Nevada Supreme Court

Commission to Study the Administration of Guardianships in Nevada's Courts

September 16, 2016, Meeting Materials

Justice James W. Hardesty, Chair

Supreme Court of Nevada

ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

MEETING NOTICE AND AGENDA

Name of Organization:

Supreme Court Commission to Study the Administration of Guardianships In Nevada's Courts

Date and Time of Meeting: September 16, 2016, 1:30 p.m. to 4:30 p.m.

Place of Meeting:

LAS VEGAS	CARSON CITY	ELKO
Regional Justice Center Nevada Supreme Court 200 Lewis Ave., 17th Floor, Courtroom	Nevada Supreme Court 201 S. Carson Street Law Library, Room 107	Fourth Judicial District 571 Idaho Street Dept. 2

AGENDA

I. Call to Order
   a. Call of Roll and Determination of Quorum
   b. Approval of Meeting Summary from August 26, 2016 (*pages 5-30*) (*for possible action)

II. Public Comment
*Because of time considerations, the period for public comment **will be limited to 3 minutes.** Speakers are urged to avoid repetition of comments made by previous speakers.*

III. Updates
   a. Status Report – Caseloads

IV. Discussion on Subject Matter Recommendations (*for possible action)
   a. Management/Administration of the Protected Person's Estate*
      i. Proposed NRS Estate Statutes* (*pages 31-45*)
   b. Auditors and Investigators*
      i. Florida Model/Materials (*pages 46-88*)

ii. Standing Committee on Judicial Ethics – Advisory Opinion JE15-002 (*pages 89-94*)

c. Physician's Certificates – Terminology* (*pages 95-101*)

d. Filing Fees*

e. Exhibits*

i. Minor Guardianship Statute

ii. Attorney Fees

iii. Bill of Right Statutes/Court Rule

f. Commission on Services for Persons with Disabilities* (*pages 102-108*)

V. Confidential Draft Final Report – Edits*

Restriction - The Final Report is in draft form and is confidential. The draft is NOT to be duplicated or shared outside Commission members or placed on the website until it has been approved by the Commission.

VI. Other Business

VII. Next Meeting Date

a. September 26, 2016, 4 p.m. Teleconference

VIII. Adjournment

- Action items are noted by (*for possible action) and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows:, Vicki Elefante (775) 687-9807 - email: elefante@nvcourts.nv.gov
- This meeting is exempt from the Nevada Open Meeting Law (NRS 241.030 (4)(a))
- At the discretion of the Chair, topics related to the administration of justice, judicial personnel, and judicial matters that are of a confidential nature may be closed to the public.
- **Notice of this meeting was posted in the following locations**: Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: Regional Justice Center, 200 Lewis Avenue, 17th Floor.

TAB 1

MEETING SUMMARY

Supreme Court of Nevada
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ROBIN SWEET
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MEETING SUMMARY

Transcribed by Raquel Espinoza, Vicki Elefante, Sue Berget
Summarized by Stephanie Heying
Administrative Office of the Courts

Supreme Court Commission to Study the Administration of Guardianships in Nevada's Courts

Date and Time of Meeting: August 26, 2016, 10:00 a.m. to 4:00 p.m.
Place of Meeting:

Carson City	***Las Vegas***	***Elko***
Nevada Supreme Court 201 South Carson St. Law Library, Room 107	Regional Justice Center 200 Lewis Ave. 17th Floor, Courtroom	Fourth Judicial District Court 571 Idaho Street, Dept. 2

Members Present:

Chief Justice James W. Hardesty, chair
Chief Judge Michael Gibbons
Judge Frances Doherty
Judge Nancy Porter
Judge Cynthia Dianne Steel
Judge William Voy
Judge Egan Walker
Senator Becky Harris
Assemblyman Glenn Trowbridge
Julie Arnold
Debra Bookout
Kathleen Buchanan (Jeff Wells Proxy)
Rana Goodman
Susan Hoy
Jay P. Raman
Sally Ramm
Terri Russell
Christine Smith
David Spitzer
Kim Spoon
Tim Sutton
Susan Sweikert
Elyse Tyrell

AOC Staff

Vicki Elefante
Raquel Espinoza
Stephanie Heying
Hans Jessup

Call of Roll and Determination of Quorum

Chairman Hardesty called the Commission to Study the Administration of Guardianships in Nevada's Courts (Commission) to order at 10 a.m. A quorum was present.

Approval of Meeting Summaries from June 13, 2016, and June 21, 2016

The June 13, 2016, and the June 21, 2016, meeting summaries were unanimously approved.

Updates

The Commission has two meetings scheduled in September.

ADKT 507 Opinion

Commissioners were sent a copy of the order that was filed on July 22, 2016, and is included in the meeting materials. The order speaks for itself in respect to the application of both the Rules of Civil Procedure and the Rules of Evidence, appropriate citations have been made with respect to those areas.

Revised Uniform Guardianship and Protective Proceedings Act

The Commission discussed the Revised Uniform Guardian Protective Proceedings Act. One of the sources for many guardianship laws in the country is the Uniform Law Commission (ULC). The ULC is a commission that develops uniform laws for a variety of subject matter. The memo included in the materials was distributed, in July, to the members of the Conference of Chief Justices indicating that the ULC have undertaken a complete review of guardianship statutes and in the process have made a number of proposed revisions to the Uniform Law regarding guardianships. Many of the areas the ULC are proposing to amend are consistent to the approaches this Commission has taken; whether in the context of minor guardianships, language used to name or characterize a person who is subject to guardianship, revisions to attorney fee provisions, visitation and communication of third parties, etc. The ULC addressed the question of the terms *ward*, *incapacitated person*, and *disabled person*, concluding that they would rename those individuals as *person subject to guardianship,* which is consistent with the approach taken by the Commission.

Recommendation Relating to Appointment of Registered Agent

The Resolution, prepared by the Secretary of State, clarifies the role of a Resident Agent (RA) with regard to the appointment of a nonresident guardian. The Resolution still imposes a duty on the nonresident guardian to designate a RA but it clears up some confusion about what the Secretary of State's role is in the context of tracking RAs for nonresident guardians. Justice Hardesty asked the Commissioners to adopt the Resolution, adding the only function was to make certain there is an ability to serve the nonresident guardian and it goes beyond their role as a party. Service plays a large role for corporations, and this allows for service to be obtained on someone acting as a nonresident guardian.

Ms. Kim Spoon asked if it would be left to the judge to verify if the RA is appropriate for guardianship purposes, and if there would be a standard form or certificate the RAs should have ready. Justice Hardesty noted the judge would assure compliance, not the Secretary of State. The Secretary of State would continue to use its current form for RAs but the duty would be on the nonresident guardian to designate and file a RA form with the Secretary of State's Office, and the duty will be on the court to assure that the task has been completed.

Ms. Julie Arnold asked if the task would be assured as stated, by "*the Commission and the Court."* Justice Hardesty said the word "*Commission"* should be stricken from the text.

Judge Steel expressed concern regarding address changes and asked how the courts were to keep track of the RAs in the event that they move and do not leave a forwarding address. Justice Hardesty stated the RA designations are to be renewed every year. Ms. Susan Hoy suggested that could be included in the report of guardian that a nonresident guardian has to report every year. Ms. Elyse Tyrell added they would need to file proof of recertification every year with the annual report. Justice Hardesty agreed it should be included in the annual report. Judges involved in making the designations would need to advise the responsibilities a RA takes on; part of the resolution is to make clear that the RA acts in a similar capacity as a RA for a corporation. By statute that RA has various responsibilities including maintaining a current address, being available during business hours to accept service of process, etc. It is important that the court make sure the RA understands the responsibilities they are taking on and those are summarized in a publication that the Secretary of State provides.

Judge Steel noted the RA may not come to court. The judge does not interface with them; they only have a certificate from the Secretary of State stating there is a RA. Justice Hardesty stated he is hopeful that the courts will put together informational packets that would help instruct guardians and RAs of their responsibilities.

Judge Egan Walker moved to approve the recommendation to adopt the Resolution including the edit to strike *Commission.* Ms. Elyse Tyrell seconded the motion. The motion was approved unanimously.

Lockbox Program Recommendations

Justice Hardesty thanked Ms. Rana Goodman for her involvement with the Lock Box Program. Justice Hardesty asked the Commission to adopt a policy for the Lock Box Program and the Legislative Counsel Bureau would work out the details with the Secretary of State's Office. The idea is to allow for the designation of guardian forms to be placed in the Secretary of State's Lock Box, similar to what can be done now with wills and powers of attorney; expanding the opportunity to put those permanent documents in the Secretary of State's Lock Box. Ms. Goodman thanked Senator Becky Harris for assisting with the topic. When a person files their nominated guardian form, the form would go to the Secretary of State, when an individual, Elder Protective Services (EPS), or other state agency states a person needs a guardian and a public or professional guardian files the guardianship, there would be a check and balance system.

The Commission discussed accessibility and timing of accessibility to the Lock Box. Ms. Goodman explained those who had already filed have been advised to send the nominated guardian form to a trusted neighbor, friend, or family member, and to keep a copy for themselves. The question posed was how would the general public gain access to be able to go to court and say there is no directive under the Lock Box. It was suggested the attorney would have authority to verify names of who has submitted documents to the Lock Box. Access to the Lock Box would be available to family and the Secretary of State's Office would maintain a log of those who have lodged their designated documents and parties could access the log to see if a person has filed a guardian nomination form with in the Lock Box. It was noted that individuals should only be able to gain access to the nomination of the guardian form but not necessarily have access to the will or power of attorney. The Commission discussed a person in an emergency room may need to gain access quickly to documents, there would be need to be a faster way to gain access to those documents. Senator Harris stated she would be a proponent to a simple yes or no answer to an inquiry in the context of the guardianship nomination, rather than providing the entire document. Ms. Hoy stated at times the person may not have any documents on them and the hospital may not know who to contact. Senator Harris suggested that in an emergent situation a healthcare provider could be provided with that information. Senator Harris stated she would be open to suggestions from the Commission as to how to protect

the person in need of protection and provide the kinds of safeguards at a healthcare level that they will need so that decisions can be made on their behalf. There would need to be a balance.

Mr. Jay Raman asked if the designation of a future guardian is a notarized document. Ms. Goodman stated it is a notarized document. Senator Harris stated she would advocate witness signatures for integrity in terms of confidence.

The Commission discussed whether a person who wants to file for a guardianship could get permission from the court to access the Lock Box for the potential nomination for a guardian. A person petitioning for guardianship might not be aware that the proposed protected person has a nomination form filed in the Lock Box. A person could verify with the Secretary of State's Office whether someone had a nomination form filed in the Lock Box. There was concern that just anyone could contact the Secretary of State's Office and ask for this information. There may need to be an extra step in which a person would need to get court approval to access the Lock Box. The current Lock Box program does not allow anyone to access the information. A code is provided to the person filing their documents in the Lock Box and they can provide the code to others if they want them to have access to the Lock Box.

Justice Hardesty asked if the Commission would include a guardianship designation in the Lock Box. Ms. Ramm agreed it would be an efficient way to find documents. Justice Hardesty stated the Commission had identified questions and access issues and those things would need to be sorted out. As a policy, it would be important to determine whether the Commission supports the use of the Lock Box for this purpose. Judge Walker stated there has been an evolution in understanding; use, recording, and accessibility of advanced directives, the access to the documents can incrementally improve over time. Having the avenue for a central repository for the documents to begin with would be important and then a permanent Guardianship Commission could discuss the concerns of accessibility at a later time and address those issues as an ongoing task.

Judge Egan Walker moved to approve support of the Secretary of State's Lock Box Program to include designations of guardians. Ms. Rana Goodman seconded the motion. Motion passed.

Minor Guardianship Statute

Judge Walker noted when the Guardianship Commission was first constituted it was clear Justice Hardesty contemplated there would be robust discussion regarding minor guardianships, in addition to all guardianships. Early in the process, Judge Walker was provided a spreadsheet, created by the American Bar Association with information on how minor guardianship statutes are handled across the United States. There are few jurisdictions that completely break out minor guardianships from the adult guardianships, some have hybrid statutes, and most states are similar to Nevada's current statutory structure. Judge Walker reviewed Mississippi, New York, and West Virginia's statutes and drafted an entirely separate chapter 159A as though chapter 159 did not exist. The subcommittee reviewed this first draft and determined it be better to hybridize chapter 159A.

Judge Nancy Porter, Judge Dianne Steel, Judge William Voy, and Ms. Barbara Buckley provided feedback during the drafting process. Judge Walker wanted the record to reflect that the subcommittee has had robust conversations about minor guardianships and have taken particular care to make sure that the proposal is sensitive to chapter 432B, and permanency plans for children, and that the statutory language would not negatively affect NRS chapter 432B. The subcommittee pulled in national best practices related to a minor's needs and made changes to language regarding physician certification for a temporary guardianship. The subcommittee recommends the Commission adopt the proposal and LCB can harmonize the language with other statutory sections. Judge Voy wanted it noted that his law clerk did a lot of work on this draft. Justice Hardesty thanked everyone for their efforts on this proposal.

Commissioners were asked if they had any edits or comments.

Discussion 159A.005 (4) Contents of Citation and 159.006 Attorney and Guardian ad Litem

Ms. Buckley said Judge Porter had expressed concern with 159A.005 (4). This subsection seems to indicate that the Guardian ad Litem (GAL) and the attorney can be the same person. While the GAL can be an attorney, the GAL and attorney should be different people. Subsection (4) currently reads, "P*roposed protected minor has the right to be represented by an attorney, who may be appointed for the proposed protected minor by the court as a Guardian ad Litem.*" Judge Walker said there are children that are so young that their attorneys cannot form an attorney/client relationship. If you have a three or four-year-old the only remaining role for that attorney would be as GAL, assuming they cannot form an attorney/client relationship. Ms. Buckley said the Children's Attorney Project follows the recommendation of the American Bar Association (ABA) and the Association for Counsel of Children, which says that you form the best relationship you can, and where the client is under a disability, and a two or three-year-old would be in that category, you use a certain model that you represent their legal interest. Similar to what you would do if someone has dementia, you represent their legal interest being the least restrictive environment. The attorney makes sure they have expressed their interest and that is taken care of. It is more of a legal rights substituted judgment. There are objective measures. Ms. Buckley did not think the roles of the GAL and attorney should be blended in 159A.005 (4) or in 159A.006. It is either a GAL or an attorney. That follows the rules of professional responsibility as being a client directed or expressed wishes. Judge Voy said that is why the subcommittee added pursuant to NRS 159.048. Ms. Buckley suggested breaking NRS 159A.006 into two paragraphs where one addresses attorneys and one addresses GALS, so the roles do not get mixed up. There is similar language in chapter 432B and the Commission would not want to say children in foster car do not get an attorney they can just have a GAL.

Ms. Buckley suggested deleting *as a Guardian ad Litem* in 159A.005 (4). Judge Walker and Judge Voy agreed. 159A.005 (4) would read:

> *Proposed protected minor has the right to be represented by an attorney, who may be appointed for the proposed protected minor by the court.*

Ms. Buckley wanted to be clear that 159A.006 would be separated for the GAL and attorney. Justice Hardesty responded yes. Ms. Buckley said when it is pertaining to the GAL the language would need to be cleaned up because the GAL would not have the same authority and rights as an attorney representing a party, they would have the duties of a GAL. Judge Voy said NRS 159.048 could be referenced to make it clear. It is included in 159A.005 and could be included in 159A.006. Ms. Buckley agreed.

Discussion 159A.003 (1) Petition for Appointment of Guardian

Ms. Arnold asked if a minor could petition the court for a guardian as the language suggest in 159A.003 (1). Judge Walker explained that has come up with the unaccompanied minors. The unaccompanied minors have filed petitions for themselves for a guardian because they need someone to make legal decisions for them.

Discussion 159A.002 – Suitability of Parent

Senator Harris asked the subcommittee to provide background on how 159A.002 Suitability of Parent came to be and what the definition is going to be applied to. Judge Voy explained the definition is when a parent is deemed unsuitable i.e. you have petitioners seeking guardianship and you need a starting point as to why the parents are not suitable, to give a basis for the guardianship petition. This would be the first reference point, and would also apply on the backside i.e., grandparents had petitioned for guardianship because the parent has a drug problem, the parent is now sober and wants to petition to terminate the guardianship because they are a suitable parent. This provides the court a reference point.

Senator Harris is concerned that the statute could be misapplied. For example, subsection 5; *basic education*. A parent could decide to home school their child and someone else could deem home schooling as denying the child an education. Senator Harris did not disagree with providing factors to consider whether or not a guardianship of a minor is appropriate but she wanted to see if there was a way to be more specific with the language.

Judge Steel said 159A.002 is it is entitled the *Suitability of the Parent* but describes what is not suitable. Judge Walker said the challenge is in the context of the minor guardianship. There is a parental preference doctrine that is well established in our law so that is why guardianship would only be considered if a parent is unsuitable. There is a presumption of suitability. Judge Walker suggested adding language regarding the presumption. Senator Harris and Judge Steel agreed having the presumption in the language would be better. Senator Harris said when she looks at this on its face it is describing what unsuitability is, not suitability, some of it could be interpreted rather broadly, and she does not think that was the intent of the subcommittee. It was not. Judge Voy said this is referenced later on in the draft when it talks about parental petition for the termination of guardianship.

Justice Hardesty suggested 159A.002 begin with subparagraph 1 that says, "*There is a presumption that a parent is suitable to care for their child*." Subparagraph 2 would then become the current subparagraph 1 that says, "*The presumption that a parent is suitable may be overcome or rebutted…*" Judge Steel agreed that would tie in with the right of how to raise your own child and the things that go along with parenting. If you were to say that they are presumed suitable, however, if there are these other things that show they are unsuitable then a non-parent should have guardianship. Judge Voy added the Hudson v. Jones case established the presumption and you have to show by clear and convincing evidence to rebut the presumption that the parent is otherwise suitable.

Judge Walker added the doctrine was established by the Nevada Supreme Court and the burden of proof to establish a guardianship is in chapter 159 and it would carry over to 159A. It is clear and convincing evidence and that would come from the presumption. Judge Walker suggested adding a new paragraph 1 to say, "*Affirmatively there is a presumption that a parent is suitable to care for their minor child."* Subparagraph 2, would read, *"A parent that is unsuitable to care for their child if and then…*" as follows can have a subparagraph 3 and 4 and say *"demonstration of clear and convincing evidence is necessary to impose a guardians and is necessary to overcome the presumption…"* or something to that effect. Justice Hardesty the concept is clear so the Commission can work on some edits based on this discussion.

The language in 159A.002 would be amended to include a presumption of suitability and that there is a demonstration of clear and convincing evidence. Justice Hardesty suggested the deletion of "basic" in (1) (a) (v) prior to education as basic is already included in the language above. The Commission agreed.

Discussion 159A.020 (4) Termination of Guardianship of Person, Estate, or Person and Estate; Procedure Upon Death of Protected Minor

The Commission discussed 159A.020 (4), which addresses the termination of guardianship in the context of minors terminating when they reach the age of majority. This occurs automatically. The draft language contemplates that if a protected minor is incompetent a petition may be filed to transition the case from a minor guardianship to an adult guardianship. The Commission discussed the possibility of changing the language unless a petition to terminate the guardianship is filed then the minor guardianship would automatically transfer to the adult guardianship administration. Commissioners were concerned with automatic transfer and how it would work. Commissioners would not want to have the 18-year-old automatically under an adult guardianship because the guardian did not file a petition to terminate.

Judge Steel suggested *all minor guardianships have a mandatory three-month review prior to the minor's emancipation.* The case management systems include dates of birth so this could automatically be added to the

court's calendar and the court could notify parties to come to court and say whether or not the guardianship is needed beyond the age of 18, if the guardianship needs to be enlarged, or whatever might need to happen. There would be an automatic three-month review prior to emancipation. Commissioners agreed with there should be a three-month review prior to emancipation. The courts could administratively say in the case management system that the case will stay alive, if necessary, and then court administration would transfer the case from the adult guardianship system and then the judge handling the adult guardianships could set a hearing. This would be a positive hand-off as opposed to a passive hand-off.

Judge Voy suggested keeping the language in 159A.020 as it is currently written, adding language that an automatic review has to occur three months prior to the protected minor's 18th birthday. This would require a separate petition and would have to comply with NRS 159.044. Parties would be on notice. The way it is written now does not contemplate anything happening automatically.

Judge Walker said the evaluation of a child when they are ten may not be the same as when they are 18. Judge Walker said notwithstanding our concern that we do not want to make the process too onerous for the minor who is now an adult and their parents but an actual evidentiary re-evaluation of whether or not the protected person meets the criteria for guardianship is an important step.

Judge Steel said the Commission would need to ascertain what the court wants at the three-month review. Judge Walker suggested the court could determine whether the guardianship should continue passed the 18th birthday at the three-month hearing. The judge can explain at that hearing that clear and convincing evidence would have to be provided to the judge in the adult guardianship court that establishes the incompetence of the person going forward. This could be done in a way that does not require additional filing fees. This would be a more seamless handoff the judges could coordinate so the parties would know when they needed to come back for a setting or something like that. Judge Steel suggested it could become a temporary order once the minor turns 18 pending further proof. Ms. Buckley added they would also have the right to an attorney.

Judge Voy asked what language the Commission would like added. Judge Steel said the Commission would want to have the facts on the record as the minor turns 18 not just a preliminary idea of what we might want to do but grant an adult guardianship. Justice Hardesty said the Commission conceptually understands what we are trying to do. Justice Hardesty asked Judge Walker, Judge Voy, Judge Porter, and Judge Steel to insert language where appropriate that requires an automatic review of a protected minor who is incompetent 90-days prior to their emancipation. Judge Walker said they would finesse the language.

Justice Hardesty asked if the Commission was prepared to endorse 159A Minor Guardianship statute with the edits and conceptual changes discussed.

Judge Walker moved to approve chapter 159A Minor Guardianship statute as a conceptual frame, with the edits discussed. Judge Voy seconded the motion. Motion passed.

Attorney Fees

Judge Doherty and her staff drafted a statute that would guide judges in determining, approving, and/or disallowing attorney fees. Included in the preliminary research is an evaluation of the guardian fees. Judge Doherty deferred to Ms. Debra Bookout's memo from last fall on the guardian fees. Judge Doherty introduced Mr. Tyler Hart. Mr. Hart interned for Judge Doherty over the summer and compiled, at her direction and request, best practices with respect to considering attorney fees. Mr. Hart used this information to draft a statute that would allow judges to consider the various components for evaluating attorney fees.

