical or cognitive capacity; it also would have been permitted when a ward was in a persistent vegetative state with no likelihood of reversal. The proposed safeguards included written certification by the treating physician that a ward's condition fit the parameters for withdrawing or withholding medical care, written concurrence of a second physician or a medical ethics committee, and provision of comfort care.

However, New Sec. 26(e)(7) of Substitute HB–2469, the version

Sen Jud 3-27-02 att 10

passed by the House of Representatives, contains a different provision for consenting to the withdrawal or withholding of a ward's life-prolonging healthcare. Instead of the clinically based process that was originally proposed, Substitute HB–2469 requir that a judicial process be used for making these decisions.

Guardianship expresses the commitment of Kansans to protect their most vulnerable citizens. The desire to provide special protection to wards during their final illness reflects the humanity of Kansans. However, the protection presently being offered is problematic and though Substitute HB–2469 offers a different protection, it is also problematic. In the name of protecting ward the current guardianship statute prohibits the people charged witl caring for them (guardians, judges, physicians, families and othe healthcare providers) from addressing the possibility that it migh sometimes be better to provide comfort care than continue aggressive, but ineffective treatment. Substitute HB–2469 make different mistake. Though it permits the withdrawal or withholding life-prolonging care at the end of a ward's life, Substitute HB–2469 requires that the issue be considered and the decision be made in a judicial setting. Courtrooms are not the be place to decide whether to withdraw or withhold life-prolonging care. Clinicians are better prepared for, and have more experienc with, these decisions than judges. The Kansas Judicial Council's Guardianship & Conservatorship Advisory Committee has proposed an amendment to Substitute HB–2469 §26(e)(7)(C) tha will allow a guardian and a ward's attending physician to withho or withdraw life-prolonging care in certain situations. This amendment does not require that a court be involved in the decision-making. Instead it protects wards during their final illn by providing important safeguards that operate in the usual clinic setting of healthcare. These safeguards (the treating physician's written certification that the ward's condition fits the statutory parameters for withdrawing or withholding medical care, a secor physician's or a medical ethics committee's written concurrence, and provision of comfort care) round-out a complete response to the question of how best to protect wards with respect to their en of-life healthcare. Midwest Bioethics Center supports this proposed amendment of Substitute HB–2469 §26(e)(7)(C).

10-8

KSNA
KANSAS STATE NURSES ASSOCIATION

1208 SW TYLER
TOPEKA, KANSAS 66612-1735
785.233.8638 * FAX 785.233.5222
www.nursingworld.org/snas/ks
THE VOICE AND VISION OF NURSING IN KANSAS

TERRI JOHNSON M.S.N., A.R.N.P.
PRESIDENT

TERRI ROBERTS J.D., R.N.
EXECUTIVE DIRECTOR

For More Information Contact
Terri Roberts J.D., R.N.
Executive Director
troberts@sound.net
March 27, 2002

H.B. 2469 Guardianship and Conservatorship

Written Testimony-in support

Senator Vratil and members of the Senate Judiciary Committee, the KANSAS STATE NURSES ASSOCIATION is pleased to support H.B. 2469, as amended by the House Judiciary Committee, which incorporates the Guardianship and Conservatorship Committee recommendations. In particular we are pleased with the addition of:

- the word "*or withdrawl*" following withholding (page 40)
- the term "*or life-sustaining*" following the term life-saving (page 40)
- the language recommended for additions to line 23 (page 40) that include "*persistent vegetative state or is suffering from an illness or other medical condition*" to modify the description of certain circumstances that an individual may be in.

Clearly a lot of work, by a number of professional organizations, interested parties and public officials have gone into the proposed changes being considered by the Senate Judiciary Committee. We support these recommended changes, believing them to be improvements in the original H.B. 2469 language.

Thank you for your consideration of these changes and we look forward to working with the judiciary and bar to implement these in the best interest of the clients they are intended to serve and protect.

Sen Jud 3-27-02 att 11

ASSOCIATION OF KANSAS HOSPICES

The Association of Kansas Hospices has long worked to help all Kansans have access to quality care at the end of life. During our more than twenty years of service in the state, we have been concerned that wards of the state of Kansas are denied the rights and opportunities that other citizens of the state have to accept or refuse medical interventions. It is our belief that all Kansans should be able to receive quality health care and that the medical community, in consultation with guardians and other medical providers and ethics committees, should oversee medical care and make all decisions based on the best interests of the wards.

Please adopt the proposed amendments to 2001 HB 2469 revised Guardianship and Conservatorship Act, recommended by the Guardianship and Conservatorship Advisory Committee and Approved by the Judicial Council and submitted to the House Judiciary Committee earlier this session. This proposal has language that improves the ability of wards to live with best medical care as determined by those to whom their overall and medical care has been entrusted.. We believe that the wards' best interests are most fully honored by allowing the medical community, with checks and balances of second opinions, to make medical decisions.

Please change section 23(e)(7)(C) of Substitute HB 2469 back to the language in HB 2469. We agree with the other groups who come before you today to speak on behalf of those who cannot speak fully for themselves – the wards of our state.

Robert Carlton, Board Chair, Association of Kansas Hospices
Central Homecare & Hospice
427 E. Second Street
Newton, KS 67114

Kim Fair, Secretary/ Treasurer, Association of Kansas Hospices
Hospice of Salina
333 S. Santa Fe
Salina, KS 67402-2238

Karren Weichert, Public Policy Chair, Association of Kansas Hospices
Midland Hospice Care
200 SW Frazier Circle
Topeka, KS 66606-2800

1901 University · Wichita, KS 67213-3325
316-263-6380 · Email: livewell@southwind.net · Fax 316-263-6542

Jud 3-27-02 att 12