SESSION OF 2002

SUPPLEMENTAL NOTE ON SUBSTITUTE FOR HOUSE BILL NO. 2469

As Amended by Senate Committee on Judiciary

Brief*

Sub. for HB 2469 revises and recodifies the Kansas Guardianship and Conservatorship laws in a new enactment entitled, the Kansas Act for Obtaining a Guardian or Conservator.

The following are major provisions of the recodified law.

Who Needs a Guardian or Conservator

Under the current law KSA 59-3001 *et seq*., a guardian or conservator may be appointed for a "disabled person." Instead of "disabled person," the bill uses the term "adult with an impairment in need of a guardian or a conservator, or both," which is defined as an adult "whose ability to receive and evaluate relevant information, or to effectively communicate decisions, or both, even with the use of assistive technologies or other supports, is impaired such that the person lacks the capacity to manage such person's estate, or to meet essential needs for physical health, safety or welfare, and who is in need of a guardian or conservator, or both." This definition is almost identical to the definition of "disabled person" under current law, except for the reference to assistive technologies and other supports. Also, by defining the terms, "in need of a guardian," and "in need of a conservator," The bill makes it clear that these terms apply only to a person who lacks appropriate alternatives for dealing with his or her impairment.

The result of these interwoven definitions is a two-part test for determining when a guardian or conservator should be appointed: (1) is the person impaired? and (2) is there a need for judicial involvement

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*****Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at http://www.kslegislature.org/cgi-bin/fulltext/bills.cgi

in the person's affairs? Both questions must be answered in the affirmative before the court may intervene.

Six Separate Alternatives. The bill contains six separate sections under which a petition for guardianship or conservatorship may be filed. The two most common situations are the adult with an impairment and the minor (Sections 9 and 10, respectively). These two sections do not differ significantly from current law except that they contain more detailed pleading requirements. There are new provisions regarding the examination and evaluation of the proposed ward or conservatee and the concept of guardianship or conservatorship plans discussed later.

The other sections under which a petition may be filed cover minors with an impairment (Section 11), persons previously adjudged as impaired in another state (Section 12), ancillary conservatorships (Section 13), and voluntary conservatorships (Section 7). Voluntary and ancillary conservatorships are provided for under current law and are not significantly different, except for expanded pleading requirements. The minor with an impairment and persons previously adjudged as impaired in another state are new concepts in Kansas law.

A "minor with an impairment in need of a guardian or conservator, or both" is defined as a person under the age of 18 who would otherwise meet the central definition of an adult with an impairment in need of a guardian or conservator, or both, and whose impairment is expected to last into adulthood (see Section 2). The purpose of this concept is to avoid the necessity of a second court proceeding when the impaired minor reaches the age of 18. Under Sub. for HB 2469, the court may appoint a guardian or conservator for a minor with an impairment in need of a guardian or conservator, or both, and its adjudication and orders will follow the minor into adulthood.

The other new concept, involving out-of-state wards or conservatees who are moving to Kansas, allows the out-of-state guardian or conservator to file a petition in Kansas asking the court to give full faith and credit to the other state's adjudication and to appoint a guardian or conservator in Kansas. Upon such appointment, proceedings in the other state must be terminated (see Section 12).

Venue

Under Sub. for HB 2469, a petition initiating guardianship or conservatorship proceedings may be filed in the county of residence of the proposed ward or conservatee, or where the proposed ward or conservatee may be found. If a proposed conservatee resides outside the state or is not present in the state, a petition may be filed in any county where the proposed conservatee's property is located (see Sections 9, 10, and 11). In the case of a person previously adjudged as impaired in another state, a petition may be filed where the proposed ward or conservatee may be found or where the petitioner plans to relocate the proposed ward or conservatee (see Section 12). A petition for an ancillary conservatorship may be filed where property of the proposed conservatee is located (see Section 13).