Judge Doherty noted there is some redundancy in the statute and she has made some edits. The court should consider the just, reasonable, and necessary standard to determine payment of attorney fees. The standard provision in almost every area reviewed was that attorney fees could not be paid out of the assets of the protected person without the court first approving such payments. That was the premise, just and reasonable and approval by the court.

Judge Doherty said the research outline was meant to provide the Commissioners background of the various jurisdictions statements with respect to payment of attorney and guardian fees. The only notable distinction in the research is some states use percentages as opposed to time and hourly rate with respect to payment for attorney, guardian, and trustee fees. Judge Doherty does not think the percentage payment is a national trend or the majority rule. The inclusion of a written agreement between the attorney and the guardian, or the attorney and the retaining party, was important. Additionally, the written agreement must provide a general explanation as to how the compensation will be accessed. The written agreement must include the hourly billing rate of the time keepers and to the extent there are gradation in the timekeepers, they must identify the same and the fee rate must be served on all persons prior to the court's consideration. Judge Doherty reviewed the draft statute.

The draft statute indicates an hourly statement of generalized work performed. They wanted to include a requirement that fees be reduced to the tasks performed within 1/10 of an hour, and that no minimum billing i.e., no block or standardized billing, would be allowed. Each task is itemized at a detailed level to allow the court to analyze the nature and reasonableness of the task. One jurisdictions had suggested that any time spent traveling or waiting for services or accessing information that did not include a direct benefit to the protected person be outlined and articulated so the court could determine whether or not that should be included in payment.

A common practice of section 3 (d) is the augmentation of fees during a court hearing. A fee petition will be filed, notice will be given, the court will have considered the request and considered its reasonableness and then in the court proceeding, because time has lapsed, there is an augmentation request that is typically of an oral nature and the counsel is seeking approval of that. This language provides that unless there is a stipulation between all parties a new petition is required for such fee requests and that is not an uncommon practice.

Judge Doherty deleted section 4 of the draft as it repeats what is stated in section 1.

Section 5 provides more detail for the consideration of the nature of the extent of attorney fees and services that are appropriately paid by the court and out of the estate of the ward. Judge Doherty has deleted section 5 (a) as it was addressed earlier in the statutory provisions.

Section 5 (b) reads, "*whether the services advanced, or attempted to advance, the best interests of the ward.*" Judge Doherty said they found other statutes that use that language and those statutes typically have a more specific and articulable requirement for the attorney fee petition than most, so the prioritization of best interest in terms of attorney work was a good addition.

The Brunzell factors are included in the draft including the qualities of the attorney; his/her ability, training, education, skill, and professional standing. Judge Doherty said the research outline shows a wide array of fees even amongst jurisdictions for initial filings and petition to guardianship order. It might cost $950 dollars in one state and $4,500 in another there is still a gray area in terms of practice and expectations, but there is the ability to refer to the standards of practice within our jurisdictions to draw those conclusions.

The court is directed to consider the nature and extent of the difficulty. Section 5 (e) refers to the actual work performed. Judge Doherty said when the court does not have a breakdown of the actual work performed the

judges are at a loss to figure out what time scale and attention was necessary. Many states included whether or not the attorney was successful in the outcome of the advocacy he/she was involved in.

Section 5 (h) refers to attorney apportionment between multiple clients. Judge Doherty said this appeared with enough frequency in their research to include this in the statutory provision to the extent there are multiple clients with multiple billings that those be apportioned between each client and perhaps that would be an attorney who serves a guardian who has several cases and he/she is billing across the board at a standardized rate.

Section 5 (i) refers to the efficiency of the attorney's work.

Section 5 (j) is included in some state statutes. It is the ability of the protected person to pay including the value of the estate, nature and extent of the protected person's assets, disposal net income, and the anticipated future needs of the protected person, and any other unforeseeable expenses that would potential be hampered by the requested amount of attorney fees. Judge Doherty noted "*ward*" would be replaced with "*protected person*."

Section 5 (k) is a critical issue and is significant for litigious matters in guardianship court. Attorneys can lose sight of the priorities within the case and the litigation takes over from best interests, so the question is whether attorneys use their time efficiently or whether they unnecessarily expanded the issues to the detriment of the estate.

The final section is meant to specifically eliminate block billing in every attorney fee requests to ensure the clerical support was not included in the billing statement, to ensure that attorneys did not use or bill for the time that they take to prepare the attorney fee requests.

Section 7, which has occurred frequently in the Second Judicial District, is whether or not attorney fees are being paid by a third party. The court comes across attorney fee payments quite frequently by trusts, and the issue of whether or not that payment has been reviewed and approved by the court may or may not get to the court's review. Section 7 specifies to the extent an attorney is paid for conducting guardianship attorney representation, regardless of the payer, those fees need to be approved by the court.

Section 8 addresses costs.

The draft statute is an effort to provide the Commission a guideline and the Commission could decide what components should be included in statute. Judge Doherty stated they shied away from developing an attorney fee schedule but it is not her position that an attorney fee schedule should not be developed. Judge Doherty suggested the development of an attorney fee schedule would require a subcommittee to conduct intensive research to develop fee schedules.

Ms. Tyrell said she thought the draft was very well done and she appreciates the work that went into the draft.

The statute would apply to attorneys who charge fees in guardianship cases, whether they are representing the guardian or related parties in the guardianship. It would not apply to an attorney who is not asking for fees to be awarded out of the estate.

Mr. Conway was concerned someone could petition for guardianship over a proposed protected person, the proposed protected person has four or five children, all of the children hire their own attorney, and the statute would allow all those attorney fees to be paid by the protected person's estate. He suggested it be limited to the guardian's attorney fees, not every other person who chooses to participate in the action. Justice Hardesty suggested allowing the judge determine this. There had been testimony with claims made that the attorney for the guardian ran up the bill when the argument was the family member and their attorney ran up the bill. The

judge has to decide who is right or wrong in these disputes and it may be that the judge would decide the family member is right and the attorney for the guardian is wrong, so there may be a basis for compensating counsel who is coming into the process to try and correct the record or the process. Mr. Conway agreed that was a good point and asked if the statute could be made clearer. He is concerned where there are three or four attorneys billing on the same case and the court approves the fees. Mr. Conway is hopeful that is not how the statute would operate but was concerned about the potential that it be interpreted that way. Justice Hardesty said there could be instances where multiple attorneys could be representing a guardian, e.g. a complex estate or contested proceeding. The statute allows the judge the ability to regulate who is going to get paid and who is driving the costs up. Mr. Conway said subsection 2 does give the judge control of who is seeking fees right at the outset.

Judge Doherty said Mr. Conway's point has merit because it is very common for siblings to come in with their own attorneys and each and every one of them have an expectation that the estate is going to pay for their attorneys because each and every one of them think that their position is the right position, in the best interest of the protected person. Perhaps a statement in this provision that advises parties that the assumption that the estate will pay for any attorney fees, or clarify that the estate will only pay such attorney fees as the court deems appropriate and in the best interest of the protected person; language that would put those entities on notice that just because they are hiring an attorney and they think they have the right position does not mean they will automatically get paid out of the estate. That is the overwhelming impression of siblings or children of protected persons, that they will all get paid out of the estate. Judge Doherty thinks some of the components in the statute, with respect to whether they prolong the litigation, whether their pursuit of the claim is in the best interest, whether they allowed the efficient disposition take care of that and allows the court to reject those fees without further statement. Judge Doherty would develop a sentence that is clearer, if the Commission thinks that is appropriate.

Judge Walker asked Judge Doherty if there would be any benefit to requiring an attorney, who intends to seek compensation, to give written notice of the basis of his or her compensation by filing with the court. Judge Walker said the cases that seem to have issues are where there is a substantial estate; the parties are three or four months into litigation and have accumulated enormous fees in that short period of time. Judge Walker said if there was a requirement that they submitted to the court, the court could case manage the case. Judge Walker was not sure if that would address Mr. Conway's concern.

Justice Hardesty said the second sentence in section 1 reads, "*The attorney's compensation cannot be paid from the assets of the protected person unless and until the court allows the payment to occur as set forth therein.*" No one has the right to anything unless the court approves it. Judge Doherty agreed and said subsection 2 goes even further with respect to approving the written agreement, and it builds on itself as it goes through.

Discussion Section 7 – Any fees paid by a third party must be disclosed and approved by the Court.

The Commission discussed attorneys who are paid through a trust that are the beneficiary but the trust does not fall under the estate of the guardianship. The attorney takes funds from the trust and it does not require approval from the judge because it is a trust, a third party payer. Ms. Spoon asked if assets could be better defined, including any other assets they are a beneficiary of, not just what they have their name on. Judge Doherty said section 7 was meant to address trust payments. It does not specifically say trust but that is the most common third party payment source.

Mr. Spitzer said that is discretionary now. It is extremely difficult as an attorney for a protected person to understand where money is if they do not have access to the trust, and if the protected person is the name beneficiary, and that is all they know about the trust, then they do not know where the rest of the money is going, even after a guardianship is granted, unless the court has jurisdiction.

Judge Voy said a distinction could be made that if it is the protected person's trust, but if it is someone else's trust that is a different issue. Justice Hardesty said it depends on the extent in which the protected person is a beneficiary. The Commission discussed trust where there could be more than one beneficiary and if fees are being paid out of that trust for attorney fees for a guardianship, there could be some dispute about the conduct of the trust.

Justice Hardesty said the way it is addressed in subsection 7 is adequate. You are expecting to know that an attorney who is providing services to the estate, and seeking compensation from the estate, is not getting double paid. This allows you to get that information. Judge Doherty said she could change the language to say including, but not limited to a trust. Justice Hardesty did not think that change was necessary. The guardian has a fiduciary duty to assure the attorney does not bill twice. If that is happening, then the guardian has the duty to go back and find out why you are getting paid this amount of money from the trust and now you are seeking compensation from the guardianship for the same thing.

The Commission discussed if the trust is not in the guardianship estate then the attorney who is representing the protected person would not know the trust is paying, how much, or for what even though the protected person is the beneficiary. If the protected person is the beneficiary of the trust the attorney has the right to know under the trust statutes. The trust can be brought into the jurisdiction of the probate court. Justice Hardesty said there is an affirmative obligation in this draft statute, that fees paid by a third party must be disclosed and approved by the court so unless someone commits fraud, this disclosure has to be made.

Judge Doherty said under chapter 159 the court has discretionary jurisdiction to take jurisdiction over the trust. In some cases, there is a strong disinclination to allow that because there is that independence, the ability and freedom not to provide an accounting to the court, not to keep the court updated on both sides of the person's existence. The trend is to take jurisdiction.

Mr. Conway suggested instead of having section 7 apply by having fees to any third party it could be changed to any fees that are paid out of the protected person's non-guardianship estate. For instance, a hospital may retain an attorney who files the guardianship petition to appoint a public guardian; certainly that is a third party. The third party pays the attorney's fees directly; they are not coming out of the protected person's estate so there is no reason to disclose the fee agreement with the court.

Ms. Hoy suggested adding the third party needs to be disclosed but not approved by the court if it is not the protected person's assets or the protected person does not have a beneficiary interest in the asset. In the case example, the hospital is paying, the attorney can disclose that information but it does not have to be approved by the court. Mr. Spitzer said any participating attorney must disclose the source of their payments. The way subsection 7 is written it says disclosed and approved. Ms. Buckley said stating non-guardian assets make sense. Judge Steel said you are simply disclosing the fees, and if someone feels they are outrageous they can ask the court to intervene in those non-assets of a trust. Ms. Tyrell said number 7 would say any fees paid by a third party must be disclosed to the court and then you could add a subsection 8 to say any fees paid by the protective person's non-guardianship assets must be disclosed and approved by the court.

Justice Hardesty said they have a beneficiary interest in that trust, he recognizes the trust is a separate entity but beneficiaries of that trust have substantial rights under the trust statutes. Ms. Tyrell did not disagree but the distinction is the guardian may not be in charge of those assets. The guardian may not be the successor trustee of the trust and that is why it would not necessarily be a guardianship asset.

Judge Doherty said the possibility would be an attorney representing a guardian. The attorney prefers to solicit fees from the trust, those fees will be less scrutinized than if they solicited fees from the court where they would

have these various provisions reviewed. That is what we are trying to get to. If there is a bucket of money and the attorney can get $10,000 for the same service the court would only approve $2,500 for that trust, if it is not revealed, it distorts the whole protocol, not only in that case but in many other cases, and that is why we want disclosure and approval when it goes directly to the guardian for the purposes of the protected person. Justice Hardesty said it is not clear why the language that is drafted would not be adequate. Ms. Tyrell said because it includes all third parties so all third party payments would have to be approved. Justice Hardesty said to the person who is the applicant for the fees. Ms. Spoon said then they would not apply for fees if it is a trust and they know they can get money from the trust; then the fees can be as much as they want without any type of disclosure or approval and that is the problem.

Justice Hardesty suggested subsection 7 could read, "*Any fees paid to an attorney who provides services to a protected person or guardian by a third party must be disclosed and approved by the court.*" Ms. Tyrell said what if the family members do not want the protected person's estate to pay; they want to pay the attorney from their own money. That should be disclosed but should the court have to approve or disapprove the fees paid, and would they have the authority to do that? Justice Hardesty said it sounds like what Judge Doherty is saying is, if you are providing services for the guardian, you are representing the guardian, that is your client and the family members are paying you, or a trust is paying you or someone else, the court wants to know about that and how much you are paid. Ms. Tyrell asked but does the court have to approve the fees. Justice Hardesty said yes, because the court is concerned the attorney will evade or attempt to evade the requirements of the statute, and wants to know what the attorney is being paid outside the guardianship for services rendered to the guardianship. Judge Doherty said that was correct.

Ms. Spoon said what we are concerned about is not so much anyone's money it is the money that belongs to the protected person. Any fees paid from the protected person's non-guardian assets need to be disclosed and approved. That is what needs to be looked at. Not anyone's third party that has nothing to do with the protected person's assets. It is the protected person's assets that are not being looked at now, i.e. trusts and other things.

Justice Hardesty said he had a problem with the term non-guardian assets, if he is the beneficiary in a trust, the trusts own the assets, but he has an interest in that trust, and if you are paying fees from that trust then he would be paying a quarter of them.

Mr. Conway said what happens is someone will have a trust with provisions in the trust where the trustee takes over if someone becomes incapacitated, they will take over their assets but they do not have sufficient authority to act as the guardian of the person so they will petition for authority to make medical decisions for the person but the finances of the person are never really under the jurisdiction of the court because they are not the guardian of the estate only the person. The trustee of the trust has the authority to act, to pay the attorney fees of the individual who petitioned for the guardianship over the person. Those estate assets are never really reviewed by the court because it is just a petition over the person not the estate.

Mr. Spitzer explained there are situations where the protected person that formed the trust, was the initial trustee, then the successor trustee petitions for guardianship of the person to have power to move them from their house and sell the house for the benefit of the trust. In a situation where a trust that was initiated by the wealth of the proposed protected person, the trust should be under the jurisdiction of the court for guardianship purposes for both the guardianship of the person and the estate. That is going to prevent trustee malfeasance and it is going to provide adequate assurance that there is enough money in the trust to sustain that person in the least restrictive environment. The money from the trust is being spent to sustain that person. It is important for a judge who is going to monitor the personal existence, the lifestyle of the protected person, to know how much money is out there to be able to do that.

Ms. Lora Myles said in the public guardian arena they often see where the public will get custody of the protected person and are the guardian of the person. The person who is handling the trust is, oftentimes a child of the protected person, and refuses to pay for the protected person's care. Since the trust is a part of the guardianship the only way to get control of those funds and to pay for the protected person's care is for the court to take jurisdiction over the trust but that becomes a battle if the child says no, we are the heirs under the trust, we are going to spend the money the way we want to, and we do not care what happens to mom or dad; that is very common.

Justice Hardesty said the court could then convert the case to a guardian of the estate and proceed to require the trust to account. The fact that they are in a guardianship does not change the rules regarding the relationships between beneficiaries and trusts. Ms. Buckley said except the protected person does not have the ability to file a lawsuit. Justice Hardesty added the guardian has the fiduciary duty to do that. Ms. Buckley agreed and said the only remedy for an attorney for a protected person would be to file a motion that the guardian is failing to do their duties and that they are required to bring the trust in. Ms. Buckley said she would volunteer to draft some language, but NRS 159.113 subsection (l) states that before taking any of the following actions, the guardian of the estate. Ms. Buckley said you could do a stand-alone statute that limits it to that, so your concern about other trusts that are outside the jurisdiction of the trust are excluded and to say upon those cases an attorney for the protected person or other person upon motion can also bring the request that the court assume jurisdiction of those types of trusts where they feel that the income is not being used for the benefit of that protected person.

Judge Steel said if you do not have jurisdiction over the estate the court could not do anything with the trust. Justice Hardesty that is his point. The hypothetical Mr. Spitzer provided was the guardian of the person, the statute only governs guardian of the estate but his point is well taken. If you are going to pay the medical bills, then the judge is going to appoint a guardian to both. Once you have a guardian of both you have jurisdiction to do what you need to do including bringing those trusts in. The judge wants to understand if someone is being paid legal fees outside and away from the assets of the guardianship and this requires a disclosure of that and approval if necessary. Justice Hardesty asked why the language in section 7 would not cover that. Judge Doherty stated she is happy with the language in section 7. She said NRS 159.183, which is the authority of the court to approve reasonable fees for a guardian who is retaining services to pursue a guardianship regardless of whether it is a guardianship of the person or guardianship of the estate. Even if it is just guardianship of the person the court still approves the fee so this falls in line with fee approval triggered by the guardian accessing professional services and how it would be evaluated and she thinks it would be consistent with our statute it just elaborates more specifically for our court. Justice Hardesty said if there is the least bit doubt in section 7 you could say, "*Any fees paid by a third party including a trust, which the estate is a beneficiary*," and then proceed. Judge Doherty agreed that is better.

Justice Hardesty asked if anyone would like to make a motion.

Kim Spoon moved to approve the draft statute for attorney fees with the edits provided by Judge Doherty and the edit he made. Elyse Tyrell seconded the motion. Motion passed unanimously.

Justice Hardesty thanked Judge Doherty and her intern, Mr. Tyler Hart, for all their work on this.

Guardian Fees

Justice Hardesty asked if the Commission wanted to make statutory changes to NRS 159.183, as it currently reads relating to guardians and their compensation. The primary issue the Commission discussed is whatever fees are going to be paid to the guardian they will be part of the initial preliminary and subsequent permanent plan, and the fees would be reasonable and the court would have to prove who they are paying. This has been addressed

in the context of the statutes that Ms. Buckley had drafted. Justice Hardesty was open to any other motions or suggestions. Justice Hardesty thanked Ms. Bookout for her summaries and work on this topic and asked if she thought more needed to be done in this area.

Ms. Bookout responded she does not think more needs to be done. She said the Commissioners agree that the standard is "just and reasonable" and understand before any guardian fees are paid the court must approve them. The Commission has discussed whether the fee should be set at the outset and/or whatever the agreement is, and that is a good idea. Ms. Bookout said there are some states that require the fee…whatever we decide that to be…the rate be set at the beginning so all parties have some idea going forward what the guardian fees are going to look like. The fees could be modified later on but in the initial plan there should be some idea financially of what the fees will look like. Ms. Bookout said the Commission might want to think about how fees are set when the protected person is indigent. Their research found some states allow for guardian fees to be paid by the county. In Minnesota, the Board of County Commissioners sets the fee schedule for the Public Guardians and that is the same fee schedule that would be applied for an indigent protected person's case. Ms. Bookout said one of the things the Commission has heard from the testimony is the estate was depleted due to guardian fees. When you have a tiny estate those monies can be depleted quickly. In an effort to avoid that problem some states have the county pay the fee. Ms. Bookout said some states set a cap for the fee that can be charged, i.e., a percentage of the estate and some states, like Florida, actually set a fee rate depending on years of experience as a guardian. Ms. Bookout does not know where the Commission would want to go with that but those are some of the ways states have assigned rates for guardian fees.

Justice Hardesty asked Judge Doherty and Judge Steel if they wanted to see a different approach to how they review and approve fees, other than the preliminary plan, and then connect those fees to a "just and reasonable assessment."

Judge Doherty said she can operate under both a more general or specific plan. She added the Commission has articulated with more specificity, the kind of the expectations and reaffirmations that guardians should not be charging guardian fees for certain things. Judge Doherty said this is edging its way into the culture of the fee charges. It is good to have specific language, on the other hand, she thinks we have progressed to the point that we can use the "just and reasonable standard" sufficiently in the courts. Judge Steel agreed she could operate either way. Judge Steel would prefer to have an amount of the fees the protected person's guardian and attorney plan to bill in the initial budget so the court could review and approve those fees.

Justice Hardesty said the Commission will let the preliminary plan and the budget process take its course and then see if it needs to be reviewed later. The Commissioners agreed.

Bill of Rights Statutes

Ms. Buckley said the Bill of Rights was examined, adopted, and approved at the last meeting and there are proposed statutory changes that are separate from the Bill of Rights. Ms. Buckley said the Bill of Rights could state clearly what the right is in one sentence and that would be separate and apart from a statutory change. In drafting the Bill of Rights and statutory changes Ms. Buckley reviewed the guardianship materials from other states, including Florida and Texas. There is a good deal of language for duties for an attorney, Guardians ad Litems, court visitors, and advocates, and the Commission can begin to put some definition on those terms. There is the ability to define, through administrative order (ADKT), Court Rules, and/or court policies even more details on the roles of an attorney, advocate, or court visitor, if that is the direction of the Commission. A subcommittee may need to review those areas further. Ms. Buckley reviewed New Jersey standards for accountings, representing protected persons, as well as reference materials from Alaska, Utah, and West Virginia. She suggested an ongoing subcommittee might look at establishing a guide book or policy book.

Justice Hardesty asked the Commission to approve the Bill of Rights including the recent edits. Mr. Jay Raman stated the Bill of Rights seemed to be directed toward the protected person, the language at the beginning states "*his* or *her*" or "*he* and *she.*" Mr. Raman suggested stating "*you*" to remain consistent with the rest of the document. Justice Hardesty stated the edit would be to clarify "*person*" i.e. "*proposed protected person*." Mr. David Spitzer asked what role the Bill of Rights would play would it be statutory, a mandated attachment to petitions that must be personally served on the proposed protected person, or would it be part of the guardianship oath. Justice Hardesty stated the use of the Bill of Rights was to be determined, if passed.

Judge Walker moved to approve the Bill of Rights including the suggested edit. Ms. Debra Bookout seconded the motion. The Bill of Rights was unanimously approved.

Ms. Stephanie Heying reminded the Commission that on June 21, 2016, Judge Walker had moved to adopt the Bill of Rights with the understanding that they would be included in the guardianship oath and be subject to enforceability through a private right of action. Justice Hardesty thanked Ms. Heying for the reminder and noted this point covered Mr. Spitzer's concern of how the Bill of Rights would be used. In addition, a copy of the Bill of Rights must be provided to the person who is the subject of guardianship. Mr. Spitzer stated the easiest way to do that would be to require a copy of the Bill of Rights as part of the petition and have it be personally served to the proposed protected person. Ms. Tyrell stated sending the Bill of Rights with the petition may be premature and suggested it be provided with the entry of the order. Mr. Tim Sutton stated the Bill of Rights provides the proposed protected person the opportunity to review it; it could have a potential benefit to the person. Justice Hardesty stated the Bill of Rights would provide a benefit to the proposed protected person before and/or after the guardianship would be considered by the court, serving the document in advance would provide a benefit to understand the person's rights. Ms. Terri Russell suggested editing the Bill of Rights to state "*If you are the subject…*" to make it appropriate to serve the paperwork to the proposed protected person. Mr. Spitzer stated that would work along with the Court Rules requiring the document to be personally served. Ms. Russell suggested re-numbering the order of the Rights. Judge Steel asked for clarification regarding how the Bill of Rights would coincide with the oath. Judge Walker stated the Bill of Rights would be meaningfully provided to the proposed protected person before any substantive hearing. Ms. Tyrell suggested including the Bill of Rights with the citations. Judge Steel stated it would be acceptable to have the Bill of Rights as a document for the guardian to sign off on and file separately; it may be equally overwhelming for a person to be read the Bill of Rights as it would be to have the document served to them. Mr. Spitzer stated it would be important for both the proposed protected person and the guardian to know what the person's rights are.

Mr. David Spitzer moved that a person subject to a petition for guardianship would have the Bill of Rights discussed, the Bill of Rights would be served with the petition, and it would be acknowledged upon the administration of the guardianship oath. Mr. Tim Sutton seconded the motion.

Ms. Bookout stated there would need to be a mechanism, beyond serving documents, in the event a person could not read the Bill of Rights. Justice Hardesty encouraged the Commission to consider that the court adopts rules that assures the Bill of Rights is communicated to the guardian and the proposed protected person by Court Rule. Senator Harris suggested a reorganization of the Bill of Rights to address what the rights of the person are before, during, and after a guardianship is imposed to avoid confusion for a proposed protected person in regards to where they are in the process. Ms. Buckley stated reorganization would not be needed because many rights apply at all stages of the proceeding, it would be up to the proposed protected person's counsel to explain their rights at every stage. Senator Harris expressed concern for proposed protected persons that do not wish to have counsel that can clearly articulate the rights of the person, it would be beneficial to those individuals for the rights to be reorganized and she would appreciate consideration of her concerns. Justice Hardesty asked Mr. Spitzer to amend the motion to request the Supreme Court undertake, by rule making, the dissemination and communication of the Bill of Rights to a proposed guardian and to a proposed protected person.

Mr. David Spitzer moved to approve the amended motion. Mr. Tim Sutton seconded the amended motion. Motion passed.

The Commission discussed language proposing statutory and Court Rule changes concerning lawyers who practice in the guardianship area. Justice Hardesty noted the Indigent Defense Commission (IDC) spent many years developing standards of performance that govern the way attorneys practice criminal defense, outlining in detail the expectations and guidelines that apply to an attorney representing an indigent person charged with a crime. It specifies the types of investigations they must undertake, the type of CLE they must undertake, what they must do to bring a motion to suppress, etc. Using that pattern and following up on some of Ms. Buckley's references, Justice Hardesty asked the Commission to consider using Court Rule, a set of rules that would govern the duties of an attorney when representing a proposed protected person. Additional work would be needed in this area but the Commission would need to endorse the idea as a matter of policy and that would be the recommendation. Justice Hardesty suggested the Commission support asking the Court to consider adopting the rules governing the practice of attorneys in this area. Ms. Buckley stated upon further research, some states had certain rules in statute that were very limited and had a broad overview and then the Court Rules or policy handbooks became more explicit. Justice Hardesty encouraged the Commission to leave the regulation of the practice of law to the constitutionally designated court system rather than dispute the separation of powers. Justice Hardesty stated it is an evolving process the Court would need to formulate a set of Court Rules; it would be important for the Court to know whether the Commission recommends the Court should engage in the rule making process that governs standards of practice by attorneys in this area.

Judge Cynthia Dianne Steel moved to urge the Court to adopt standards of practice governing the practice of law in this area. Judge Egan Walker seconded the motion. Motion passed.

Ms. Susan Sweikert suggested an edit to number 2 (vii), which states "best interest of the *child*," the word "*child"* should be changed. Ms. Buckley agreed to the edit.
Ms. Arnold addressed the points of Guardians ad Litem (GAL); section 8 (b) "*and is not an attorney*" should be stricken, it should be left for the judge to decide according to the situation. In many cases having a GAL, who is also an attorney is helpful. The text in section 9 (b), "*not receive compensation*," should be stricken, that should be at the option of the court. Including the language may eliminate good people and necessary situations if payment is restricted. Justice Hardesty agreed that compensation should be reviewed by the court. Judge Doherty stated there are GALs who do receive compensation as attorneys, compensation should not be barred. The language is meant to segregate GALs who are attorneys from GALs who are not attorneys and contemplate the possibility of payment for legal counsel. Justice Hardesty stated the two edits to the section would be to remove the restriction against an attorney being appointed and alter 9(b) to allow GAL compensation to be determined by the Court. Ms. Buckley stated in drafting the document she was hopeful that one of the Commission reforms would be to encourage the creation of a program for volunteers, in most of those cases a proposed protected person may be indigent or have very limited funds and cannot afford to pay anyone, the volunteer program would be a non-profit organization and the volunteers would not be paid from the proposed protected person's estate, the paragraph regarding compensation was drafted for those reasons. Ms. Buckley noted paragraph 8 (c) was drafted for the exception in which a high level attorney, for example, would be needed and that person could still be appointed and paid. Justice Hardesty reminded the Commissioners the Commission had previously voted on encouraging the use of volunteer programs in all districts. Ms. Goodman stated the volunteer program she had suggested would be modeled after CASA and payment would come from grants, not a proposed protected person's estate. Justice Hardesty stated having the court review payment would be a way to monitor when it is appropriate for an attorney or GAL to be compensated. Judge Steel suggested adding a portion stating volunteers should keep a log of reimbursable expenses.

Ms. Kim Spoon expressed concern regarding moves. Sometimes moves are made for the health and safety of the proposed protected person but at times moves are made due to financial reasons; if a proposed protected person cannot afford the care they need. Finances would need to be acknowledged in the language. Ms. Spoon suggested editing the language which states, "*wishes to*" to "*needs to*" in section 2 (c). The Commission discussed concerns regarding moving a protected person from one place to another and the issue regarding notice for moving a person. Judge Walker stated the Rules of Civil Procedure explicitly apply to Chapter 159 cases and provide outlets for emergency relief. In certain circumstances, it may be appropriate to seek ex parte relief from the court. Justice Hardesty stated when the court is deciding the question about moves it would have to make a decision based upon the best interest of the protected person, not based on the guardian's or family's choice. Judge Doherty stated the decision to move a protected person is for the best interest of the person. Subsection 2 (e) addresses some of Ms. Spoon's concern with respect to exigent circumstances. Some of the issues may be addressed by this Commission or another commission in the future in the meantime, between subsection (e), the ability to file an ex parte motion without too much difficulty, and with the expectation that the decision will be the best interest of the protected person; the paragraphs addressing moves are adequate. Ms. Buckley noted section 2(c) regarding moves states "*when a guardian or proposed guardian wishes to admit a protected person to a nursing home or change the residential placement of the person from a private home to…*" a more restricted placement, a motion needs to be followed. This is similar to language in NRS 159.079, paragraph 6, which discusses moving to a secure residential facility and is consistent with keeping the protected person in a least restrictive environment. People have been and continue to be moved from familiar surroundings for the convenience of the guardian when they have the money to stay where they are and this causes harm, which is why the new rules are being discussed. Ms. Spoon suggested adding a medical provision in section 2 regarding moves to address prior notification to the protected person in the event of a move for their best interest. Mr. James Conway expressed concern having a healthcare physician authorizing a move without any notice to the protected person. Currently under the physician's certificate there is a place for a medical professional to check off whether or not the proposed protected person should attend a hearing, many times a doctor has checked the box explaining that if the person attended a hearing it would be detrimental to their health, cause confusion or anxiety, but it is not always checked off for medical expediency rather than a true evaluation. Judge Doherty stated judges turn ex parte motions around within 24 hours, schedule ex parte hearings on a very prompt basis, and if the practice turned to seeking emergency court intervention for the crises, the best interest standard could be met, the prior court advanced authority could be addressed and the 10-day hearing after the initial order could gather all the parties to address the ongoing placement of the individual. The existing remedies for those crises have been built in but have not been practiced and it would be a good idea to move towards that. Justice Hardesty asked the Commission if there were further questions regarding the proposed statutory modifications, the Commission had no further questions or comments.

Rights of a Person Facing or Under Guardianship that Should be added to Statute

1) **Visits/Communications**

Ms. Elyse Tyrell moved to endorse this policy change to the statutes regarding visits and communications. Ms. Julie Arnold seconded. Motion passed.

2) **Moves NRS 159.079 (4)**

The Commission discussed edits to paragraph 2. Justice Hardesty suggested changing "*wishes"* to "*intends"* in sub (c). Ms. Tyrell asked if language could be added in sub (e) in regard to finances. Judge Doherty thinks that is too broad of a set of circumstances. Finances covers a broad spectrum of judgment and absent an eviction she is not sure finances is a basis to do that without contact and notice. Ms. Tyrell would like to see some ability to act if it is not necessarily a health issue. Justice Hardesty said the judge would make the call.

Judge Doherty moved to pass section 2, Moves, with the edit to sub (c). Ms. Debra Bookout seconded the motion. Motion passed.

3) **Remedies – No edits**

Ms. Elyse Tyrell moved to approve section 3, Remedies. Mr. David Spitzer seconded the motion. Motion passed.

4) **Initial Plan**

Ms. Elyse Tyrell asked if "*Upon the filing of a guardianship action*…" is the right statement. She said a budget is being completed within so many days and the proposed preliminary care completed within a reasonable time. Justice Hardesty suggested, "*Upon the filing of a guardianship action, and within a time specified by the Supreme Court, the proposed guardian shall also file*…" Judge Doherty agreed with the edit. Judge Doherty added the latest point at which that proposed preliminary plan should be submitted is at the full guardianship hearing 20 days later. The Second Judicial District contemplates the proposed preliminary care plan can be filed rather quickly, preferably with the petition, and then at the full guardianship hearing, the court can discuss the plan further, recognizing that the guardian does not have all that information. The number one question is from this day forward after you get this guardianship what is your plan with respect to placement and care of the protected person. If we delay this, it should be filed no later than the full hearing on the guardianship petition.

Justice Hardesty said he suggested the language be adopted by the Supreme Court because he would like the Court to vet and address issue, which ultimately needs to be a statewide rule.

Ms. Buckley said if the members will recall from the last meeting the language was more extensive and it was paired back significantly and relabeled preliminary care plan. The idea behind it is if you are the attorney for the protected person and there are dueling family members knowing what they intend generally helps you know what your position should be. The items requested were also paired down. You may not know the full amount of the assets but if you have a daughter that says I plan to have my mom come back to me in Michigan and live with me and she has $2,000 a month then that would generally care for her versus a son that says I would like to put her in a group home with 8 other unrelated people you have a road map of the case and that is very helpful early on even if it is supplemented by due diligence. Justice Hardesty said this is another reason why he thinks the Court should evaluate this by Court Rule and see what is best in a preliminary plan and what the contents should look like including the edit.

Judge Egan Walker moved to acknowledge and approve section 4, Initial Plan, with the edit proposed by Justice Hardesty. Mr. Jay Raman seconded the motion. Motion passed.

5) **Accountings NRS 159.179**

Judge Doherty moved to accept the recommendation on section 5, Accountings. Ms. Terri Russell seconded the motion. The motion passed unanimously.

6) **Hearing of Account NRS 159.181**

Justice Hardesty deferred item #6 until the Commission discusses the notice issues under agenda item III (g).

7) Appointment of Attorney, duties NRS 159.0455

Justice Hardesty deferred item #7 to Court Rule as the Commission had previously discussed. There were no objections.

8) Appointment of Volunteer Guardian ad Litem, Court Visitor, or Attorney Guardian ad Litem

Ms. Julie Arnold had requested striking the language in subpart (b) *and is not an attorney.*

Ms. Julie Arnold motioned to approve section 8, Appointment of Volunteer Guardian ad Litem, Court Visitor, or Attorney Guardian ad Litem with the edit. Ms. Elyse Tyrell seconded the motion. Motion passed.

9) Qualifications for Non Attorney Guardian ad Litem or Court Visitor

Justice Hardesty said there was a previous discussion that item *(b) would be changed and the compensation would be determined by the court.* Is there a motion on that item? Ms. Arnold motioned to section 9, Qualifications for Non Attorney Guardian ad Litem or Court Visitor, with the edit. Ms. Rana Goodman seconded the motion. Motion passed.

Additional discussion

Mr. Jay Raman would like to amend subsection (c) that says not have any felony conviction. There are crimes against the elderly and vulnerable which are gross misdemeanors and Mr. Raman suggested adding gross misdemeanor. The Commission discussed expanding the language in subsection (c).

The edit would be that "*compensation would be determined by the court*" and *item (c)* is would be change read, "*include any conviction for gross misdemeanor or felony."*

Ms. Buckley was not sure if the Commission was going to want the qualifications of the Guardian ad Litem included in Court Rule or in the statute. In 432B, they are already in the statute so it may be beneficial to keep them there. Justice Hardesty said this requires specialized training or skill in these areas. It would seem the standards for Guardian ad Litem could be established by Court Rule.

Justice Hardesty suggested changing 9 (d) to say, *"…have specialized training or skill, according to Court Rule, in the following areas."* The subject the Commission is referring to is not attorney practitioners but non attorneys. This provide an opportunity to reach out to those who are developing volunteer programs as an example, and collaborate with them on what kind of training they have in mind, and what kind of training the court views as appropriate. Ms. Goodman agreed with the edit.

Justice Hardesty asked if Commissioners agreed with the edits to item 9, the qualifications on non-attorney guardian. Motion passed.

10) Advising a proposed protected person or protected person of their Legal Rights NRS 159.0535

This would be deferred to Court Rule.

Supportive Decision-Making

In a prior meeting, the Commission had discussed the financial Power of Attorney (POA) statutory provisions should suffice and not require the addition of the Supportive Decision-Making agreement in the bucket of tools for alternatives to guardianships. Judge Doherty kept coming across more information on the topic and asked to bring the topic to the Commission for a final look. Supportive Decision-Making is an evolving trend internationally and now nationally. It is a specific protocol by which a person who is incapacitated, but not unable to communicate their desires and decisions to another person, receives the ability to continue to control their decisions by extending the body of people who may assist them in making those decisions. The incapacitated person would designate people they trust and would sign a Supportive Decision-Making agreement. It is not a POA. A POA allows someone else to make a decision for you. They are two different documents. Judge Doherty talked to Mr. Cavallera following the last Commission meeting. Mr. Cavallera redrafted the POA to include a Supportive Decision-Making section. Judge Doherty said a Supportive Decision-Making agreement and a POA could co-exist or stand alone; education is the issue and getting people to understand the alternatives to guardianship.

Judge Doherty explained there is a grant opportunity through the National Resource Center for Supported Decision-Making. Six states would be awarded $4,000 to work statewide, to educate and publish information about the Supportive Decision-Making protocol. Judge Doherty said with a Supportive Decision-Making Agreement the person retains all of their authority and delegates assistance to others to effectuate their desires. In a POA, that person makes the decisions for the agent, for the grantor of the authority. The Supportive Decision-Making Agreements would target our younger individuals who are not so disabled that they are not able to make decisions about their future but who want to remain independent, surrounded by a group of trusted individuals who will effectuate their will. Judge Doherty asked the Commission to consider whether it would be interested in applying for a grant. Judge Doherty volunteered to make the application and distribute information in whatever way the Commission thought was sufficient. She asked the Commission to consider allowing Supportive Decision-Making agreements to exists with or outside POAs; to allow those tools to be an option for those persons who would otherwise be subjects to guardianship.

Ms. Ramm noted a technical point, it seems this would not go into chapter 159. Judge Doherty said many states take the position it is an agreement and does not need statutory authority but she thought statutory authority would be a good idea. Judge Doherty said it would be dispersed and relied on the same as POAs but it could be wherever the Commission chooses. Judge Doherty said the National Guardianship Association presented an article that was circulated to Commissioners *Rethinking Supportive Decision-Making*. She is asking the Commission to rethink Supportive Decision-Making to allow it as a possible tool in their jurisdiction.

Ms. Spoon noted there is a need clarification of what the Supportive Decision-Making is and what it means. The grant could assist in setting some type of criteria to clarify who the agreements work best for. Judge Doherty said the agreements are typically used with intellectually challenged and developmentally disabled adults who are trying to maintain and sustain their level of independence. They are able to convey their will and decision making but need assistance in effectuating those decisions rather than giving away their decision making authority.

Justice Hardesty asked if Commissioners supported an application for a grant to further investigate Supportive Decision-Making. Judge Doherty said she could apply for the grant on behalf of the Second Judicial District or as a state project within the Administrative Office of the Courts (AOC). The grant does specifically say the purpose is to increase knowledge of and access to Supportive Decision-Making by older adults and people with intellectual and developmental disabilities. That is one component of the two-prong priority for the grant so the Commission would have to say they are moving towards Supportive Decision-Making to be able to represent possible eligibility for the grant. Justice Hardesty asked if the Commission supports further study of the subject matter, and assuming

that the Commission does then that supports the grant and the Commission could further pursue the information and review it.

Judge Walker moved that the Commission supports of further study of the supportive decision making and a subset of that would be that the Commission supports application using Judge Doherty's services for this grant to study Supportive Decision-Making. His rational is drawing a broad analogy of chapter 432B in child dependency for the state has to take reasonable efforts to return a child home and place a child in least restrictive alternatives this is really about least restrictive alternatives for our protected persons and for that reason he strongly supports this. Terri Russell seconded the motion.

Judge Steel expressed concern and had some questions regarding the level of proof the court would need to have, who would sign off on behalf of the child that they have contractual capacity to be involved in Supportive Decision-Making, etc. Judge Steel would need more information before she could support this. Justice Hardesty said the motion is to further study the Supportive Decision-Making Agreements. Judge Steel said the state has to be moving in that direction, that has to be stated in the application. Judge Doherty is not sure "study" is going to be a sufficient word. The grant language is "increase knowledge of and access" to Supportive Decision-Making.

Judge Walker amended his motion to include study and increase the knowledge of and access to Supportive Decision-Making Agreements. Judge Walker said we have to explore least restrictive alternatives and we have to have an array of tools for least restrictive alternatives for protected persons and this is one of those tools. Judge Walker would amend the motion to say that the Guardianship Commission would support movement toward a system for Supportive Decision-Making in Nevada. Ms. Russell seconded the motion.

Ms. Arnold said given that this Commission has two meetings left the motion supposes a continuation or an establishment of an ongoing Commission in order to do the study. Justice Hardesty said further study could depend on whether or not the Supreme Court adopts the recommendation of a permanent Commission but the court and/or AOC could pursue the grant and study Supportive Decision-Making Agreements. Judge Doherty can apply on behalf of her own court indicating that at least at this stage this Commission has expressed support for expanding its knowledge base in this area or this Commission could sit silent and do nothing and she could still apply for the grant. Ms. Bookout said the Commission should not miss the opportunity to apply for this grant. The Commission is confirming some of the changes and we need to explore all that is available for our guardianships.

Justice Hardesty asked those in favor of the motion to raise their hands. One member abstained, one member voted nay. Motion passed.

Notice Requirements

Commissioners were asked if they had any further comment on the recommendations. Justice Hardesty said there is some level of language clean up but the Commission should focus on the concepts for revisions to notices and the reason for those. Specific statutory language could be addressed, if the ideas are found to be appropriate to the Commission.

Judge Doherty said the point is to have every kind of hearing be noticed to all the parties and to have all relevant documents, including reports and accountings be noticed to all the parties. Notice to all the parties contemplates notice within the second degree of consanguinity or consistent with those generalized requirements for all substantive matters. Everyone gets notice for the sale of real estate, everyone gets notice of the accounting, everyone gets notice of the personal annual report, unless that is narrowed i.e., HIPAA, everyone gets notice of a change in placement, etc. The large segment of the statute contemplates notice to everyone and then there are

various smaller sections that did not reference back to notice so the recommendations are meant to include notice to all parties for all hearings.

Justice Hardesty asked if Commissioners had questions to the objectives of this recommendation. Justice Hardesty said the motion would be to endorse the recommendations that are made on pages 103-104.

Mr. Jay Raman moved to endorse the recommendations for notice that were included in pages 103-104 of the August 26, 2016, meeting materials. Ms. Susan Sweikert seconded the motion. Motion passed.

Judge Steel would like something to prove the protected person received service. Justice Hardesty asked Commissioners if the subject of proof of service has been an issue. Ms. Bookout said it can be a problem. She has had people state they had not received notice, she was not sure why that was but it is one of the complaints she has heard. Mr. Spitzer said when they have issues with proof of service it is not usually with the protected person because their attorney has been served. It is an issue with family members when addresses are out of date or no effort has been made to identify them. Another example provided is when a proposed protected person is served with a "care of" status to the administrator of the facility and the protected person does not see the petition.

Justice Hardesty suggested personal service and proof of that personal service by affidavit be provided for the protected person for notice of the petition.