The bill also provides that if a petition is filed in a county other than the county of residence, the court may consider whether it is in the best interests of the proposed ward or conservatee or in the interests of justice for proceedings to take place in that county. If the court determines proceedings should take place elsewhere, the court may dismiss the petition, transfer venue to the county of residence, or continue the matter for not longer than 60 days to allow for the filing of proceedings in the appropriate court.

Venue of guardianship and conservatorship proceedings under current law provides that guardianship proceedings may be had in the proposed ward's county of residence or where the proposed ward may be found. Conservatorship proceedings may be had in the proposed conservatee's county of residence or, if the proposed conservatee resides outside the state, in any county in which the proposed conservatee's property is located. In a combined guardianship and conservatorship proceeding, venue is exclusively in the proposed ward/conservatee's county of residence.

Small Estates

The bill raises the dollar limits on the size of estates which may be handled without resort to a formal conservatorship. Section 4 increases from $5,000 to $10,000 the value of an estate which may be held in trust and managed by a minor's natural guardian without a conservatorship. Section 6 increases from $5,000 to $100,000 the amount of

money which the court may authorize to be placed in a restricted account at a bank, credit union or savings and loan association, payable to a minor on his or her 18th birthday. Section 6 also provides that the court may order payment of an amount not exceeding $10,000 directly to any person including the minor or the minor's natural guardian. If the money is paid to a person other than the minor, the court shall order that person to hold in trust and manage the money for the minor's benefit. Finally, Section 6 allows the court to authorize the deposit of an amount not exceeding $10,000 into a savings account at a bank, credit union or savings and loan association, payable to the guardian for the benefit of the ward without appointment of a separate conservator or the giving of a bond.

Examination and Evaluation

The bill requires an "examination and evaluation" of the proposed ward. If no report accompanies the petition, or if the court does not find that report sufficient, the court shall order an examination and evaluation as part of the preliminary orders of the court. If the court accepts a report which accompanies a petition, the proposed ward may request that an additional examination and evaluation be ordered by the court (see Section 15).

The bill sets out in detail what matters should be covered in the report of the examination and evaluation. These include a description of the person's physical and mental condition, cognitive and functional abilities and limitations, adaptive behaviors, social skills, and educational and developmental potential. The report must also include a prognosis for improvement and recommendation for treatment or rehabilitation as appropriate. The professional completing the report must also state his or her opinion as to whether the person is impaired and in need of a guardian or conservator and whether the person could meaningfully participate in the proceedings (see Section 15(b)).

Trial

The bill requires the court to issue a preliminary order setting the date of trial no earlier than 7 days nor later than 21 days after the date of the filing of the petition. Current law requires the trial date to be set within 7 to 14 days of the filing of the petition. KSA 59-3010.

In the case of an adult with an impairment in need of a guardian or conservator, or both, the proposed ward may request a jury trial if a demand for such is filed in writing at least four days before the date set for trial. Section 18. Current law requires a jury trial demand to be filed at least 48 hours before the time of the hearing. KSA 59-3013(b).

Who May Be Appointed as Guardian or Conservator

The bill substantially changes current law regarding specific persons whom the court must consider in choosing a guardian or conservator. Current law provides that the court in appointing a suitable guardian or conservator shall give priority in the following order: (1) To the nominee of a minor over the age of 14 years who is not a disabled person; (2) to the nominee of a natural guardian." KSA 59-3014. Further, the law provides that the nominee of a natural guardian shall be appointed as guardian or conservator if found to be a fit and proper person by the court.

Sub. for HB 2469 eliminates the priority provision and expands the list of persons who may "suggest" that a particular person be appointed. Section 19 provides that the court "shall give consideration to the individual or corporation suggested by" the petitioner, the natural guardian, the proposed ward or proposed conservatee, a minor proposed ward or proposed conservatee who is over 14 years of age, or the spouse, adult child or other close family member of the proposed ward or proposed conservatee. The bill also amends KSA 59-3004 to state that a nominee of the natural guardian must be "strongly considered" by the court if found to be a fit and proper person. See Section 5.