Justice Hardesty asked if proof of personal service by affidavit would address the concerns expressed by Commissioners. The Commissioners agreed it would and endorsed the requirement that proof of personal service by affidavit be required to show proof that a proposed protected person was served notice of the petition. Commissioners endorsed the requirement. The motion passed.

Justice Hardesty said the process and timing for filing and evaluating an inventory and care plan for the protected person was addressed in the recommendations provided by Ms. Buckley that the Commission voted on earlier.

Management/Administration of the Protected Person's Estate

The meeting materials included statutory edits addressing the management/administration of the protected person's estate. The materials also included information on estate sale companies and auction houses.

Judge Steel said the statutes regarding the sale of property and the guardianship court do not use the same terminology that is used in real estate transactions. The intent of the edits was to make the language understandable to lay persons. The first part of the statute says contract of sale when it should be permission to sell, so the statute has been reorganized from the first petition and the steps you have to go through to confirm the sale. Judge Steel stated Mr. Alan Pearson works in real estate and assisted in drafting the edits, which were then passed on to the Rules Committee, chaired by Dara Goldsmith.

The Commission discussed NRS 159.146 and auctions in open court. Ms. Spoon asked if the judges want to have some type of regulation about the bids or if they would prefer to have no regulation on the bids. Mr. Spitzer noted without regulation the bids could go up a $1 at a time. Ms. Spoon agreed, and said she was referring to the deletion of subpart (c). Judge Doherty uses those guidelines very strictly and asked why the language was being deleted, was it redundant? The response was whether the court is doing this in writing or orally the court is using the same increments. Ms. Spoon asked if 4 (b), "*may conduct a public auction in open court*" should be deleted because it is already included in subsection 1, "*at the hearing to confirm the sale of real property*…" Judge Doherty said the public auction being referred to is the public auction in the court room. Judge Doherty wanted to know what was being eliminated from 4 (c), the standard by which the public auction is conducted in court.

Mr. Alan Pearson explained the language the Commission is discussing has to do with fixed percentages that are set in statute. If an item is being auctioned, you are trying to get the best price. The best price might not be in $5,000 increments as is set in the statute; it might be a $1,000 increment. If $5,000 is set in statute, there might be a loss of $2,000 or $3,000 because someone is not going to bid $5,000, they will stop before that. This is why this language was deleted. Commissioners discussed the increments and whether or not those should be changed or eliminated because the statutory bids may not produce the best price. Commissioners would like more time to review the edits. Judge Steel asked if anyone has suggestions to please send them to her. This item will be deferred to the September 16 meeting.

Office of State Public Guardian

Mr. Sutton conducted a survey among the rural public guardians. The offices were asked three questions in relation to a Statewide Public Guardian's Office. All of the counties, with the exception of one, responded to Mr. Sutton's survey.

Question 1. Do the public guardians employ or contract with any accountants, auditors, or investigators?

Most of the public guardians do not employ accountants, auditors, or investigators. Four public guardians did contract with accountants, one used an auditor, and one used an investigator.

Question 2. Would you be in favor of or opposed to the formation of an Office of State Public Guardian?

Eight respondents were conditionally in favor of, five were in favor of, and two were opposed to the formation of an Office of State Public Guardian. Some of the concerns or questions that were raised included the duplication of efforts between the Public Guardian's Office and the State's Public Guardian's Office, how it would be funded, loss of personal connection, there was not enough information provided for them to know if they were in favor of or opposed, and logistics.

Question 3. What eligibility requirements or restrictions do you have in place that limits your ability to file for guardianship of proposed wards?

Most of the eligibility requirements were related to age. Most were of a minimum age of 60 and above, and there were a couple where the proposed protected person had to be at least 18 years old. One had a residency requirement, one had a requirement that the person not be incarcerated, a couple had caseload limits ranging from 40-60, and one public guardian had a pay source requirement that there had to be some kind of pay source e.g. social security or something.

Mr. Sutton was also asked to provide a resource as to funding and resources. Mr. Sutton included a chart that had been provided at one of the first meetings by Ms. Kathleen Buchanan.

The Commission discussed concerns as to why the public guardians felt there were restrictions that limited their ability to file for guardianship for proposed protected persons. Mr. Sutton explained some of the responses indicated the limitations were county imposed and some were self-imposed by the virtue that the public guardian does not have enough time and/or resources to take on all the cases. The graph provided in the materials indicates some citizens in the rural counties may not have the benefit of guardianship services for a variety of reasons. The reason often cited in the responses was the lack of resources to meet the needs of the proposed protected person.

Justice Hardesty said based on the responses it would seem to support the notion that there needs to be an enhancement, at least, whether it is an enhancement at the county level of public guardianship services.

Ms. Lora Myles noted many of the restrictions are not imposed by the public guardian themselves but by the County Commissioners. Ms. Myles said the restriction on age is by county resolution in most of those counties, restriction on residency is by statute, and the restrictions on the number of cases are limited by their County Commissioners and funding.

Mr. Sutton said the graph shows one county/city-imposed but that does not mean when the public guardian responded that they knew or indicated this so there could be more restrictions listed that were county/city-imposed.

There was a discussion about whether or not the statute that governs public guardians includes language that if there is no pay source the public guardian office is limited to or does not have to take the case. Ms. Buckley said they had recently read the statute in chapter 253 and it does not say that the counties can deny services if there is no pay source. There is no legal justification for a public guardian's office to turn away a case because a person is indigent.

NRS 253.250 reads:

The court may, at any time, terminate the appointment of a public guardian as an individual guardian of a person or of an estate upon petition by the ward, the public guardian, any interested person or upon the court's own motion if:

1. It appears that the services of the public guardian are no longer necessary; or
2. After exercising due diligence, the public guardian is unable to identify a source to pay for the care of the ward and, as a consequence, continuation of the guardianship would confer no benefit upon the ward."

Justice Hardesty said one of the reasons he asked Mr. Sutton to conduct the survey was the concern with the availability of public guardianship services throughout the state. This concern is the reason Justice Hardesty included the recommendation that a Statewide Public Guardian's Office be created so there is a uniform approach to guardianships.

The Commission discussed the use of investigators and auditors, similar to the Florida model. The Commission discussed the efficiency of consolidating services and having trained investigators and auditors available to the rural counties versus requiring all counties to hire their own investigators and auditors. Investigators and auditors would provide the judges the expertise to evaluate inventories, fee applications, etc. Justice Hardesty would like the Commission make recommendations about best practice, which involve the use of independent investigators and auditors. Judge Walker mentioned the Minnesota Conservator Account Auditing Program (CAAP). Judge Walker noted the language in NRS 253.250 was added in 2009, and was a bi-partisan bill.

> **Judge Egan Walker moved that the Supreme Court Guardianship Commission support promulgation of rules through the Nevada Supreme Court to establish statewide standards for guardianship investigation, administration, and accounting and otherwise. The statewide model seems to be the national best practice and we can look at whether we would need legislation, for example, to create a Statewide Office of Public Guardian. It seems to him there is no way you are going to get consistency across counties. Judge Walker had no idea there were people in the rural counties who could not get a guardianship if they needed one, and that is an atrocious state of affairs. Ms. Sally Ramm seconded the motion.**

The Commission discussed whether Court Rules were the best way to address some of the issues that had been raised. Justice Hardesty said it might be more appropriate to have statutes enacted to address this issue. Justice Hardesty suggested considering an amendment to call on the Legislature to address this issue and to provide a

review of the State Public Guardian System, in addition to providing adequate investigative and accounting services to public guardianships. Judge Walker and Ms. Ramm accepted the amendment to the motion. Ms. Ramm said she accepts the amendment reluctantly, as she is concerned that there may be resistance, but she would like to see this process get started.

Judge Doherty said there is a significant separation of powers issues if we do not do it through the Legislature.

Senator Harris suggested making a recommendation that the Legislature conduct an interim study. This is a complex issue and she thinks it is very important that it is done correctly. She understands that timeframe is not soon enough but those would be the options.

Judge Doherty moved for statutory changes. Justice Hardesty called for a vote. One member abstained. Motion passed.

Auditors

The Commission discussed auditors and the Florida model. Justice Hardesty noted a preliminary budget was included in the meeting materials, to include auditor and investigatory positions, excluding Clark and Washoe County. One of the weaknesses of the Guardianship system is the absence of adequate auditing and investigatory services available to the judges who are responsible for supervising guardianship matters. It would be more efficient if there were auditors and investigators in one location and counties could access those services as needed. Guardianship is a specialized area and auditors and investigators who have a specialty in this area, and are available to the courts, would be helpful.

The Commission discussed the concern with the separation of powers. Ms. Buckley asked how the evidence would be introduced subject to the adversarial method. Justice Hardesty said that is why he has suggested the creation of a Statewide Public Guardian's Office that would be a part of the Executive Branch.

The Commission discussed the need for investigators. The Florida model has a series of judicial districts that are serviced by a central set of employees to optimize the efficiency of the expertise and work. Nevada does not have the caseloads throughout the state to require each county to have its own auditors and investigators but you could centralize those services and make them available to the counties as needed.

Judge Doherty said the National Center for State Courts (NCSC) has a proposed model that incorporates those positions into the court system. Judge Doherty would like to do further research with the NCSC as they had recommended to Washoe County that they identify auditors and investigators and potentially place those within Washoe County, so we might be able to look at the whole spectrum of options.

Judge Walker thought the Minnesota model was run by the Administrative Office of the Courts. Other states have gone that route because it is easier, more direct.

Justice Hardesty referred to the Judicial Ethics Commission opinion that had been on the agenda in prior meetings but the Commission had not discussed. The Commission discussed ex-parte communications in relation to auditors and investigators. The Commission discussed the use of compliance officers and the difficulty agencies have in communicating certain information with the courts. Mr. Raman suggested the Commission recommend a study of the Minnesota and Florida models.

The information from Florida would be distributed to Commissioners for discussion at the September 16 meeting.

Private Professional Guardians Licensure

Ms. Spoon reported the application for the private professional guardians became available July 1. Three companies have submitted their applications.

Physician's Certificate

Justice Hardesty asked Ms. Tyrell to contact Mr. Kim Rowe and draft a physician certificate with the terminology that has been approved so it can be vetted at the next meeting.

Adjournment

The meeting was adjourned at 4:30 p.m.

TAB 2

PROPOSED NRS ESTATE STATUTORY AMENDMENTS

Guardianship Sales Statutes in Logical Order

Real Property

General

NRS 159.136 Order requiring guardian to sell real property of estate. If the guardian neglects or refuses to sell any real property of the estate when it is necessary or in the best interests of the ward, an interested person may petition the court for an order requiring the guardian to sell the property. The court shall set the petition for a hearing, and the petitioner shall serve notice on the guardian at least 10 days before the hearing.

(Added to NRS by 2003, 1759)

(After) Authorization

NRS 159.171 Executing and recording legal documents.

1. A guardian of the estate shall record a certified copy of any court order authorizing the sale, mortgage, lease, surrender or conveyance of real property in the office of the county recorder of the county in which any portion of the land is located.

2. To carry out effectively any transaction affecting the ward's property as authorized by this chapter, the court may authorize the guardian to execute any promissory note, mortgage, deed of trust, deed, lease, security agreement or other legal document or instrument which is reasonably necessary to carry out such transaction.

(Added to NRS by 1969, 430)

NRS 159.1385 Contract for sale of real property of ward authorized; limitation on commission; liability of guardian and estate.

1. A guardian may enter into a written contract, upon obtaining approval of the court for authorization to place the property on the market, with any bona fide agent, broker or multiple agents or brokers to secure a purchaser for any real property of the estate. Such a contract may grant an exclusive right to sell the property to the agent, broker or multiple agents or brokers.

2. The guardian shall provide for the payment of a commission upon the sale of the real property which:

(a) Must be paid from the proceeds of the sale;

(b) Must be fixed in an amount not to exceed:

(1) Ten percent for unimproved real property; or

(2) Seven percent for ~~improved~~ real property with any type of improvement; and

(c) Must be authorized by the court by confirmation of the sale.

3. Upon confirmation of the sale by the court, the contract for the sale becomes binding and enforceable against the estate.

4. A guardian may not be held personally liable and the estate is not liable for the payment of any commission set forth in a contract entered into with an agent or broker pursuant to this section until the sale is confirmed by the court, and then is liable only for the amount set forth in the contract.

Commented [DG1]: Does that mean utilities or a house? Isn't the rule really 7% for residential and 10% for commercial or raw land. Maybe this can be stated in another manner.

Commented [DS2]: To clarify the nature of improvement

(Added to NRS by 2003, 1760)

Notice of Sale

NRS 159.1425 Notice of sale of real property of ward: When required; manner of providing; waiver; content.

1. Except as otherwise provided in this section and except for a sale pursuant to NRS 159.123 or 159.142, a guardian may sell the real property of a ward only after, court grants authority for the sale to NRS 159.113 and 127, and notice of the sale is published in:

(a) A newspaper that is published in the county in which the property, or some portion of the property, is located; ~~or~~

(b) If a newspaper is not published in that county:

(1) In a newspaper of general circulation in the county; or

(2) In such other newspaper as the court orders;or ~~and~~

(c) The guardian, working with a realtor, may additionally publish the notice of sale in the Multiple Listing Service (MLS).

2. Except as otherwise provided in this section and except for a sale of real property pursuant to NRS 159.123 or 159.142:

~~(a) The notice of a public auction for the sale of real property must be published not less than three times before the date of the sale, over a period of 14 days and 7 days apart.~~

~~(b)~~ The notice of a ~~private~~ sale must be published not less than three times before the date on or after which ~~offers~~ the sale may ~~will~~ be ~~accepted~~ made, over a period of 14 days and 7 days apart.

3. For good cause shown, the court may order fewer publications and shorten the time of notice, but must not shorten the time of notice to less than 8 days.

4. The court may waive the requirement of publication pursuant to this section if:

(a) The guardian is the sole devisee or heir of the estate; or

(b) All devisees or heirs of the estate consent to the waiver in writing.

5. Publication for the sale of real property is not required pursuant to this section if the property to be sold is reasonably believed to have a net value of $10,000 or less. In lieu of publication, the guardian shall post notice of the sale in three of the most public places in the county in which the property, or some portion of the property, is located for at least 14 days before~~:~~

~~(a) The date of the sale at public auction; or~~

~~(b) T~~the date on or after which an offer~~s~~ will be accepted for a ~~private~~ sale.

6. Any notice published or posted pursuant to this section must include, without limitation:

~~a) For a public auction:~~

~~(1) A description of the real property which reasonably identifies the property to be sold; and(~~

~~(2) The date, time and location of the auction.~~

~~(b) For a private sale:~~

~~(1)~~ (a) A description of the real property which reasonably identifies the property to be sold; and

~~(2)~~ (b) The date, time and location, on or after that an offer~~s~~ will be accepted.

(Added to NRS by 2003, 1761; A 2009, 1661)

Commented [DS3]: Suggest removal as it has ceased to be common practice)

Commented [DS4]: Ceased to be common practice

~~**NRS 159.1435 Public auction for sale of real property: Where held; postponement.**~~

~~1. Except for a sale pursuant to NRS 159.123 or 159.142, a public auction for the sale of real property must be held:~~

~~(a) In the county in which the property is located or, if the real property is located in two or more counties, in either county;~~

~~(b) Between the hours of 9 a.m. and 5 p.m.; and~~

~~(c) On the date specified in the notice, unless the sale is postponed.~~

~~2. If, on or before the date and time set for the public auction, the guardian determines that the auction should be postponed:~~

~~(a) The auction may be postponed for not more than 3 months after the date first set for the auction; and~~

~~(b) Notice of the postponement must be given by a public declaration at the place first set for the sale on the date and time that was set for the sale.~~

~~(Added to NRS by 2003, 1762; A 2009, 1662)~~

Commented [DS5]: Ceased to be common practice

NRS 159.144 Sale of real property of guardianship estate ~~at private sale~~: Requirements for establishing date; manner of making offers.

1. Except for the sale of real property pursuant to NRS 159.123 or 159.142, a sale of real property of a guardianship estate ~~at a private sale~~:

(a) Must not occur before the date stated in the notice.

(b) Except as otherwise provided in this paragraph, must not occur sooner than 14 days after the date of the first publication or posting of the notice. For good cause shown, the court may shorten the time in which the sale may occur to not sooner than 8 days after the date of the first publication or posting of the notice. If the court so orders, the notice of the sale and the sale may be made to correspond with the court order.

(c) Must occur not later than 1 year after the date stated in the notice.

2. The offers made in a ~~private~~ sale:

(a) Must be in writing; and

(b) May be delivered to the place designated in the notice or to the guardian at any time:

~~(1)~~ After the date of the first publication or posting of the notice; ~~and~~

~~(2) Before the date on which the sale is to occur.~~

(Added to NRS by 2003, 1762; A 2009, 1662)

Appraisal

NRS 159.1455 Confirmation by court of sale of real property of guardianship estate at private sale.

1. Except as otherwise provided in subsection 2, the court shall not confirm a sale of real property of a guardianship estate ~~at a private sale~~ unless:

(a) The court is satisfied that the amount offered represents the fair market value of the property to be sold; and

(b) Except for a sale of real property pursuant to NRS 159.123, the real property has been appraised within 1 year before the date of the sale. If the real property has not been appraised within this period, a new appraisal must be conducted pursuant to NRS 159.086 and 159.0865 at any time before the sale or confirmation by the court of the sale.

2. The court may waive the requirement of an appraisal and allow the guardian to rely on the assessed value of the real property for purposes of taxation in obtaining confirmation by the court of the sale.

3. The court may waive the requirement for appraisal pursuant to this section if:

(a) The guardian is the sole devisee or heir of the estate; or

(b) All devisees or heirs of the estate consent to the waiver in writing.

(Added to NRS by 2003, 1762; A 2009, 1662)

Commented [DG6]: As related to 3 a and b- We think this is problematic for Medicaid and other creditors, what if the price is way low. Not a BFP issue. We do not like this. Keep in mind the Ward is not dead! We suggest just leave it discretionary. This could be a Pandora's box.

Sale

NRS 159.1375 Sale of real property of ward to holder of mortgage or lien on such property. At a sale of real property that is subject to a mortgage or lien, the holder of the mortgage or lien may become the purchaser. The receipt for the amount owed to the holder from the proceeds of the sale is a payment pro tanto.

(Added to NRS by 2003, 1760)

Commented [DG7]: Sorry our Latin stinks, can we use English here?

NRS 159.138 Sale of equity of estate in real property of ward that is subject to mortgage or lien and of property that is subject to mortgage or lien.

1. In the manner required by this chapter for the sale of like property, a guardian may sell:

(a) The equity of the estate in any real property that is subject to a mortgage or lien; and

(b) The property that is subject to the mortgage or lien.

2. If a claim has been filed upon the debt secured by the mortgage or lien, the court shall not confirm the sale unless the holder of the claim files a signed and acknowledged document which releases the estate from all liability upon the claim.

(Added to NRS by 2003, 1760)

Confirmation

NRS 159.134 Selling real property of ward.

1. All sales of real property of a ward must be~~:~~

~~(a) Reported to the court; and~~

~~(b) C~~confirmed by the court before the sale can close and before title to the real property passes to the purchaser, pursuant to NRS 159.146.

Commented [DS8]: So the guardians don't sell it and then tell the court

2. ~~The report and a petition for~~ The petition for confirmation of the sale must be filed with the court not later than 30 days after the date of each sale. The date of the sale shall be the date the contract for the sale was signed.

Commented [DG9]: I have always thought the term should be "proposed sale" or "contract of sale" (as used in 159.1415)since it needs to be confirmed but I understand that is the nomenclature……

3. The court shall set the date of the confirmation hearing and give notice of the hearing in the manner required pursuant to NRS 159.115 or as the court may order.

Commented [DG10]: Should it include the 3 day right to rescind. I suggest that the days do not start until the right to rescind has expired.

4. An interested person may file written objections to the confirmation of the sale, prior to the confirmation ~~the~~ of sale hearing. If such objections are filed, the court shall conduct a hearing regarding those objections during which the interested person may offer witnesses in support of the objections. The Court may entertain oral objections on the date of the hearing ~~if appropriate~~ in its discretion.

5. Before the court confirms a sale, the court must find that notice of the sale was given in the manner required pursuant to NRS 159.1425, 159.1435 and 159.144, unless the sale was exempt from notice pursuant to NRS 159.123.

(Added to NRS by 1979, 788; A 2003, 1794; 2009, 1660)

NRS 159.1415 Presentation of offer to purchase real property to court for confirmation; division of commission for sale of such property.

1. When a ~~n offer to~~ contract of sale to purchase real property of a guardianship estate is presented to the court for confirmation:

(a) Other persons may submit higher bids ~~to the~~ in open court; and

(b) The court may confirm the highest bid.

(c) Except for real property as described in NRS 159.146 (10).

2. Upon confirmation of a sale of real property by the court, the commission for the sale must be divided between the listing agent or broker and the agent or broker who secured the purchaser to whom the sale was confirmed, if any, in accordance with the contract with the listing agent or broker.

(Added to NRS by 2003, 1760)

NRS 159.146 Hearing to confirm sale of real property: Considerations; conditions for confirmation; actions of court if sale is not confirmed; continuance; successive bids if court does not accept offer or bid.

1. At the hearing to confirm the sale of real property, the court shall:

(a) Consider whether the sale is necessary or in the best interest of the estate of the ward; and

(b) Examine the return on the investment and the evidence submitted in relation to the sale.

2. The court shall confirm the sale and order conveyances to be executed if it appears to the court that:

(a) Good reason existed for the sale;

(b) The sale was conducted in a legal and fair manner;

(c) The amount of the offer ~~or bid~~ is not disproportionate to the value of the property; and

(d) It is unlikely that ~~an offer or~~ a bid would be made which exceeds the original offer ~~or bid~~:

(1) By at least 5 percent if the offer ~~or bid~~ is less than $100,000; or

(2) By at least $5,000 if the offer ~~or bid~~ is $100,000 or more.

3. The court shall not confirm the sale if the conditions in this section are not satisfied.

4. If the court does not confirm the sale, the court:

(a) May order a new sale; or

(b) May conduct a public auction in open court, ~~; or~~

~~(c) May accept a written offer or bid from a responsible person and confirm the sale to the person if the written offer complies with the laws of this state and exceeds the original bid:~~

~~(1) By at least 5 percent if the bid is less than $100,000; or~~

~~(2) By at least $5,000 if the bid is $100,000 or more.~~

5. If the court ~~does not confirm the sale and~~ orders a new sale:

(a) Notice must be given in the manner set forth in NRS 159.1425; and

(b) The sale must be conducted in all other respects as though no previous sale has taken place.

Commented [DS11]: Fixes the problem with short sale up-bids in court.

6. If a higher ~~offer or~~ bid is received by the court during the hearing to confirm the sale, the court may continue the hearing rather than accept the ~~offer or~~ bid as set forth in paragraph (~~c~~b) of subsection 4 if the court determines that the person who made the original offer being confirmed ~~or bid~~ was not notified of the hearing and that the person who made the original offer being confirmed ~~or bid~~ may wish to increase his or her ~~bid~~ price. This subsection does not grant a right to a person to have a continuance granted and may not be used as a ground to set aside an order confirming a sale.

~~7. Except as otherwise provided in this subsection, if a higher offer or bid is received by the court during the hearing to confirm the sale and the court does not accept that offer or bid, each successive bid must be for not less than:~~

~~(a) An additional $5,000, if the original offer is for $100,000 or more; or~~

~~(b) An additional $250 if the original offer is less than $100,000.~~

~~Ê Upon the request of the guardian during the hearing to confirm the sale, the court may set other incremental bid amounts.~~

Commented [DS12]: Section is restrictive on finding a better price when you must use fixed upbid increments.

7. Except as otherwise provided in subsection 8-10 below, the auction in court shall only change the name of the buyer and the price of the sale. The order confirming the sale shall act as sufficient addendum to the original contract to allow the sale to close.

8. The title company may be changed by mutual agreement by both the estate and the buyer, in writing.

9. The close of escrow date shall be at least ten judicial days from the date that the notice of entry of order confirming the sale is filed with the Clerk of the Court, unless the contract specifies a date further into the future. The parties to the sale may extend the close of escrow date, upon mutual agreement of both the estate and the buyer, in writing.

10. Where the estate owes more than the value of the property and the estate has made an agreement with the lienholder or lienholders to accept the sale price and waive any deficiency between the sale price and the amount owed to the lienholder (s), the sale shall be confirmed without the potential for bidding in court. All other portions of the confirmation of sale shall be adhered to. The valuation of the bank shall be deemed sufficient to meet the appraisement requirement for the sale. The date of the sale shall be the date of the bank approval for this type of sale.

(Added to NRS by 2003, 1762; A 2013, 921)

NRS 159.142 Sale of interest of ward in real property owned jointly with one or more persons.

1. If a ward owns real property jointly with one or more other persons, the interest owned by the ward may be sold after the court grants authority to place the property for sale to one or more joint owners of the property only if:

(a) All joint owners of the property have been noticed of the authority to place the property for sale;

(b) The guardian files a petition with the court to confirm the sale pursuant to NRS 159.134; and

~~(b)~~ (c) The court confirms the sale.

2. The court shall confirm the sale only if:

(a) The net amount of the proceeds from the sale to the estate of the ward is not less than 90 percent of the fair market value of the portion of the property to be sold; and

(b) Upon confirmation, the estate of the ward will be released from all liability for any mortgage or lien on the property.

(Added to NRS by 2003, 1761)

After Confirmation

NRS 159.1365 Application of money from sale of real property of ward that is subject to mortgage or other lien. If real property of the estate of a ward is sold that is subject to a mortgage or other lien which is a valid claim against the estate, the money from the sale must be applied in the following order:

1. To pay the necessary expenses of the sale.
2. To satisfy the mortgage or other lien, including, without limitation, payment of interest and any other lawful costs and charges. If the mortgagee or other lienholder cannot be found, the money from the sale may be paid as ordered by the court and the mortgage or other lien shall be deemed to be satisfied.
3. To the estate of the ward, unless the court orders otherwise.

(Added to NRS by 2003, 1760)

NRS 159.1465 Conveyance of real property of guardianship estate to purchaser upon confirmation of sale by court.

1. If the court confirms a sale of real property of a guardianship estate, the guardian shall execute a conveyance of the property to the purchaser.
2. The conveyance must include a reference to the court order confirming the sale, and a certified copy of the court order must be recorded in the office of the recorder of the county in which the property, or any portion of the property, is located.
3. A conveyance conveys all the right, title and interest of the ward in the property on the date of the sale, and if, before the date of the sale, by operation of law or otherwise, the ward has acquired any right, title or interest in the property other than or in addition to that of the ward at the time of the sale, that right, title or interest also passes by the conveyance.

(Added to NRS by 2003, 1763)

NRS 159.1475 Sale of real property made upon credit.

1. If a sale of real property is made upon credit, the guardian shall take:

(a) The note or notes of the purchaser for the unpaid portion of the sale; and

(b) A mortgage on the property to secure the payment of the notes.

2. The mortgage may contain a provision for release of any part of the property if the court approves the provision.

(Added to NRS by 2003, 1763)

NRS 159.148 Neglect or refusal of purchaser of real property to comply with terms of sale.

1. After confirmation of the sale of real property, if the purchaser neglects or refuses to comply with the terms of the sale, the court may set aside the order of confirmation and order the property to be resold:

(a) On motion of the guardian; and
(b) After notice is given to the purchaser.
2. If the amount realized on the resale of the property is insufficient to cover the bid and the expenses of the previous sale, the original purchaser is liable to the estate of the ward for the deficiency.
(Added to NRS by 2003, 1763)

NRS 159.1495 Fraudulent sale of real property of ward by guardian. A guardian who fraudulently sells any real property of a ward in a manner inconsistent with the provisions of this chapter is liable for double the value of the property sold, as liquidated damages, to be recovered in an action by or on behalf of the ward.
(Added to NRS by 2003, 1764)

NRS 159.1505 Periods of limitation for actions to recover or set aside sale of real property. The periods of limitation prescribed in NRS 11.260 apply to all actions:
1. For the recovery of real property sold by a guardian in accordance with the provisions of this chapter; and
2. To set aside a sale of real property.
(Added to NRS by 2003, 1764)

Personal Property

Sale Without Notice

NRS 159.1515 Sale of personal property of ward by guardian without notice.
1. A guardian may sell perishable property and other personal property of the ward prior to filing the inventory pursuant to NRS 159.085, without notice, and title to the property passes ~~without confirmation by the court~~ if the property:
(a) Will depreciate in value if not disposed of promptly; or
(b) Will incur loss or expense by being kept.
2. The guardian is responsible for the actual value of the personal property, in section 1 above, unless the guardian makes a report to the court, which includes a showing that good cause existed for the sale to be made and that it was not sold for a price disproportionate to the value of the property ~~obtains confirmation by the court of the sale~~, within 90 days of the conclusion of the sale.
(Added to NRS by 2003, 1764)

Notice of Sale

NRS 159.1535 Notice of sale of personal property of ward: When required; manner of providing content.
1. Except as otherwise provided in NRS 159.1515 and 159.152, a guardian may sell the personal property of the ward only after notice of the sale is published in:

(a) A newspaper that is published in the county in which the property, or some portion of the property, is located; or

(b) If a newspaper is not published in that county:

(1) In a newspaper of general circulation in the county; or

(2) In such other newspaper as the court orders.

2. Except as otherwise provided in this section:

~~(a) The notice of a public sale must be published not less than three times before the date of the sale, over a period of 14 days and 7 days apart.~~

~~(b)~~ The notice of a ~~private~~ sale must be published not less than three times before the date on which offers will be accepted, over a period of 14 days and 7 days apart.

3. For good cause shown, the court may order fewer publications and shorten the time of notice, but must not shorten the time of notice to less than 8 days.

4. The notice must include, without limitation:

~~(a) For a public sale:~~

~~(1) A description of the personal property to be sold; and~~

~~(2) The date, time and location of the sale.~~

(~~b~~a) For a ~~private~~ sale:

(1) A description of the personal property to be sold; and

(2) The date, time and location that offers will be ~~accepted~~ received.

(~~c~~b) For a sale on an appropriate auction website on the Internet:

(1) A description of the personal property to be sold;

(2) The date the personal property will be listed; and

(3) The Internet address of the website on which the sale will be posted.

(Added to NRS by 2003, 1764; A 2009, 1663)

Commented [DS13]: Not practiced

Commented [DS14]: Not praticed

Sale

NRS 159.154 Place and manner of sale of personal property of ward. **Report of Sale to the Court.**

1. The guardian may sell the personal property of a ward ~~by public sale~~ at:

(a) The residence of the ward; or

(b) Any other location designated by the guardian.

2. The guardian may sell the personal property ~~by public sale~~ only if the property is made available for inspection at the time of the sale or photographs of the personal property are posted on an appropriate auction website on the Internet.

3. Personal property may be sold ~~at a public or private sale~~ for cash or upon credit.

(Added to NRS by 2003, 1765; A 2009, 1663)

4. No sale or disposition of any personal property of the ward may be commenced, except as otherwise provided in NRS 159.1515, until 30 days after the filing and mailing of the inventory. The inventory shall be sent by regular mail to those specified in NRS 159.034 and an Affidavit of Mailing confirming the same shall be filed with the Court.

5. The guardian is responsible for the actual value of the personal property, in this section, unless the guardian makes a report to the court, which includes a showing that good cause

existed for the sale to be made and that it was not sold for a price disproportionate to the value of the property, within 90 days of the conclusion of the sale.

6. The family members and interested persons shall be offered the first right of refusal to acquire the personal property of the ward from the estate sale at fair market value.

Commented [DG15]: How does this work in practicality, do you use the FROR before the sale, if so switch 6 to 5? We suggest selling at appraised value or they can go to the sale and buy there, as the price may be lower, or higher…… Pay your money or take your chances……

Other

NRS 159.152 Sale of security of ward by guardian. A guardian may sell any security of the ward if:

1. The guardian petitions the court for confirmation of the sale;
2. The clerk sets the date of the hearing;
3. The guardian gives notice in the manner required pursuant to NRS 159.034 unless, for good cause shown, the court shortens the period within which notice must be given or dispenses with notice; and
4. The court confirms the sale.

(Added to NRS by 2003, 1764)

NRS 159.156 Sale of interest in partnership, interest in personal property pledged to ward and choses in action of estate of ward. The following interests of the estate of the ward may be sold in the same manner as other personal property:

1. An interest in a partnership;
2. An interest in personal property that has been pledged to the ward; and
3. Choses in action.

(Added to NRS by 2003, 1765)

Lease of Property

NRS 159.157 Lease of property of ward. A guardian of the estate may lease any real property of the ward or any interest in real property:

1. Without securing prior court approval, where the tenancy is from month to month or for a term not to exceed 1 year and the reasonable fixed rental for the property or the ward's proportionate interest in such rental does not exceed $250 per month.
2. With prior approval of the court by order, for such period of time as may be authorized by the court, not exceeding any time limitation prescribed by law, and upon such terms and conditions as the court may approve. Such lease may extend beyond the period of minority of a minor ward.

(Added to NRS by 1969, 428)

NRS 159.159 Contract with broker to secure lessee. The court may authorize the guardian to enter into a written contract with one or more licensed real estate brokers to secure a lessee of the ward's property, which contract may provide for the payment of a commission, not exceeding 5 percent of the fixed rental for the first 2 years, to be paid out of the proceeds of any such lease.

(Added to NRS by 1969, 428)

NRS 159.161 Petition for approval of lease: Content; conditions for approval.

1. Petitions to secure court approval of any lease:

(a) Must include the parcel number assigned to the property to be leased and the physical address of the property, if any; and

(b) Must set forth the proposed fixed rental, the duration of the lease and a brief description of the duties of the proposed lessor and lessee.

2. Upon the hearing of a petition pursuant to subsection 1, if the court is satisfied that the lease is for the best interests of the ward and the estate of the ward, the court shall enter an order authorizing the guardian to enter into the lease.

(Added to NRS by 1969, 428; A 2003, 1794)

NRS 159.163 Agreement for rental or bailment of personal property. A guardian of the estate, with prior approval of the court by order, may enter into agreements providing for the rental or bailment of the ward's personal property. All proceedings to obtain such a court order shall be the same as required for the lease of real property.

(Added to NRS by 1969, 428)

NRS 159.165 Lease of mining claim or mineral rights; option to purchase.

1. If the property to be leased consists of mining claims, an interest in the mining claims, property worked as a mine or lands containing oil, gas, steam, gravel or any minerals, the court may authorize the guardian to enter into a lease which provides for payment by the lessee of a royalty, in money or in kind, in lieu of a fixed rental. The court may also authorize the guardian to enter into a lease which provides for a pooling agreement or authorizes the lessee to enter into pooling or other cooperative agreements with lessees, operators or owners of other lands and minerals for the purpose of bringing about the cooperative development and operation of any mine, oil field or other unit of which the ward's property is a part.

2. If the proposed lease contains an option to purchase, and the property to be sold under the option consists of mining claims, property worked as a mine, or interests in oil, gas, steam, gravel or any mineral, which has a speculative or undefined market value, the court may authorize the guardian to enter into such a lease and sales agreement or give an option to purchase without requiring the property to be sold at public auction or by private sale in the manner required by this chapter for sales of other real property.

3. If the petition filed pursuant to this section requests authority to enter into a lease with an option to purchase, in addition to the notice required by NRS 159.034, the guardian shall publish a copy of the notice at least twice, the first publication to be at least 10 days prior to the date set for the hearing and the second publication to be not earlier than 7 days after the date of the first publication. The notice must be published in:

(a) A newspaper that is published in the county where the property is located; or

(b) If no newspaper is published in the county where the property is located, a newspaper of general circulation in that county which is designated by the court.

(Added to NRS by 1969, 429; A 2003, 1794)

Agreement to Sell or Give Option to Purchase Mining Claim

NRS 159.1653 Petition to enter into agreement; setting date of hearing; notice.

1. To enter into an agreement to sell or to give an option to purchase a mining claim or real property worked as a mine which belongs to the estate of the ward, the guardian or an interested person shall file a petition with the court that:

(a) Describes the property or claim;
(b) States the terms and general conditions of the agreement;
(c) Shows any advantage that may accrue to the estate of the ward from entering into the agreement; and
(d) Requests confirmation by the court of the agreement.
2. The court shall set the date of the hearing on the petition.
3. The petitioner shall give notice in the manner provided in NRS 159.034.
(Added to NRS by 2003, 1765)

NRS 159.1657 Hearing on petition; court order; recording of court order.
1. At the time appointed and if the court finds that due notice of the hearing concerning an agreement has been given, the court shall hear a petition filed pursuant to NRS 159.1653 and any objection to the petition that is filed or presented.
2. After the hearing, if the court is satisfied that the agreement will be to the advantage of the estate of the ward, the court:
(a) Shall order the guardian to enter into the agreement; and
(b) May prescribe in the order the terms and conditions of the agreement.
3. A certified copy of the court order must be recorded in the office of the county recorder of each county in which the property affected by the agreement, or any portion of the property, is located.
(Added to NRS by 2003, 1765)

NRS 159.166 Bond and actions required upon court order to enter into agreement.
1. If the court orders the guardian to enter into the agreement pursuant to NRS 159.1657, the court shall order the guardian to provide an additional bond and specify the amount of the bond in the court order.
2. The guardian is not entitled to receive any of the proceeds from the agreement until the guardian provides the bond and the court approves the bond.
3. When the court order is entered, the guardian shall execute, acknowledge and deliver an agreement which:
(a) Contains the conditions specified in the court order;
(b) States that the agreement or option is approved by court order; and
(c) Provides the date of the court order.
(Added to NRS by 2003, 1765)

NRS 159.1663 Neglect or refusal of purchaser of mining claim or of option holder to comply with terms of agreement.
1. If the purchaser or option holder neglects or refuses to comply with the terms of the agreement approved by the court pursuant to NRS 159.1657, the guardian may petition the court to cancel the agreement. The court shall cancel the agreement after notice is given to the purchaser or option holder.
2. The cancellation of an agreement pursuant to this section does not affect any liability created by the agreement.
(Added to NRS by 2003, 1766)

NRS 159.1667 Petition for confirmation of proceedings concerning agreement: When required; notice; hearing.

1. If the purchaser or option holder complies with the terms of an agreement approved by the court pursuant to NRS 159.1657 and has made all payments according to the terms of the agreement, the guardian shall:

(a) Make a return to the court of the proceedings; and

(b) Petition the court for confirmation of the proceedings.

2. Notice must be given to the purchaser or option holder regarding the petition for confirmation.

3. The court:

(a) Shall hold a hearing regarding the petition for confirmation; and

(b) May order or deny confirmation of the proceedings and execution of the conveyances in the same manner and with the same effect as when the court orders or denies a confirmation of a sale of real property.

(Added to NRS by 2003, 1766)

Miscellaneous Provisions

NRS 159.167 Special sale of property of ward or surrender of interest therein.

1. A guardian of the estate, with prior approval of the court, may accept an offer for the purchase of the interest or estate of the ward, in real or personal property or both real and personal property, where it appears from the petition and the court determines that:

(a) The interest or estate of the ward in such property is an interest in a partnership, joint venture or closely held corporation, in which the offeror or offerors own the remaining interests in the partnership, joint venture or closely held corporation, or are offering to purchase such remaining interests.

(b) The interest or estate of the ward in such property is an undivided interest in property in which the offeror or offerors own the remaining interests in such property or are offering to purchase such remaining interests.

(c) The interest or estate of the ward to be sold or granted is an easement in or creates a servitude upon the ward's property.

2. A guardian of the estate, with prior approval of the court, may accept an offer to surrender the interest or estate of the ward in real or personal property or both real and personal property, where it appears from the petition and the court determines that:

(a) The interest or estate of the ward is contingent or dubious.

(b) The interest or estate of the ward in such property is a servitude upon the property of another.

(Added to NRS by 1969, 429)

NRS 159.169 Advice, instructions and approval of acts of guardian.

1. A guardian of the estate may petition the court for advice and instructions in any matter concerning:

(a) The administration of the ward's estate;

(b) The priority of paying claims;

(c) The propriety of making any proposed disbursement of funds;

(d) Elections for or on behalf of the ward to take under the will of a deceased spouse;

(e) Exercising for or on behalf of the ward:

(1) Any options or other rights under any policy of insurance or annuity; and
(2) The right to take under a will, trust or other devise;
(f) The propriety of exercising any right exercisable by owners of property; and
(g) Matters of a similar nature.

2. Any act done by a guardian of the estate after securing court approval or instructions with reference to the matters set forth in subsection 1 is binding upon the ward or those claiming through the ward, and the guardian is not personally liable for performing any such act.

3. If any interested person may be adversely affected by the proposed act of the guardian, the court shall direct the issuance of a citation to that interested person, to be served upon the person at least 20 days before the hearing on the petition. The citation must be served in the same manner that summons is served in a civil action and must direct the interested person to appear and show cause why the proposed act of the guardian should not be authorized or approved. All interested persons so served are bound by the order of the court which is final and conclusive, subject to any right of appeal.

(Added to NRS by 1969, 430; A 1979, 591; 2003, 1795)

NRS 159.173 Transfer of property of ward not ademption. If a guardian of the estate sells or transfers any real or personal property that is specifically devised or bequeathed by the ward or which is held by the ward as a joint tenancy, designated as being held by the ward in trust for another person or held by the ward as a revocable trust and the ward was competent to make a will or create the interest at the time the will or interest was created, but was not competent to make a will or create the interest at the time of the sale or transfer and never executed a valid later will or changed the manner in which the ward held the interest, the devisee, beneficiary or legatee may elect to take the proceeds of the sale or other transfer of the interest, specific devise or bequest.

(Added to NRS by 1969, 430; A 2003, 1796)

NRS 159.175 Exchange or partition of property of ward.

1. A guardian of the estate, with prior approval of the court by order, where it appears from the petition and the court determines that the best interests of the ward are served by such action, may:

(a) Accept an offer to exchange all or any interest of the ward in real or personal property or both real and personal property for real or personal property or both real and personal property of another, and pay or receive any cash or other consideration to equalize the values on such exchange; or

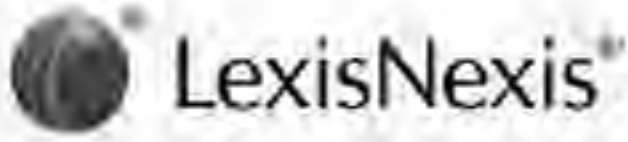
(b) Effect a voluntary partition of real or personal property or both real and personal property in which the ward owns an undivided interest.

2. Upon hearing the petition, the court shall inquire into the value of the property to be exchanged or partitioned, the rental or income therefrom, and the use for which the property is best suited.

(Added to NRS by 1969, 430)

TAB 3

FLORIDA RESOURCES



1 of 1 DOCUMENT

FLORIDA RULES OF COURT

*** This document reflects the changes received through April 1, 2016 ***

The Fifteenth Judicial Circuit -- Palm Beach County
Administrative Orders
Series 6. Civil

Fla. 15th Jud. Cir. AO 6.306-12/10 (2016)

Review Court Orders which may amend this Rule.

6.306-12/10 IN RE: GUARDIANSHIP MATTERS TO BE AUDITED BY CLERK & COMPTROLLER

Persons who are placed in guardianship need an effective and efficient review of guardianship accountings, plans, and inventories. *Florida Statute 744.368* sets forth statutory time frames within which guardianship accountings, plans and inventories must be reviewed. Different levels of review may be necessary to provide a thorough audit of the files.

NOW THEREFORE, pursuant to the authority conferred by *Florida Rule of Judicial Administration 2.215*, it is **ORDERED** as follows:

A. **LEVEL 1 AUDIT**

1. The Clerk shall:

a. Conduct the statutorily required audit/review of all initial, annual, simplified, interim, trust or final accountings, plans and inventories pursuant to Chapter 744, Florida Statutes. This review shall consist of a desk review (worksheet) of the guardianship reports in conjunction with the supporting documentation filed with the report.

b. Prepare and forward to the Court the file and the Clerk's review along with a proposed order approving the initial, annual, interim or final accounting, plan or inventory.

c. Prepare and forward to the General Magistrate or Judge a Notice of Delinquency and an Order Setting Contempt Hearing if an initial an annual report is not timely filed.

d. Send correspondence to the guardian/attorney stating the discrepancies and allowing reasonable time for a response if there is a discrepancy. If there is no response, the Clerk will prepare a Notice of Delinquency and an Order Setting Contempt Hearing which will be submitted to the General Magistrate or Judge.