The bill specifically authorizes the court to appoint co-guardians or co-conservators and to specify whether such co-fiduciaries may act independently or only in concert. See Section 18(e).

Limited Guardianships Eliminated–Guardianship Plans

The bill eliminates the concept of limited guardianships and conservatorships provided for in KSA 59-3014(d) in favor of guardianship and conservatorship plans. The Act provides that at any time the court may require, or the guardian may voluntarily develop and file with the

court, a guardianship plan. That plan may include provisions regarding where the ward will reside, what restrictions may be placed upon the persons with whom the ward may associate, and how much autonomy the ward will have to make decisions regarding, for example, employment, education and travel. The plan may also contain provisions regarding use of the ward's financial assets if no conservator has been appointed. See Section 27.

Similar provisions regarding conservatorship plans are contained in Section 30. A conservatorship plan may include provisions regarding the type and amount of funds over which the conservatee may have control, and how the conservator may protect the eligibility of the conservatee for public benefits. Section 31 contains provisions which allow the conservator, with court approval, to set up an irrevocable trust to enable the ward to qualify for public benefits.

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 likely will never need a guardianship plan. However, in those cases where the ward is capable of making some decisions, a guardianship and/or conservatorship plan can set out which decisions should be left to the ward.

Once a plan is filed, the court may order notice to all interested parties, and may also order a hearing if requested. The court may order a plan to be withdrawn or amended. See Section 27(c).

The Act states that such plans "shall be effectuated . . . to the maximum extent possible consistent with any changing circumstances of the ward." If a guardian or conservator acts in deviance from the plan, those actions must be explained in a report or accounting. See Section 27(d).

Powers and Duties of Guardians

The bill incorporates much of existing KSA 59-3018 regarding the rights, powers and duties of a guardian, but includes some new concepts as well, such as requiring a guardian to become and remain personally acquainted with the ward and other interested persons, exercising only the authority necessitated by the ward's limitations,

encouraging the ward to participate in making decisions and to develop the skills to act independently, and considering the expressed desires and personal values of the ward in making decisions on his or her behalf.

The bill follows current law generally in setting out the guardian's duties and powers, including the authority to have care and custody of the ward, and the duty to provide for the ward's care, treatment, habilitation, education, support and maintenance. See Section 2(b)(7), which gives the guardian the authority to make necessary arrangements for the ward's funeral services, burial or cremation, autopsy, and anatomical gifts, subject to other provisions of Kansas law which give relatives the right to make such decisions.

The bill also expands the guardian's power to exercise control and authority over the ward's estate, but only with specific court authorization. The court may authorize the guardian to exercise control over the ward's estate and may waive bond if the initial value of the ward's estate is $10,000 or less. Once the value of the estate exceeds $10,000, the guardian must file a guardianship plan with provisions similar to a conservatorship plan, or petition the court for appointment of a conservator. See Section 26(e)(9).

Limits on Guardian Powers. The bill closely follows current law with regard to limitations on the guardian's power except in the area of consent to withhold life-saving medical care. As under current law, the guardian does not have the power to prohibit the ward from marrying or divorcing, or to consent to termination of the ward's parental rights. The guardian cannot place the ward in a treatment facility without court authorization. See Section 26(e).

Sub. for HB 2469 expands the circumstances under which the guardian may consent to the withholding of live-saving medical care or the withdrawal of life-sustaining medical care. Current law provides that the guardian does not have the power "to consent on behalf of the ward to the withholding of life-saving medical procedures, except in accordance with provisions of KSA 65-28,101 through 65-28,109." Those statutes referenced in KSA 59-3018(g)(4) comprise the Natural Death Act which allows a person to make a declaration directing the withholding or withdrawal of life-sustaining procedures when that person is in a terminal condition.