2. Upon review of the file, the Clerk will determine if a Level 2 or Level 3 audit is needed.

B. **LEVEL 2 & LEVEL 3 AUDITS**

1. If the Clerk determines that a Level 2 Audit is necessary the Clerk will:

a. Examine the guardianship report and attempt to verify selected questionable items.

b. Conduct limited inquiries and/or requests for supporting documentation to resolve the issues.

c. Submit to the General Magistrate or Judge the file and audit report identifying any discrepancies within 90 days after the filing of the verified inventory and accountings pursuant to *Florida Statute sec. 744.368*. If the 90 day time period is insufficient to complete the audit, the Clerk shall file an Ex-Parte Motion for Extension of Time to Complete Review, along with a proposed order.

d. If the filed documents are insufficient to properly audit the account at any stage in the review or documents are not produced timely upon written request by the Clerk, the Clerk will prepare an order for the Court to order the guardian to file the report within 15 days after the service of the order upon her or him or show cause why she or he should not be compelled to do so as provided by *Florida Statute 744.3685*.

e. If the documents are still not forthcoming after service of the above order, the Clerk shall notify the Court that the documents were not timely received and will request that a hearing be set.

f. Determine if a Level 3 Audit is necessary.

2. If the Clerk determines that a Level 3 Audit is necessary the Clerk will:

a. Examine and attempt verification of all significant items pertinent to the guardianship report.

b. Conduct a detailed review of the accounts and attendant transactions which may include third party confirmation.

c. Submit to the General Magistrate or Judge the file and audit report identifying any discrepancies within 90 days after the filing of the verified inventory and accountings pursuant to *Florida Statute sec. 744.368*. If the 90 day time period is insufficient to complete the audit, the Clerk shall file an Ex-Parte Motion for Extension of Time to Complete Review, along with a proposed order.

d. If the filed documents are insufficient to properly audit the account at any stage in the review or documents are not produced timely upon written request by the Clerk, the Clerk will prepare an order for the Court to order the guardian to file the report within 15 days after the service of the order upon her or him or show cause why she or he should not be compelled to do so as provided by *Florida Statute 744.3685*.

e. If the documents are still not forthcoming after service of the above order, the Clerk shall notify the Court that the documents were not timely received and will request that a hearing be set.

C. **QUALITY CONTROL SAMPLE**

Each year the Clerk shall randomly select a sample of guardianships and perform a comprehensive audit of related

transactions and records. From the selected sample, the Clerk will conduct a Level 2 or Level 3 audit as described above.

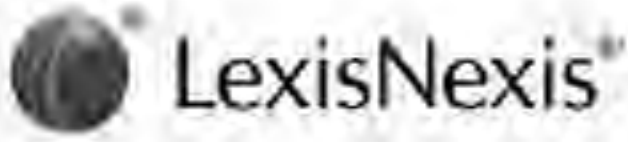
D. **CONFIDENTIALITY**

In accordance with *Florida Statute 744.3701(1)* & (2), any data included in the reports and supporting documentation prepared by the Clerk auditor which came directly from the guardianship reports shall remain confidential and not available for review by the general public without a court order.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this 20 day of December, 2010.

PETER D. BLANC

CHIEF JUDGE



1 of 19 DOCUMENTS

The Florida code and constitution are updated for all 2016 emergency legislation through Chapter 243 with the exception of Chapters 16, 40, 140, 160, 178, 220, 224, and 231, which are in progress.

Title XLIII. Domestic Relations. (Chs. 741-753).
Chapter 744. Guardianship.
Part VI. Powers and Duties.

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Stat. § 744.3701 (2016)

§ 744.3701. Confidentiality.

(1) Unless otherwise ordered by the court, upon a showing of good cause, an initial, annual, or final guardianship report or amendment thereto, or a court record relating to the settlement of a claim, is subject to inspection only by the court, the clerk or the clerk's representative, the guardian and the guardian's attorney, the guardian ad litem with regard to the settlement of the claim, the ward if he or she is at least 14 years of age and has not been determined to be totally incapacitated, the ward's attorney, the minor if he or she is at least 14 years of age, or the attorney representing the minor with regard to the minor's claim, or as otherwise provided by this chapter.

(2) The court may direct disclosure and recording of parts of an initial, annual, or final report or amendment thereto, or a court record relating to the settlement of a claim, including a petition for approval of a settlement on behalf of a ward or minor, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf of a ward or minor, in connection with a real property transaction or for such other purpose as the court allows.

(3) A court record relating to the settlement of a ward's or minor's claim, including a petition for approval of a settlement on behalf of a ward or minor, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf of a ward or minor, is confidential and exempt from the provisions of *s. 119.07(1)* and *s. 24(a), Art. I of the State Constitution* and may not be disclosed except as specifically authorized.

HISTORY: S. 39, ch. 90-271; s. 1091, ch. 97-102; s. 1, ch. 2015-84, eff. July 1, 2015.

NOTES:

Amendments.

The 2015 amendment rewrote the section heading, which formerly read: "Inspection of report" and rewrote the section, which formerly read: "(1) Unless otherwise ordered by the court, any initial, annual, or final guardianship report or amendment thereto is subject to inspection only by the court, the clerk or the clerk's representative, the guardian and the guardian's attorney, and the ward, unless he or she is a minor or has been determined to be totally incapacitated, and the ward's attorney. (2) The court may direct disclosure and recording of parts of an initial, annual, or final report in connection with any real property transaction or for such other purpose as the court allows, in its discretion."

LexisNexis (R) Notes:

CASE NOTES

1. *Fla. Stat. § 744.447(2)* entitled the ward's estranged adult chlid, as next of kin, to notice of the guardian's petitions to perform any acts requiring court approval under *Fla. Stat. §§ 744.441* or *744.446*, Fla. Stat. if the adult child filed a request for notices and copies of pleadings, as provided in the *Florida Probate Rules. Swan v. Trost (In re Trost), 100 So. 3d 1205, 2012 Fla. App. LEXIS 19550 (Fla. 2nd DCA 2012).*

TREATISES AND ANALYTICAL MATERIALS

1. Florida Estates Practice Guide, Appendix PRG Florida Probate and Guardianship Rules, Part III Guardianship, Rule 5.620. Inventory.

2. Florida Estates Practice Guide, Appendix PRG Florida Probate and Guardianship Rules, Part III Guardianship, Rule 5.690. Initial Guardianship Report.

3. Florida Estates Practice Guide, Appendix PRG Florida Probate and Guardianship Rules, Part III Guardianship, Rule 5.695. Annual Guardianship Reports.

4. Florida Estates Practice Guide, Appendix PRG Florida Probate and Guardianship Rules, Part III Guardianship, Rule 5.696. Annual Accounting.

5. Florida Estates Practice Guide, Appendix PRG Florida Probate and Guardianship Rules, Part III Guardianship, Rule 5.720. Court Monitor.

6. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 57A Electronic Lawyering, § 57A.01* Electronic Access to the Courts.

7. Florida Family Law, Division IV Dissolution of Marriage, Chapter 57A Electronic Lawyering, § 57A.20 Notice of Confidential Information within Court Filing.

8. Florida Probate Code Manual, Florida Probate Rules, Scope.

9. *LexisNexis Practice Guide: Florida Civil Motion Practice, Chapter 1 Preliminary Motions, VII. Forms, § 1.41* Notice of Confidential Information Within Court Filing.

10. *LexisNexis Practice Guide: Florida Civil Motion Practice, Chapter 10 Summary Judgment, VII. Forms, § 10.70* Notice of Confidential Information Within Court Filing.

11. *LexisNexis Practice Guide: Florida Civil Discovery, Chapter 1 Discovery Strategy and Planning, VII. Forms, § 1.112* Notice of Confidential Information Within Court Filing.

12. *LexisNexis Practice Guide: Florida Civil Discovery, Chapter 6 Oral Depositions, VII. Forms, § 6.61* Notice of Confidential Information Within Court Filing.

13. *LexisNexis Practice Guide: Florida Civil Discovery, Chapter 7 Oral Depositions Outside of Florida, VII. Forms, § 7.61* Notice of Confidential Information Within Court Filing.

14. *LexisNexis Practice Guide: Florida Civil Discovery, Chapter 9 Interrogatories, VI. Forms, § 9.33* Notices and Motions.

15. *LexisNexis Practice Guide: Florida Civil Discovery, Chapter 14 Protective Orders, VI. Forms, § 14.30* Notice of Confidential Information Within Court Filing.

16. *LexisNexis Practice Guide: Florida Civil Discovery, Chapter 16 Review of Discovery Orders, VII. Forms, § 16.40* Notice of Confidential Information Within Court Filing.

17. *LexisNexis Practice Guide: Florida Trial and Post-Trial Procedure, Chapter 13 Proceedings in Appellate Courts, VIII. Forms, § 13.83* Notice of Confidential Information Within Court Filing.

STATE BAR PUBLICATION

1. *Florida Guardianship Practice, 15 Accountings and Reports of Guardians of the Property, II. Accountings and Reports, C. [§ 15.9*] Forms For Reports.

2. *Florida Guardianship Practice, 15 Accountings and Reports of Guardians of the Property, II. Accountings and Reports, L. [§ 15.18*] Service Of Reports.

3. *Florida Guardianship Practice, 15 Accountings and Reports of Guardians of the Property, II. Accountings and Reports, M. [§ 15.19*] Inspection Of Accountings.

4. *Florida Guardianship Practice, 15 Accountings and Reports of Guardians of the Property, II. Accountings and Reports, N. Objections, 3. [§ 15.22*] Filing And Hearings On Objections.

MEMORANDUM

Fla. Stat. §744.368

Circuit Court Clerk
For the Twentieth Judicial Circuit
State of Florida

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I. PURPOSE

The purpose of this Memorandum is to alert the Twentieth Judicial Circuit Court Clerk to a potential issue that may be raised by guardians with respect to the current policy for executing the Clerk's duties pursuant to Fla. Stat. §744.368. In response to the issues posed by Fla. Stat. §744.368, remedial suggestions are submitted herein as alternative routes by which the Clerk may execute the duties required by statute without sacrificing due process under the United States and Florida Constitutions.

The remedial suggestions offered are, by no means, exhaustive. Rather, they are intended merely to be examples the Court Clerk may elect to consider while identifying, developing, setting, and executing policy. This Memorandum is intended to identify potential procedures that will allow the Circuit Court Clerk to effectively execute his/her statutory duties required under Fla. Stat. §744.368 in a manner that maintains the delicate balance of implementing the implied legislative intent to protect wards while observing relevant constitutional provisions.

II. STATUTORY HISTORY

On July 1, 2014, Fla. Stat. §744.368 came into effect.[1] The intent of the legislature was to make the Circuit Court Clerks responsible for auditing all guardianship reports, ostensibly for the protection of wards throughout the state of Florida. The statute lacks enabling legislation; further, the Twentieth Judicial Circuit has not filed an Administrative Order that sets forth the manner by which the Clerk shall execute its duties under the statute. Consequently, problems

[1] A complete copy of Fla. Stat. §744.368 is attached hereto at Appendix A.

may arise with respect to the execution of the Clerk's duties under §744.368 (3). That section states as follows:

> Within 90 days after the filing of the certified inventory and accountings by a guardian of the property, the clerk shall audit the verified inventory and the accountings. The clerk shall advise the court of the results of the audit. (Emphasis added).

The statute gives no direction as to how the court shall be notified. Respect for, and compliance with, the United States and Florida Constitutions requires that notice be provided to the guardian's counsel of record, or the guardian if s/he is proceeding as pro se. The current practice for executed the Clerk's duties under §744.368 will be viewed in juxtaposition to this statement and discussed *infra*.

III. QUESTIONS PRESENTED

1. Does §744.368 authorize the Circuit Court Clerk, through its Auditors authorized by §744.368, to seek an ex parte order to show cause from the Court?
2. If the Circuit Court Clerk, through its Auditors authorized by §744.368, seeks an ex parte order to show cause from the Court, is there reason to believe such action violates the United States or Florida Constitutions?
3. Can the Circuit Court Clerk execute the statutory duties required in a manner that does not violate the United States or Florida Constitutions?

IV. SHORT ANSWERS

1. *No*. It is fair to say that exclusive communication between the auditor, acted on behalf of the Circuit Court Clerk, and the Court is an ex parte communication because it is a communication with a Judge sitting in a case to which another party to the action is excluded.
2. *Yes*. The guardian has certain unalienable constitutional protections. An ex parte order is typically sought in very narrow and emergent circumstances where the danger presented outweighs immediate observation of constitutional rights. An improper, or even a fraudulent, guardianship accounting does not appear to create an "emergency" necessitating an ex parte order and, therefore, a temporary waiver of the guardian's constitutional protections.
3. *Yes*. Through the enactment and implementation of policies and procedures, the Circuit Court Clerk's may execute its statutory duties while presenting the guardian's (and the ward's) constitutional rights.

V. DISCUSSION

A. THE OFFICE OF CIRCUIT CLERK COURT

The Florida Constitution sets out specific offices/officers and describes their respective duties. In the case of Circuit Court Clerks, Art. V, §16, Fla. Const. states:

> There shall be in each county a clerk of the circuit court who shall be selected pursuant to the provisions of Article VIII section 1. Notwithstanding any other provision of the constitution, the duties of the clerk of the circuit court may be divided by special or general law between two officers, one serving as clerk of court and one serving as ex officio clerk of the board of county commissioners, auditor, recorder, and custodian of all county funds. There may be a clerk of the county court if authorized by general or special law.

The Florida Supreme Court has, consistent with Art. V, §16, Fla. Const., specifically stated that a Circuit Court Clerk is "Constitutional Officer." See Taylor v. Tampa Elec. Co., 356 So.2d 260 (Fla. 1978) (holding that the Supreme Court had jurisdiction of Circuit Court Clerk's petition for certiorari because the Clerk is a Constitutional Officer). For purposes of the issues discussed herein it is of interest to note that the Florida Constitutional provision establishing the Circuit Court Clerk's position does so under the Article establishing the judiciary. As a result, it could be argued – and probably with some effect – that the Circuit Court Clerk is "part of the judiciary."

In 1989, the Florida Legislature passed Fla. Stat. §744.368, "Responsibilities of the clerk of the circuit court." This statute speaks directly to the responsibilities of the clerk of the circuit court in monitoring all facets of guardianship cases pending in the judicial system. In 2014, the Florida Legislature amended this statute to require the clerk's office to take greater authority by auditing guardianship files.

A. ANALYSIS OF §744.368

The current version of §744.368 adds duties to those enumerated in the Florida Constitution and Statutes.[2] The legislation also sets forth certain times within which the additional duties, auditing guardian reports, shall be accomplished.[3] The statute also has a reporting requirement: "The Clerk shall report to the Court when a report is not timely filed." (Emphasis added).[4] However, the language creating the reporting requirement is ambiguous in that it could be read to

[2] Fla. Stat. §744.368(1)

[3] Fla. Stat. §744.368(2)-(3)

[4] Fla. Stat. §744.368(4)

mean: (1) If a guardian's initial or annual report is not timely filed, the Circuit Clerk must give notice to the Court; or (2) If the Circuit Court Clerk does not perform the enumerated duties within the statutory time, the Court must be given notice.

The Second District Court of Appeal has clearly announced that the very first step in statutory analysis is to read the statute giving the language its "plain and ordinary meaning."[5] However, the ambiguity of §744.368(4) is not one of language but rather to which duty does the reporting requirement apply. One very important rule of rule of statutory construction is that the statute must be examined as a whole in order to determine its meaning and if the intent of the legislature is clear and unmistakable from the language used, the statute must be read to give effect to that intent.[6]

When reading §744.368(4), it is clear that the legislature is referring to a "report" required by one of the prior statutory sections. The fact that the legislature specifically elected to use the term "report" in §744.368(4) is significant because the only "report" referenced in the prior sections is "the initial or annual report of the guardian." In juxtaposition, the legislature refers to the Circuit Court Clerk's tasking as an audit. Thus, the interpretation giving effect to the most likely legislative intent is that §744.368(4) requires the Circuit Court Clerk to give the Court notice when the guardian has failed to file a timely initial or annual guardianship report to be audited by the Circuit Court Clerk.

After having conducted the tasks set out at paragraphs two and three of §744.368, if the Circuit Court Clerk believes that further review is appropriate, the Circuit Court Clerk may

[5] Mathews v. Branch Banking & Trust Co., 139 So.3d 498, 500 (Fla. 2d DCA 2014), quoting Gulf Atl. Office Props. Inc. v. Dep't of Revenue, 133 So.3d 537, 539 (Fla. 2d DCA 2014).

[6] Englewood Water Dist. v. Tate, 334 So.2d 626, 628 (Fla. 2d DCA 1976).

request and review additional records and documents to fully execute the statutory duties.[7] While §744.368(5) does not specifically enumerate the process by which the Circuit Court Clerk is to obtain additional records or documents, the following paragraph seemingly answers that question by stating "[i]f the guardian fails to produce records and documents to the clerk upon request ...."[8] That paragraph then goes on to authorize the Circuit Court Clerk to request the court enter an order pursuant to Fla. Stat. §744.3685(2).

In order to answer the questions posed herein, the gravamen of which is how to obtain an order without potentially running afoul of the Florida and United States Constitutions, §744.3685(2) must be examined. It states, in its entirety:

> (2) If a guardian fails to comply with the submission of records and documents requested by the clerk during the audit, upon a showing of good cause by affidavit of the clerk *which shows the reasons the records must be produced*, the court may order the guardian to produce the records and documents within a period specified by the court unless the guardian shows good cause as to why the guardian may not be compelled to do so before the deadline specified by the court. The affidavit of the clerk shall be served with the order (italics added).

The §744.3685(2) language, i.e. "which shows the reasons the records must be produced," is seemingly consistent with §744.368(6), which requires the Circuit Court Clerk to file an affidavit that "identifies the records and documents requested and shows good cause as to why the documents and records requested are needed to complete the audit." However, §744.368(6) creates a condition precedent, i.e. filing an affidavit, to the Circuit Court Clerk's request for the Court to enter an order. It is at that moment, the moment of filing an affidavit, when the guardian's right to procedural due process, i.e. notice, is most likely triggered.

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[7] Fla. Stat. §744.368(5)

[8] Fla. Stat. §744.368(6)

The phrase "shows good cause" in §744.368(6) does not likely refer to an Order to Show Cause, or show good cause, why the records should not be produced. Rather, as required by the rules of statutory construction, the language in §744.368(6) must be given its plain and ordinary meaning, must be read in totality, and must be given a construction consistent with the legislature's intent. That paragraph, in its entirety, states:

> (6) If a guardian fails to produce records and documents to the clerk upon request, **the clerk may request the court to enter an order pursuant to Fla. Stat. §744.3685(2) by filing an affidavit that** identifies the records and documents requested and **shows good cause as to why the documents and records requested are needed to complete the audit.** (Emphasis added).

Reading the statute consistently with the well-established rules of construction makes clear that the Circuit Court Clerk's affidavit, and not the guardian, needs to show good cause. Simply put, the statute provides that if the guardian fails to produce the requested records, the Clerk may ask the Court to enter an order directing the guardian to produce records by filing an affidavit that (1) identifies the records requested, and (2) shows good cause why they are needed. The good cause shown is "as to why the documents and records requested are needed to complete the audit." Fla. Stat. §744.368(6). Hence, any construction that concludes this paragraph requires a guardian to show cause, or authorizes the Court to enter an order directing the guardian to show cause as to anything is inconsistent with established principles of statutory construction and law. Rather, once the Circuit Court has filed an affidavit that shows good cause as to why the requested records are needed, §744.368(6) authorizes the Clerk *to request the court enter an order* pursuant to Fla. Stat. §744.3685(2). The Court, having received the Circuit Court Clerk's affidavit and finding it in compliance with §744.368(6), is then charged with contemplating and taking action consistent with §744.3685(2).

The Court is specifically authorized by §744.3685(2) to ". . . order the guardian to produce the records and documents [enumerated in the Circuit Court Clerk's affidavit] within a period specified by the court . . . ." Fla. Stat. §744.3685(2). In other words, the Court can clearly order the guardian to produce the enumerated document within "x" number of days. The Court can also include in its order a requirement that the guardian show good cause why the guardian should not be compelled to produce the records or documents, so long as the guardian does so before expiration of the Court's deadline. Thus, the Court is required to give the guardian a choice: either produce the records or show a legal reason why the records should not be produced.

Assuming that the guardian, and the guardian's lawyer if the guardian is represented, was served with a copy of the Circuit Court Clerk's §744.368(6) affidavit, the guardian could not have been deprived of any constitutional right to procedural due process. Moreover, if the proposed order provided to the Court provides the guardian a §744.368(6) choice, there can be no substantive due process issue or violation.

The seventh and final paragraph of the statute authorizes the Circuit Court Clerk to send out subpoenas necessary to obtain records and documents to conduct and complete the statutory duties charged by the preceding language. The language tracks, generally, with other procedural language regarding subpoenas. There is no need to specifically analyze and discuss the paragraph seven language to address the issues raised in the scope of this memoranda.

C. QUESTIONS PRESENTED

QUESTION ONE: DOES §744.368 AUTHORIZE THE CIRCUIT COURT CLERK, THROUGH ITS AUDITORS AUTHORIZED BY §744.368, TO SEEK AN EX PARTE ORDER TO SHOW CAUSE FROM THE COURT?

We look to Fla. Stat. §744.368(5), (6), and (7), respectively, to begin the analysis. Those sections state as follows:

> (5) If the clerk has reason to believe further review is appropriate, the clerk may request and review records and documents that reasonably impact guardianship assets, including, but not limited to, the beginning inventory balance and any fees charged to the guardianship.
>
> (6) If a guardian fails to produce records and documents to the clerk upon request, the clerk may request the court to enter an order pursuant to § 744.3685(2) by filing an affidavit that identifies the records and documents requested and shows good cause as to why the documents and records requested are needed to complete the audit.
>
> (7) Upon application to the court supported by an affidavit pursuant to subsection (6), the clerk may issue subpoenas to nonparties to compel production of books, papers, and other documentary evidence. Before issuance of a subpoena by affidavit, the clerk must serve notice on the guardian and the ward, unless the ward is a minor or totally incapacitated, of the intent to serve subpoenas to nonparties.

Although there has been no litigation concerning these revisions to the statute, there has been much confusion on how to implement these new provisions.

Ex parte communication between the clerk and assigned judge arises when a clerk directly requests an Order to Show Cause regarding discrepancies in guardianship records and the guardian is not privy to this communication. The Code of Judicial Conduct forbids communication between one party and the Court regarding a matter pending before it. Canon 3(B)(7) of the Code of Judicial Conduct provides:

> [A] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." "Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.

One may argue that the Clerk is not a party to the lawsuit; rather, the Clerk carries out its statutory duties by generating its audit reports, memos, and other communications. The Clerk is performing its duties in such a manner that it acts as a litigant in the case. It is no longer a neutral administrator. Rather, the Clerk takes an adversarial position to the guardian when it asks the Court to issue an order to the guardian. The language of the new provisions make unmistakably clear that is the clerk that is charged with requesting these orders from the court; provisions (5), (6), and (7) of the statute all reference the Clerk.

> QUESTION TWO: IF THE CIRCUIT COURT CLERK, THROUGH ITS AUDITORS, AUTHORIZED BY §744.368, SEEKS AN EX PARTE ORDER TO SHOW CAUSE FROM THE COURT, IS THERE REASON TO BELIEVE SUCH ACTION VIOLATES THE UNITED STATES OR FLORIDA CONSTITUTIONS?

The touchstone of our society, based upon the rule of law, is that each citizen is guaranteed basic due process by the United States Constitution[9] and the Florida Constitution.[10] The Second District Court of Appeals has held:

> Procedural due process under the Florida Constitution guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of private rights. It contemplates that the defendant shall be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure, before judgment is

[9] U.S. Const. amend. XIV, §1; *see also* Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[10] Art. I, § 9, Fla. Const.

rendered against him. Dep't of Law Enforcement v. Real Prop., 588 So.2d 957, 960 (Fla. 1991).[11]

The same court has also held "the right to due process of law must be respected in guardianship proceedings."[12] While the facts in Shappell are distinguishable from those discussed herein, we may apply the Shappell principle and obtain the conclusion that an ex parte order, absent an emergency, violates a guardian's due process rights. Additionally, the Second District Court of Appeal recently found that a violation of due process exists when a court issues a *sua sponte* order directing relief for which no party had properly pleaded.[13] When the Circuit Court Clerk seeks an ex parte Order to Show Cause, the court is granting relief that no party has pleaded.

The purpose of an ex parte order is to address an emergency that, without immediate judicial intervention, will result in some grievous harm.[14] By granting an ex parte order, the court has deprived the party of the procedural due process that is required under both the Florida and United States Constitutions.[15] This is because the non-moving party has not been given notice

[11] Dep't of Law Enforcement v. Real Prop., 588 So.2d 957, 960 (Fla. 1991). While this case does not involve guardian issues, it is cited to show the appellate court's succinct explanation of due process.

[12] See Shappell v. Guardianship of Naybar, 876 So.2d 690, 691 (Fla. 2d DCA 2004), in which the court held denying a guardian's uncontested fees without providing the guardian notice and the opportunity to be heard violated the guardian's constitutional right to due process.

[13] See In re R.T., 164 So.3d 11, 14 (Fla. 2d DCA 2015), wherein Mother sought to dissolve a no contact order between her sons and her husband, who was accused of sexually molesting a previous girlfriend's daughter. The trial court denied mother's motion to dissolve the no contact order and issued a sua sponte order directing sons to undergo therapeutic assessments of their self-protective capacities. The Court held that the trial court violated mother's due process rights by entering sua sponte order requiring sons to undergo therapeutic assessments.

[14] See Kopelovich v. Kopelovich, 793 So. 2d 31, 33 (Fla. 2d DCA 2001), wherein the Court makes clear that an ex parte order stands in derogation of due process and should only be issued based upon an "immediate or present danger or the threat of or actual domestic violence."

[15] Compare and contrast Loudermilk v. Loudermilk, 693 So.2d 666, 668 (Fla. 2d DCA 1997), in which the court reversed by holding that an emergency warranting temporary suspension of father's right to procedural due process was not present, and Williams v. Williams, 845 So.2d 246, 248 (Fla. 2d DCA 2003), in which the court determined

that there was an issue before the court and also because the court entered an order without hearing the non-moving party's facts or evidence. When granting an ex parte order, the court is required to weigh the likely harm of not issuing the order against the constitutional process due to the non-moving party. In other words, when the court grants an ex parte application and issues an ex parte order, i.e. without requiring notice to the non-moving party and without giving the non-moving party the opportunity to be heard before the order is issued, the court has effectively suspended the non-moving party's constitutional right. Of course, doing so is a very serious matter, but is permissible when: 1) The court has determined that the likely harm outweighs the non-moving party's fundamental right to due process; and 2) The non-moving party is afforded due process, i.e. notice and an opportunity to be heard, present evidence etc., at the earliest possible time after immediate harm has been avoided. The court, then fully armed with the facts and evidence through having provided due process, can modify or dissolve the ex parte order as necessary to effect the ends of justice. A temporary suspension of due process can be justified by immediate harm or the threat of immediate harm. However, without such harm or threat, it is neither necessary nor permissible to deny one due process. By the Circuit Court Clerk filing a Motion for an Order compelling a guardian to produce documents and, in the alternative to file a response showing good cause why the documents should not be produced, there will be no harm done to the ward; the ward is whom the law seeks to protect. Absent such harm, there can be no justification to suspend operation of the United States and Florida Constitutions.

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the trial court's entry of an ex parte order did not violate mother's right to due process due to emergency circumstances the ex parte order addressed, so long as mother was subsequently provided the process of an evidentiary hearing to determine whether ex parte order should be dissolved.

Florida courts have consistently held that due process of law requires, among other things, that interested parties have a reasonable opportunity to be heard before a judgment or decree is rendered. The Second District of Appeal was clear about observance of due process in a case where the trial court denied an inmate's request to attend a hearing in person on the City's Motion for Summary Judgment. See Burch v. City of Lakeland, 891 So.2d 654 (2d DCA 2005). The Court concluded that the inmate was deprived of his due process rights, and in so ruling, approvingly quoted the following language in the Florida Supreme Court's decision of Dep't of Law Enforcement v. Real Prop., 588 So.2d 957, 960 (Fla. 1991):

> Procedural due process under the Florida Constitution guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of private rights. It contemplates that the defendant shall be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him. Id. at 656 (emphasis added).

In light of the aforementioned legal principles, the answer to the second issue presented is clear. Unless an emergency circumstance exists, the Circuit Court Clerk should not seek an ex parte order; if the court grants an ex parte order absent emergent circumstances, such an order violates the guardian's due process rights guaranteed under both the United States and Florida Constitutions.

The same legal reasoning applies to the facts discussed herein. Given that the clerk has hired auditors who communicate with the court and seek an Order to Show Cause directed at the guardian without providing notice to the guardian, the guardian's constitutional rights to due process are violated. The only remedy is for the auditor, on behalf of the clerk, to file a motion requesting an order to show cause, serve the same on the guardian, and set it for a hearing to determine if there is a factual and legal basis for an order to show cause.

Without taking these necessary steps, the clerk is, in effect, violating the guardians' constitutional right to due process under both the Florida and United States Constitutions.

QUESTION THREE: CAN THE CIRCUIT COURT CLERK EXECUTE THE STATUTORY DUTIES REQUIRED IN A MANNER THAT DOES NOT VIOLATE THE UNITED STATES OR FLORIDA CONSTITUTIONS?

Analysis of this question must begin with recognizing the constitutional reality that "[n]o person shall be deprived of life, liberty or property without due process of law . . . ." (Art. I, § 9, Fla. Const.). We certainly know that an order to show cause deprives the guardian, or ward through the guardian, of neither life nor liberty. It does, however, potentially deprive the ward through the guardian of property. The right to due process is more than just the right to notice and to be heard. In fact, when the state takes away a person's right to personal freedom by adjudicating that person incompetent in addition to providing written notice and a hearing at which the person, or his/her guardian, may appear, that person is entitled to many other protections to complete the constitutional canopy. For instance, the right to present evidence, confront and cross-examine adverse witnesses, a neutral decision-maker, representation by counsel, findings by preponderance of the evidence, and a record sufficient to permit a meaningful appellate review are some of those concomitant rights that give the right to due process actual meaning.[16]

Ordering the ward, through the guardian, to a hearing without first having been given the opportunity to produce the document(s) by a specified date and time is: a) inconsistent with the statute; and b) compels the ward to incur attorney's fees for a Show Cause hearing when the same may not be necessary. Moreover, in order to safeguard the time-honored constitutionally

[16] See In re Guardianship of King, 862 So. 2d 869, 871 (Fla. 2d DCA 2003).

protected right to due process, the guardian must be given notice, which means a reasonable amount of time; an opportunity to be heard, which means a hearing; and the rights to both present and cross-examine witnesses; as well as the right to enter evidence.

It is very difficult to envision a scenario that would lead a reasonable and prudent jurist to conclude that the failure to provide requested documents constitutes an emergency that is sufficient to delay a ward's right to due process. Rather, as the statute provides, the court should issue an order directing the guardian to produce the documents requested by the Circuit Court Clerk on or before a specified date and time, which must be reasonable; or, as an alternative, invite the guardian to set an evidentiary hearing and present evidence as to why the documents should not be legally required or produced. Of course, to the extent that the court views the totality of circumstances and finds an "emergency," then an ex parte order would be appropriate if that order also established a date and time for an evidentiary hearing at the earliest possible opportunity following the ex parte order. The ward, through the guardian, would then have been given the process due under both the United States and Florida Constitutions.

VI. SUMMARY AND CONCLUSION

The Circuit Court Clerk, in accordance with Fla. Stat. §744.3685, has a statutory duty, *inter alia*, to do the following:

1. Review every initial or annual report filed by a guardian of the person within thirty (30) days of that report being filed.

2. Additionally, the Circuit Court Clerk has a statutory duty to audit every verified inventory and accounting filed by a guardian of property within ninety (90) days.

The Circuit Court Clerk, in accordance with Fla. Stat. §744.3685, has the discretion to:

1. Request additional documents from guardians;

2. If a guardian fails to comply with the Circuit Court Clerk's request, file an affidavit identifying the records requested and show good cause why the documents requested are needed to complete the audit.

It is at this point that the procedure can become problematic. Once the Circuit Court Clerk has exercised discretion to obtain records in addition to those provided with the guardian's report or accounting, the statutes are clear that the court may issue an order requiring the requested documents to be produced on or before a date and time specified by the court. In so doing, however, the law requires the court to provide the guardian an alternative to producing the documents, i.e. to show good cause why the documents should not be produced.

If the Circuit Court Clerk requests an Order to Show Cause in the absence of an emergency, the Clerk must do so by motion with notice to the guardian. If an order issues, it must require the guardian to produce the records on or before a specific date. If the guardian believes there is good cause showing that the records ought not to be produced, the guardian should, in lieu of producing the documents, be given the opportunity to set an evidentiary hearing and present evidence supporting the asserted good cause to avoid production. This could easily be accomplished by the Circuit Court Clerk filing a Motion to Compel Production and, in the alternative, to issue an Order to Show Cause why the documents should not be produced.

VII. TAKE AWAY

Fla. Stat. §744.368, as amended, requires Circuit Court Clerks to audit all initial and annual guardianship reports. If discrepancies are discovered, the statute empowers the Clerks to request the guardian to produce specific records or documents. The statute does not, however, specify the proper procedure to be followed if the guardian does not produce those specific records or

documents. Although the statute allows the Clerk to request the trial court to issue an Order to Show Cause for the production of the records or documents, this automatically places the Clerk in an adversarial position adverse to the position of the guardian. Accordingly, any communication between the Clerk and the Court cannot be ex parte; it must be by motion with notice to the guardian. In this way, the Clerk is able to execute the statutory duties set forth in the amended statute while, at the same time, ensuring that the guardian's constitutionally protected right to due process is not violated.

1. During the audit of verified inventory and accountings submitted by guardians, should the Circuit Court Clerk has reason to believe further review is appropriate, the Circuit Court Clerk should:

    a. Write a letter to the guardian, or if the guardian has counsel write to the guardian's counsel, citing Fla. Stat. §744.368(5) requesting additional documents;

    b. The letter should identify the specific documents sought and should include, where appropriate, date or date ranges;

    c. The letter should provide a specific, but reasonable, time in which a response is expected;

    d. The letter should advise the guardian or guardian's counsel that if the documents are not received, or other mutually acceptable arrangements are made, that the Circuit Court Clerk will file a Motion to Compel the requested documents.

2. When the Circuit Court Clerk determines the guardian has not provided the requested documents, an Affidavit should be completed and filed.

3. A Motion to Compel the requested documents should be filed. Both the letter and the Affidavit should be attached to the Motion to Compel.

4. The Clerk should write a letter to the Judge, copied and sent to the guardian or guardian's counsel and sent by the same method and at the same time as it is sent to the Judge, enclosing a copy of the Motion to Compel and proposed order.

5. Sample documents, i.e. letter, motion, affidavit etc., are included in the Appendices to this memorandum.

APPENDIX A

§744.368, Fla. Stat.
RESPONSIBILITIES OF THE CLERK
OF THE CIRCUIT COURT

(1) In addition to the duty to serve as the custodian of the guardianship files, the clerk shall review each initial and annual guardianship report to ensure that it contains information about the ward addressing, as appropriate:

(a) Physical and mental health care;

(b) Personal and social services;

(c) The residential setting;

(d) The application of insurance, private benefits, and government benefits;

(e) The physical and mental health examinations; and

(f) The initial verified inventory or the annual accounting.

Probate (2) The clerk shall, within 30 days after the date of filing of the initial or annual report of the guardian of the person, complete his or her review of the report.

(3) Within 90 days after the filing of the verified inventory and accountings by a guardian of the property, the clerk shall audit the verified inventory and the accountings. The clerk shall Probate advise the court of the results of the audit.

(4) The clerk shall report to the court when a report is not timely filed.

robate/IG (5) If the clerk has reason to believe further review is appropriate, the clerk may request and review records and documents that reasonably impact guardianship assets, including, but not limited to, the beginning inventory balance and any fees charged to the guardianship.

(6) If a guardian fails to produce records and documents to the clerk upon request, the clerk may request the court to enter an order pursuant to s. 744.3685(2) by filing an affidavit that identifies the records and documents requested and shows good cause as to why the documents and records requested are needed to complete the audit.

(7) Upon application to the court supported by an affidavit pursuant to subsection (6), the clerk may issue subpoenas to nonparties to compel production of books, papers, and other documentary evidence. Before issuance of a subpoena by affidavit, the clerk must serve notice on the guardian and the ward, unless the ward is a minor or totally incapacitated, of the intent to serve subpoenas to nonparties.

(a) The clerk must attach the affidavit and the proposed subpoena to the notice to the guardian and, if appropriate, to the ward, and must:

1. State the time, place, and method for production of the documents or items, and the name and address of the person who is to produce the documents or items, if known, or, if not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

2. Include a designation of the items to be produced.

3. State that the person who will be asked to produce the documents or items has the right to object to the production under this section and that the person is not required to surrender the documents or items.

(b) A copy of the notice and proposed subpoena may not be furnished to the person upon whom the subpoena is to be served.

(c) If the guardian or ward serves an objection to production under this subsection within 10 days after service of the notice, the documents or items may not be required to be produced until resolution of the objection. If an objection is not made within 10 days after service of the notice, the clerk may issue the subpoena to the nonparty. The court may shorten the period within which a guardian or ward is required to file an objection upon a showing by the clerk by affidavit that the ward's property is in imminent danger of being wasted, misappropriated, or lost unless immediate action is taken.

APPENDIX B

Sample Letter

Dear {Guardian; or Guardian's Counsel}:

Pursuant to Fla. Stat. §744.368(3) the Circuit Court Clerk of the Twentieth Judicial Circuit has audited the verified {inventory and/or accounting} submitted by you in {case style}, {county name} County, {Case Number} on behalf of {ward}. As a result of our audit, we believe that further review is appropriate and, in accordance with Fla. Stat. §744.368(5), we hereby request the following documents:

1. {document list}

We want to take every opportunity to work with you to resolve this matter. Accordingly, we request that you provide the above listed documents to {investigator}, at Office of the Circuit Court Clerk in and for the Twentieth Judicial Circuit, 1700 Monroe Street, Fort Myers, Florida 33901, within ten (10) days of the date on this letter.

Please understand that we are required by Florida law to conduct this audit and we would like to do so in a timely manner. Unless you make other, mutually agreed upon arrangements, if the documents are not received within the time requested, the Circuit Court Clerk will cause a Motion to Compel the requested documents to be filed.

Please contact {investigator} at {telephone and email} with any questions you may have regarding this matter. Your anticipated cooperation is appreciated. Thank you.

APPENDIX C

Sample Affidavit required by 744.3685(2)

AFFIDAVIT OF {Deputy Court Clerk or Auditor}

I, {Name of Affiant} am of legal age and sound mind. I am not under the influence of any medications or other substances that impair my ability to think, understand or make decisions; nor am I otherwise mentally impaired. I am swearing or affirming under oath that my following statement is true and accurate and state as follows:

1. I am employed by the Circuit Court Clerk in and for the Twentieth Judicial Circuit in the State of Florida.

2. As part of my regularly assigned duties I am conducting an audit on {Case name and number}, {County}, County, Florida.

3. During the conduct of my audit, I determined there is reason to believe further review is appropriate; and I requested records and/or documents from the Guardian, {Guardian name}. 744.368 (5)

4. By letter dated {date}, I identified and requested specific documents needed to complete the audit. (See copy of letter attached to this Affidavit as Exhibit "A").

5. The requested documents are required to complete the audit because {reasons}.

6. My letter requested the documents be provided by {date}, which was ten (10) days from my letter.

7. The Guardian has failed to provide the requested documents.

_____
{Deputy Court Clerk}

STATE OF FLORIDA §
COUNTY OF LEE §

Sworn to or affirmed and signed before me on March 22, 2016, by {Deputy Court Clerk}, who produced a Florida Driver's License as identification.

_____
NOTARY PUBLIC

APPENDIX D

Sample Motion

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

IN RE: THE GUARDIANSHIP OF {WARD}	)	CASE NO:

MOTION TO COMPEL DOCUMENTS FROM GUARDIAN

COMES now the Circuit Court Clerk, in and for the Twentieth Judicial Circuit in the State of Florida ("Clerk") and, pursuant to Fla. Stat. §744.368(6), requests this Court enter an order compelling {guardian}, as Guardian for {ward} to produce documents necessary for the Circuit Court Clerk to execute the statutory duties contained in Fla. Stat. §744.368(3). In support of this Motion, the Circuit Court Clerk states as follows:

~90 day

1. In accordance with Fla. Stat. §744.368(3), the Circuit Court Clerk began the required audit on or about {date}.

2. The Circuit Court Clerk's auditor, {name} determined that there is reason to believe further review is appropriate; and on {date of letter}, in accordance with Fla. Stat. §744.368(5), requested additional documents from {guardian or guardian's counsel} (see correspondence requesting specific documents, attached as Exhibit "A").

3. The Circuit Court Clerk requested the specified documents be provided within ten (10) days of the written request.

4. The Clerk, in compliance with Fla. Stat. §744.368(6), prepared an affidavit showing good cause as to why the requested documents reasonably impact the

guardianship assets and are required to complete the audit, which is required by statute. (See affidavit, attached as Exhibit "B").

5. As of the date of this Motion, the Circuit Court Clerk has not received the requested documents.

WHEREFORE, the Circuit Court Clerk requests this Court enter an order pursuant to Fla. Stat. §744.3685(2) compelling {guardian} for {ward} in the above styled and numbered case to produce the documents enumerated in Exhibit B within five (5) business days; or, in the alternative but also within five (5) business days, set an evidentiary hearing for a date and time certain with the Court and show good cause why the enumerated documents should not be produced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, in accordance with Fla. R. Jud. Admin. 2.516(b)(1), a copy of this document was furnished to {guardian or guardian's counsel}, {address}, by eMail to {email} on _____, 201____.

Circuit Court Clerk in and for
The Twentieth Judicial Circuit,
State of Florida

By: _____
{Name}, Deputy Court Clerk
1700 Monroe Street
Fort Myers, Florida 33901
Telephone: (239)
eMail:

APPENDIX E

Sample Proposed Order

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

IN RE: THE GUARDIANSHIP OF {WARD}	)	CASE NO:

ORDER COMPELLING GUARDIAN TO PRODUCE DOCUMENTS

NOW, having received a Motion supported by Affidavit from the Circuit Court Clerk for the Twentieth Judicial Circuit ("Clerk"), this Court finds and orders as follows, and issues the following Order pursuant to Fla. Stat. §744.3685:

1. The Clerk, pursuant to the duties enumerated in Fla. Stat. §744.368, is conducting an audit in the above styled and numbered case.

2. The Clerk, as authorized by Fla. Stat. §744.368(5), requested the guardian to provide records and/or documents that reasonably impact guardianship assets.

3. The Guardian, {Guardian Name}, pursuant to the duty required by Fla. Stat. §744.368, has failed or refused to provide the requested records and/or documents.

4. The Clerk has provided an affidavit that identifies the records and/or documents requested; and has shown good cause as to why the documents and/or records requested are needed to complete the audit required by Fla. Stat. §744.368.

5. This Court finds, in accordance with Fla. Stat. §744.3685(2), the following order should be issued.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Guardian {Guardian Name} shall produce the records and/or documents requested by the Clerk as enumerated in the Clerk's Affidavit within five (5) business days of this Order.

IT IS FURTHER ORDERED that, should the Guardian believe there exists good cause as to why the requested documents and/or records may not be compelled, the Guardian shall within five (5) business days of this order, set an evidentiary hearing for a date and time certain before this Court to show such good cause.

DONE AND ORDERED on this _____ day of _____, 20___, in Fort Myers, Lee County, Florida.

_____
JUDGE OF THE CIRCUIT COURT

CERTIFICATE OF SERVICE

Service of the foregoing Order has been furnished to counsel listed below, pursuant to Fla. R. Civ. P. 1.080 on _____, 201_____:

{Guardian or Guardian Counsel}

{Others to whom notice should be sent}

_____
{JA Name}, Judicial Assistant

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CIVIL DIVISION

IN RE: The Guardianship of DOROTHY A. LAUE **Case No. 10-GA-000190**

/

ORDER DENYING GUARDIAN'S MOTION FOR REHEARING AND ORDER GRANTING MOTION FOR CONTINUANCE

THIS CAUSE comes before the Court on the Guardian's "Motion for Rehearing" filed March 7, 2016, and "Motion for Continuance" filed March 7, 2016.