The bill provides that the guardian does not have the power to consent on behalf of the ward to "the withholding of life-saving medical care, treatment, services or procedures" or to "the withdrawal of life-sustaining medical care, treatment, services or procedures" except under three specific circumstances: (1) where the ward has made a declaration pursuant to the Natural Death Act (same as current law), (2) where the ward, prior to the appointment of a guardian, has executed a durable power of attorney for health care decisions pursuant to KSA 58-629 which contains provisions relevant to the withholding or withdrawal of life-saving or life-sustaining treatment, or (3) in the circumstances where the ward's treating physician shall certify in writing to the guardian that the ward is in a persistent vegatative 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 health care 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. (Note: The third instance was amended in Senate Committee on Judiciary at the request of the Kansas Judicial Council whose representative stated this language had been agreed to by all interested parties on this issue.)

Powers and Duties of Conservators

In delineating the powers of a conservator, the bill again parallels current law, but adds several new concepts. Under Section 29, new requirements include that a conservator exercise authority only as necessitated by the conservatee's limitations, that the conservatee be encouraged to participate in decision-making, that the conservatee be encouraged to manage his or her own estate to the extent feasible, that the expressed desires and personal values of the conservatee be considered, and that the conservatee be assisted in developing or regaining the skills necessary to manage his or her own estate.

The bill then follows current law in setting out the duties and powers of the conservator, including paying reasonable charges for the

support, maintenance, care, treatment, habilitation and education of the conservatee and the conservatee's spouse and minor children, managing the conservatee's estate and any ongoing business concerns, prosecuting and defending all actions in the name of the conservatee, and selling assets as necessary. See Section 29(b). Instead of listing appropriate investment vehicles, the bill simply requires the conservator to "invest all funds in a manner which is reasonably prudent in view of the value of the conservatee's estate." See Section 29(b)(7).

Limitations on Conservator Powers. With regard to limitations on the conservator's powers, the bill incorporates many separately existing statutory provisions (KSA 59-3021 through 59-3024) into Section 29 and expands upon them. The bill provides that the conservator does not have the power to sell, convey, or mortgage any real estate without court approval; although the conservatee may lease real estate for a period of less than three years. See Section 29(f)(3) and (4). The conservator does not have the power to sell, convey, lease or mortgage any oil, gas or other mineral interest without court approval. See Section 29(f)(5). The conservator does not have the power to sell, convey, lease or mortgage the conservatee's interest in the homestead or any other real estate which is titled in the conservatee's spouse without court approval, and such sale is not valid unless the conservatee's spouse joins as a grantor in the sale. See Section 29(f)(2) and (6). The conservator may not extend an existing mortgage in favor of the estate or against the estate for a period of more than five years without court approval. See Section 29(f)(7) and (8).

A new limitation on the conservator's power appears in Section 29(f)(1), which provides that the conservator shall not have the power to "use the assets of a minor's estate to pay any obligation imposed by law upon the minor's natural guardian or natural guardians, including the support, maintenance, care, treatment, habilitation or education of the minor, except with specific approval of the court granted upon a showing of extreme hardship."

Limits on Conervator Personal Liability. The bill also contains limitations on the personal liability of a conservator, some of which appear in current law. Section 29(d) provides that a conservator shall not be personally liable: (1) for the wrongful conduct of a third person whom the conservator selects to provide any service to the conservatee's estate, so long as the conservator exercises reasonable

care in making that selection; (2) on a mortgage note executed by the conservator in his or her representative capacity (current KSA 59-3025); (3) on a contract entered into by the conservator in his or her representative capacity unless the conservator fails to disclose the fiduciary relationship (new); (4) for obligations arising from ownership or control of the estate or other acts or omissions occurring during its administration, unless the conservator is personally at fault (new); (5) for any environmental condition on land owned or acquired by the estate (new); or (6) for retaining until maturity any investment which was a part of the conservatee's estate at the time the conservatorship was established even though such investment may not be considered prudent or reasonable (current KSA 59-3020).

Extended Distribution Plan for Minor's Estate —Until 25th Birthday

Section 32 of the bill represents a significant change in current law. It provides for an extended distribution plan of a minor's estate which would delay full distribution of all funds and assets to the minor until no later than the minor's 25th birthday. The purpose of this section is to protect the minor's estate from being squandered by an 18-year-old who is unprepared to manage a large estate.

Any such extended distribution plan must adequately provide for meeting the expected needs of the minor from the minor's 18th birthday until final distribution of all assets. The plan must also provide for accelerated distribution of assets in extraordinary circumstances. The plan must fully distribute all funds and assets of the estate to the minor by the minor's 25th birthday. See Section 32(c).

Constitutional due process requirements are addressed in several ways: (1) any petition for extended distribution must be filed during the period of minority (after the minor turns 17 but at least 30 days before the minor turns 18) while the state still has a *parens patriae* interest; (2) notice must be given to the minor and all interested parties, counsel may be appointed for the minor, and the court must hold a hearing; and (3) the petitioner must show that it is in the best interests of the minor to implement an extended distribution plan.

Restoration of the Ward

The restoration provisions are similar to current law, but provide a more detailed framework to guide the court in handling a ward's petition to be restored to capacity. When such a petition is filed, the court must review it to determine whether probable cause exists to warrant further proceedings. If not, the court may dismiss the petition, or may order an examination and evaluation of the ward. Once the court finds probable cause, it may set the petition for hearing. See Section 41.

Review Procedure by the Court

Instead of the three-year periodic review provided under current law, the bill provides that, upon the filing of any guardian's report or conservator's accounting, the court will review that report or accounting, any prior orders in the case, any guardianship or conservatorship plan which has been filed, and any previous reports or accountings. The court is to determine whether the report or accounting shows reasonable administration of the guardianship or conservatorship, whether the fiduciary is performing his or her duties and responsibilities and whether the fiduciary's powers should be expanded or limited or any other modifications made. The court may then set a hearing on the matter. See Sections 35 and 36.

In addition to the usual annual reports and accountings, The bill sets out five specific circumstances which would trigger the filing of a special report or accounting with the court: (1) a change of address of the guardian or conservator; (2) a change of residence or placement of the ward or conservatee; (3) a significant change in the health or impairment of the ward or conservatee; (4) the acquisition, receipt or accumulation of property or income by the ward which would cause the value of the ward's estate to equal or exceed $10,000; or (5) the death of the ward or conservatee. See Section 34(b).

Background

The Senate Committee made the following amendments:

- In New Section 6 regarding powers of a court to deposit moneys, when dealing with moneys of a minor without a conservator to add “any other investment account” to the list of permitted placements.

- In New Section 19 to add clarifying language regarding the priorities in appointing a guardian or conservator.

- In New Section 26 regarding limits on the powers of a guardian regarding withholding life-saving or life-sustaining medical care, to add language noted in the Brief.

- In New Section 27 and New Section 30 in regard to requiring a guardianship plan or conservatorship plan, respectively, to delete the “for good cause shown” language.

- In New Section 31 in regard to the establishment of an irrevocable trust to qualify the conservatee or ward for federal, state, or local government benefits, to add to and change several of the findings a court must make before authorizing the trust.

Those appearing in support of the bill included the Chairman of the Guardianship and Conservatorship Subcommittee of the Judicial Council and a conferee from the Life Project Foundation. Concerns were voiced on behalf of the Kansas Bar Association, an attorney, a conferee from the Topeka Independent Living Resource Center, the Kansas Guardianship Program, and delegates from the Kansas Council on Developmental Disabilities and the Kansas State Nurses Association.

During the 2001 Interim, the Special Committee on Judiciary conducted a study of the issues contained in HB 2469.

The fiscal note indicates that there would be an effect on the courts by increasing the amount of time judges would have to spend reviewing evidence in these cases; however, the actual fiscal effect cannot be estimated until there is some experience implementing the bill.

See "You Are Invited to Comment on the Proposed Guardianship and Conservatorship Act," Christy Molzen, 70 KBA No. 6 33(2001) from which much of this supplemental note was taken and for a more detailed explanation of this revision incorporated in Sub. for HB 2469.