By order rendered February 26, 2016, the Court on its own motion entered an order scheduling an evidentiary hearing for the following stated purpose:

> **"for the Guardian to provide supplemental authority as to why Petitions for Orders Authorizing Payment of Compensation & Expenses of the Guardian have been filed since the onset of this case while monthly payments have been made to Estate & Guardianship Management Services in the amounts of the invoices attached to the petitions authorizing payments that state the Petitioner has not been paid."**

Section 744.368, Florida Statutes, establishes the responsibilities of the Clerk of the Circuit Court as it relates to guardianship files, initial and annual guardianship reports, initial verified inventories and annual accountings. The statute explicitly directs and requires that the Clerk review annual reports and audit annual accountings and "shall advise the court of the results of the audit." Furthermore,

> "[i]f the clerk has reason to believe further review is appropriate, the clerk may request and review records and documents that reasonably impact guardianship assets, including, but not limited to, the beginning inventory balance and any fees charged to the guardianship," and "[i]f a guardian fails to produce records and documents to the clerk upon request, the clerk may request the court to enter an order pursuant to s. 744.3685(2) by filing an affidavit that identifies the records and documents requested and shows good cause as to why the documents and records requested are needed to complete the audit."

The Court retains jurisdiction over all guardianships, is to conduct judicial reviews, and has the authority to enter any order necessary to protect the ward. Fla. Stat. §744.372.

The Guardian has filed a "Motion for Rehearing" and "Motion for Continuance" that seemingly challenge the Court's authority to *sua sponte* schedule an evidentiary hearing for the purpose of ensuring the protection of the ward's assets and that seemingly challenge the Clerk's authority to conduct audits as it relates to guardianship files for the purpose of ensuring the protection of the ward's assets. The Clerk is required by statute to report directly to the Court with regard to guardianship matters, and any characterization of such reporting as "*ex parte*" is inaccurate. The Clerk is not a party to any guardianship matter, is required to conduct audits by statute, and is required to report to the Court by statute. The guardianship at issue is a non-adversarial proceeding. The Court and Clerk, however, are not relieved of responsibility for ensuring the protection of the ward's assets.

In the "Motion for Rehearing," the Guardian explains that inclusion of the identified phrase in the Petitions for Orders Authorizing Payment of Compensation & Expenses of the Guardian was an inadvertent, innocent oversight. The Guardian is invited and encouraged to offer any supplemental authority or evidence demonstrating any inadvertence or oversight. Furthermore, to the extent that the "Motion for Rehearing," is addressed to a *sua sponte* order that only schedules an evidentiary hearing, the "Motion for Rehearing" is not being used in an appropriate context and is unauthorized.

In the "Motion for Continuance," the Guardian seeks a continuance alleging that counsel is scheduled to attend a previously set mediation in Charlotte County. The Court having confirmed the same based on the review of the Charlotte County Clerk's Docket, the Court will grant a brief continuance and this hearing will now proceed on **Wednesday, March 23, 2016 at 11:00 am before the undersigned Judge in Courtroom 4-O.** Ensuring the protection of a ward's assets is of the utmost importance. Further, the Guardian indicates that she "may also need to take a deposition of Bharat Vallarapu ("Employee"), an employee at the Lee County Clerk's office, who contacted [the

Guardian] . . ." The Court finds this argument is without merit and appears speculative as to whether a deposition will be sought, and if so as to whether any such deposition could lead to the discovery of evidence material to the issue scheduled to be heard.

Accordingly, it is

ORDERED AND ADJUDGED that the Guardian's "Motion for Rehearing" is **DENIED**. It is further;

ORDERED AND ADJUDGED that the Guardian's "Motion for Continuance" is **GRANTED**. The Evidentiary Hearing scheduled for March 17, 2016 at 1:00 pm will be continued to Wednesday, March 23, 2016 at 11:00 am before the undersigned Judge in Courtroom 4-O. Lee County Justice Center, 1700 Monroe Street, Fort Myers, FL 33901.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 15 day of March, 2016.

Alane C. Laboda
Circuit Judge

Copies to:

Matthew Alan Linde, Esq.
Robin Vazquez
Wells Fargo, Attn: Sandra Young, Trustee for Vivian B. Degenhardt

SHARON R. BOCK
Clerk & Comptroller
Palm Beach County

POSITION STATEMENT ON CLERK'S GUARDIANSHIP DUTIES AND EX PARTE COMMUNICATION

FLA. STAT. §744.368 and §744.3685

I. INTRODUCTION

The Florida Constitution establishes the Clerk of the Circuit Court as part of the judiciary.[1] One of the Clerk's key duties is to serve as custodian of court records, including guardianship files.[2] Specifically, Florida Statutes charge the Clerk with reviewing each initial and annual guardianship report, and auditing the verified inventory and accountings within specified timeframes.[3] In 2014, the Florida Legislature voted near-unanimously to amend Florida's guardianship laws.[4] These changes increased the authority and responsibility of the Clerk, in the Clerk's role as an auditor of guardianship reports. Specifically, as a result of the amendments, the following sections of statute were added:

Fla. Stat. §744.368(5) states that "[i]f the clerk has reason to believe further review is appropriate, the clerk may request and review records and documents that reasonably impact guardianship assets, including but not limited to, the beginning inventory balance and any fees charged to the guardianship."

Fla. Stat. §744.368(6) states that "[i]f a guardian fails to produce records and documents to the clerk upon request, the clerk may request the court to enter an order pursuant to s. 744.3685(2) by filing an affidavit that identifies the records and documents requested and shows good cause as to why the documents and records requested are needed to complete the audit."

Fla. Stat. §744.3685(2) states that "[i]f a guardian fails to comply with the submission of records and documents requested by the clerk during the audit, upon a showing of good cause by affidavit of the clerk which shows the reasons the records must be produce, the court may order the guardian to produce the records and documents within a period specified by the court unless the guardian shows good cause

[1] Fla. Const., Art. V, §16.
[2] Fla. Stat. 744.368.
[3] Fla. Stat. 744.368(1)-(3).
[4] CS/HB 635 (2014) – Guardianship. Available at: http://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=51743.

as to why the guardian may not be compelled to do so before the deadline specified by the court. The affidavit of the clerk shall be served with the order."

The purpose of this position statement is to exercise due diligence by outlining how Fla. Stat. §744.368 (5) – (6) and Fla. Stat. §744.3685(2) authorize the Clerk to file an affidavit, without simultaneously notifying or serving parties to the case, requesting that the Court issue an order to show cause when records and documents related to a guardianship audit have not been provided by the guardian as previously requested by the Clerk. This memorandum does not address §744.368(7), relating to the Clerk's ability to issue subpoenas upon application to the Court, as supported by an affidavit.

II. ANALYSIS

A. A Florida Statute specifies that the Clerk's affidavit shall be served with the Court's order.

Florida Rules of Civil Procedure require every document filed in an action to be served in accordance with the requirements of the relevant Florida Rule of Judicial Administration.[5] The relevant Florida Rule of Judicial Administration provides in pertinent part that "[u]nless…a statute…specifies a different means of service, every pleading subsequent to the initial pleading and every other document filed in any court proceeding….must be served in accordance with this rule on each party.[6] In this instance, a statute does specify a different means of service. Fla. Stat. §744.3685(2) specifies that "[t]he affidavit of the clerk shall be served with the order." (emphasis added). Accordingly, the Clerk is not required to serve the parties with the affidavit until it is accompanied by the Court's order.

B. Filing of the affidavit may be accomplished with either the Clerk or the Court, either by paper or electronically.

Florida Rules of Civil Procedure require every document filed in an action to be filed in accordance with the requirements of the relevant Florida Rule of Judicial Administration.[7] The relevant Florida Rule of Judicial Administration provides in pertinent part that "[p]aper documents and other submissions may be manually submitted to the clerk or court…for filing by…any self-represented non-party…[h]owever, any self-represented nonparty that is a governmental or public

[5] Fla. R. Civ. P. 1.080(a)
[6] Fla. R. Jud. Admin. 2.516
[7] Fla. R. Civ P. 1.080(2).

agency…may file documents by electronic submission is such entity has the capability of filing documents electronically.[8] Further, Fla. R. Jud. Admin. 2.516(e) defines filing in pertinent part as "filing them with the clerk in accordance with Rule 2.525, except that the judge may permit documents to be filed with the judge." Based on the above, the Clerk may file an affidavit pursuant to the requirements of Fla. Stat. §744.368(6), with either the Clerk or the Court, either by paper or electronically.

C. No ex parte communication occurs when a Clerk files an affidavit with the Court because the Clerk is part of the judiciary and not a party to the case.

Black's Law Dictionary defines 'ex parte communication' as "as communication between counsel and the court when opposing counsel is not present." The same dictionary defines 'ex parte order' as "an order made by the court upon application of one party to an action without notice to the other." With regard to guardianship cases, the Clerk is a part of the judiciary and acts as an arm of the court to provide an independent check and balance when it comes to guardianship audits.[9] Further, the Clerk neither meets the definition of 'party,' which is defined as "one by or against whom a lawsuit is brought," nor a 'litigant,' defined as a "party to the lawsuit."[10] As the Clerk is a part of the judiciary, acts as an arm of the court, does not appear in the style of guardianship cases, and is a nonparty in guardianship actions, the Clerk can cause neither an ex parte communication, nor ex parte order to occur when reporting information or filing an affidavit with the Court. Arguing in the alternative, if the Clerk were a party to the case and the type of aforementioned communication were considered ex parte, it would still be allowed under judicial canons as it is expressly authorized by Florida Statutes.[11]

D. Due process occurs when the party receiving the order from the Court also receives a copy of the Clerk's affidavit and is afforded an opportunity to request a timely hearing to show why they should not be compelled to produce records requested by the Clerk.

Due process is defined as "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to

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[8] Fla. R. Jud. Admin. 2.525 (d)(2.
[9] Fla. Const., Art. V, §16; Fla. Stat. 744.368.
[10] Black's Law Dictionary, Third Pocket Edition.
[11] Fla. Code of Judicial Conduct Canon 3(B)(7)(e); Fla. Stat. §744.368(6); Fla. Stat. §744.3685(2).

decide the case." [12] Fla. Stat. §744.3685(2) specifies that "[i]f a guardian fails to comply with the submission of records and documents requested by the clerk during the audit, upon a showing of good cause by affidavit of the clerk which shows the reasons the records must be produced, the court may order the guardian to produce the records and documents within a period specified by the court unless the guardian shows good cause as to why the guardian may not be compelled to do so before the deadline specified by the court. The affidavit of the clerk shall be served with the order" (emphasis added). Based on the above, due process occurs when the guardian receives a copy of the Clerk's affidavit along with the Court's order, and has an opportunity to request an evidentiary hearing where they can show good cause for not producing the documents the Clerk requested. There are no substantive due process issues at stake in a hearing about whether documents should be provided so the Clerk can complete an audit. The Court at an evidentiary hearing is not issuing a final judgment, or entertaining a full trial, but merely making a determination regarding the production of documents.

III. Conclusion

Fla. Stat. §744.368 (5) – (6) and Fla. Stat. §744.3685(2) authorize the Clerk to file an affidavit, without simultaneously notifying or serving parties to the case, requesting that the Court issue an order to show cause when records and documents related to a guardianship audit have not been provided by the guardian as previously requested by the Clerk. The filing of an affidavit in this manner complies with Florida Rules of Judicial Administration governing service and filing. Further, because the Clerk is a part of the judiciary, acts as an arm of the court, and is not a party to any guardianship case, the filing of an affidavit requesting a show cause order does not cause any ex parte communication or ex parte order to occur. Even if the Clerk were a party to the case, Florida Judicial Cannons would allow this type of ex-parte communication since it is expressly authorized by Florida Statute. Finally, guardians' due process rights are preserved when the Clerk files an affidavit and the Court issues an order because the guardian receives a copy of the Clerk's affidavit at the time they are served the Court order and they have an opportunity to request an evidentiary hearing to show good cause as to why they should not have to produce the documents requested by the Clerk, before the Court-established deadline to produce the documents.

[12] Black's Law Dictionary, Third Pocket Edition.

Florida Link to Materials/Resources

Statutes and Court Rules

- Chapter 2014-124 Committee Substitute for House Bill No. 635
- Chapter 2015-83 Committee Substitute for House Bill No. 5
- Chapter 2016-40 Committee Substitute for Senate Bill No. 232

Standards of Practice for Florida Guardianship

http://www.floridaguardians.com/wp-content/uploads/2016/05/Standards-of-Practice-Final.pdf

Guardianship Fraud & Financial Exploitation 25 Red Flags

http://www.mypalmbeachclerk.com/uploadedFiles/Public_Funds/Division_of_Inspector_General/Guardianship_Fraud_Hotline/guardianship-fraud-hotline-25-red-flags.pdf

Article

Bi Focal A Journal of the ABA Commission on Law and Aging A Guardian's Health Care Decision-Making Authority: Statutory Restrictions by Karna Sandler

TAB 4

STANDING COMMITTEE ON JUDICAL ETHICS

ADVISORY OPINION JE15-002

STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

DATE ISSUED: July 23, 2015 **ADVISORY OPINION: JE15-002**

PROPRIETY OF A JUDGE CONSIDERING NON-PARTY COMMUNICATIONS DURING ADMINISTRATION AND OVERSIGHT OF ADULT GUARDIANSHIPS PROCEEDINGS

ISSUE

During administration of guardianship proceedings and oversight of the guardian, may a judge (1) consider non-party communications concerning a guardian's conduct or the ward's welfare; and (2) initiate, permit, and consider an investigation based upon a citizen's complaint or upon information received in an investigation conducted by court officers.

ANSWER

No. A judge administering a guardianship proceeding must adhere to the NCJC's general proscription against ex parte communications. Although cognizant that there is an urgent and growing need for consistent and effective monitoring of guardians in order to protect vulnerable wards from abuse and exploitation, the Committee also recognizes that the questions addressed in this advisory opinion arise chiefly from omissions in Nevada law. The Committee therefore believes that the issues require a statewide solution and that the better forum for examining and implementing changes in guardianship proceedings is the Nevada Supreme Court's recently formed Commission to Study the Creation and Administration of Guardianships.

FACTS

A judge has presented two questions arising from the administration of adult guardianship proceedings and judicial oversight of guardians. The request informs the Committee about both the extreme vulnerability of elderly wards to abuse and neglect by guardians with the power to control all aspects of a ward's existence and also Nevada's lack of a statutory scheme for reporting such conduct to the presiding judge responsible for monitoring the ward's welfare and the guardian's conduct.

Due to the nature of guardianship proceedings, it is uncertain that information most relevant to protecting vulnerable wards will be brought before the court by parties to the proceeding. Because wards are rarely represented independently by counsel, it is often family members, friends, neighbors, and community volunteers who come forward with information relevant to a guardian's abuse and neglect of a ward and depletion of a ward's estate. In the absence of specific statutory authority, the judge requests this Committee to advise whether the Nevada Code of Judicial Conduct ("NCJC") would permit the judge to consider communications from a non-party which raise concerns about a guardian's compliance with statutory duties and responsibilities, or

the welfare of the ward or the ward's estate. The judge also asks whether the NCJC permits a judge to initiate, permit, and consider an investigation, or the result thereof, based upon a citizen complaint or information received in an investigation conducted by court officers.

DISCUSSION

The Committee is authorized to render advisory opinions evaluating the scope of the NCJC. *Rule 5 Governing the Standing Committee On Judicial Ethics*. Accordingly, this opinion is limited by the authority granted in Rule 5.

Canon 2 states "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." *See Nev. Code Jud. Conduct, Canon 2.* Rule 2.9 proscribes ex parte communications with a judge concerning a pending matter and delineates limited exceptions to the prohibition. Rule 2.9(A) states, in pertinent part:

> (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
>
> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
>
> (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond.
>
> * * *
>
> (3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
>
> * * *
>
> (5) A judge may initiate, permit, or consider any ex parte communication when authorized by law to do so.

See Nev. Code Jud. Conduct, Rule 2.9(A).

Comment [3] to the Rule clarifies that "[t]he proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule." *See Nev. Code Jud. Conduct, Comment [3], Rule 2.9.*

In *Matter of Fine*, the Nevada Supreme Court held that a judge violates Canon 3B(7) by engaging in ex parte discussions with non-parties on substantive matters even if the judge later informs the parties of the ex parte

communications. *See Matter of Fine, 116 Nev. 1001, 1016 (2000)* (Canon 3B(7) is now codified in part as Rule 2.9). The court further admonished Judge Fine for acting "as an advocate for a particular position" in discussing substantive matters with a court-appointed expert outside the presence of the parties. *116 Nev. at 1023.*

The requesting judge has raised an important and urgent issue respecting the protection of adult wards who are often unable to defend themselves against their guardians' exploitation or mistreatment. Friends, family, neighbors, and others concerned for a ward's welfare are to be commended and encouraged for coming forward with information relevant to a guardian's possible abuse and neglect, and presiding judges should be able to act upon such information forcefully and expeditiously. Nevertheless, where Nevada's statutory scheme provides no specific procedure for bringing such information before the presiding judge, or for the judge to consider communications from non-parties relevant to a guardian's compliance with statutory duties and responsibilities, the Committee believes that the NCJC does not except these ex parte communications from the proscription of Rule 2.9 and, therefore, can offer only general guidance on the subject.

As ex parte communications are particularly pernicious, a judge must act with great care when a non-party communicates or attempts to communicate with the judge on substantive matters in a pending proceeding. Receiving or acting on such communications may not only impact a judge's impartiality in deciding the matter, but may also place the judge in the untenable position of advocating for one of the parties or allowing one party to gain an advantage over another party. Even if the judge notifies all parties of the substance of the communication and allows them an opportunity to respond, *Matter of Fine* makes clear that a judge who initiates or willingly participates in ex parte discussions of substantive matters has violated the NCJC.

The recently revised NCJC recognizes that there are some instances when a judge may properly assume a more interactive role in a proceeding. Comment [4] to Rule 2.9 states "[a] judge may initiate, permit, or consider ex parte communications authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others." *See Nev. Code Jud. Conduct, Comment [4], Rule 2.9.*

It appears to the Committee that a judge administering guardianship proceedings may very well be serving in the same role as a judge in a recognized therapeutic or problem-solving court – such as drug or mental health court – and that both the ward and guardian may be better served if the judge more directly interacted with family members, service providers, and others interested in the ward's welfare. Rule 2.9(A)(5) and Comment [4], however, make it very clear that before a judge may initiate, permit or consider any ex parte communication that such communications must first be authorized by law. Here, as the requesting judge has pointed out, Nevada's statutory scheme is silent and offers no

avenue for communications relevant to abuse and neglect which may be considered ex parte under the NCJC.

Given this omission in Nevada's statutory scheme, the Committee must advise that the NCJC prohibits non-party communications with a judge in guardianship proceedings. Despite the good intentions of those providing information pertinent to a judge's oversight of the guardian, and the often urgent need to protect wards from mistreatment, the NCJC does not allow a judge to solicit or consider such information ex parte under the present state of Nevada law.

The second question regarding whether a judge may initiate, permit, and consider an investigation, or result thereof, raises many of the same issues discussed above. Even though Nevada law authorizes a judge to appoint investigators, the central issue here is whether the judge may make such an appointment based on ex parte information obtained either through a citizen complaint or information received in an investigation conducted by court officers.

The Committee believes that Rule 2.9's proscription on ex parte communications would bar a judge from acting on information obtained in this manner. A judge cannot receive or discuss substantive information about a guardianship proceeding unless expressly authorized by law. As with the first question, Nevada law is silent on the issue and a judge may not receive or act on such information without running afoul of the NCJC.

In addition, the NCJC obligates a judge to ensure the right to be heard. Rule 2.6(A) states "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." As emphasized in Comment [1] to this rule "[t]he right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed." *See Nev. Code Jud. Conduct, Comment [1], Rule 2.6.*

Again, as the requesting judge notes, Nevada law is silent on the procedures a judge is to follow in order to determine whether an investigation of a ward's situation or a guardian's actions is warranted. Given most guardians' plenary power over a ward and the ward's estate, it seems to the Committee that such investigations may indeed be a critical component in protecting a ward from exploitation and mistreatment, and that a judge ought to have as many tools as possible to ensure that guardians are held accountable for their actions. It is equally critical, however, that a judge protect the parties' right to be heard and adhere to procedures designed to ensure a fair and impartial process.

The Committee notes that this request for an advisory opinion raises issues of statewide concern that are better addressed in another forum. Although this advisory opinion provides general guidance on the subjects raised, the Committee believes that the formulation of a particular procedure to deal with guardianship abuse and overreaching needs to be vetted by those most familiar with the issues and adopted only after consideration of all competing interests. The Committee therefore respectfully refers these issues to the Nevada

Supreme Court Commission to Study the Creation and Administration of Guardianships for consideration as it deems appropriate. *See In the Matter of the Creation of a Commission to Study the Creation and Administration of Guardianships, ADKT No. 0507, Order dated June 8,* 2015.

CONCLUSION

The Committee concludes that Rule 2.9's prohibition against ex parte communications precludes a judge from considering non-party communications relating to a guardian's compliance with statutory duties and responsibilities or the welfare of the ward or the ward's estate. Although guardianship proceedings are akin to recognized therapeutic or problem-solving courts, Nevada law does not at present authorize a judge to initiate, permit, or consider any ex parte communication in a guardianship proceeding.

Further, Rule 2.6 obligates a judge to ensure the parties' right to be heard. Nevada law is again silent on the procedure a judge is to follow when determining whether to investigate a guardian's actions or ward's situation. The Committee therefore concludes that the NCJC does not allow a judge to consider information transmitted ex parte in determining whether to appoint investigators in a guardianship action. The requesting judge has raised critical issues that are better resolved by the Nevada Supreme Court's Commission to Study the Creation and Administration of Guardianships. Accordingly, this Committee refers this request for an advisory opinion to the Commission for its consideration.

REFERENCES

Nev. Code Jud. Conduct, Canon 2; Rule 2.6 and 2.9; Commentary [1] to Rule 2.6 and Commentary [3] and [4] to Rule 2.9; Rule 5 Governing the Standing Committee On Judicial Ethics

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This opinion is issued by the Standing Committee on Judicial Ethics. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.

Janette Bloom
Vice-Chairperson

TAB 5

PHYSICIAN'S CERTIFICATE

PHYSICIAN'S CERTIFICATE WITH NEEDS ASSESSMENT

(Please print clearly or type)

I, _____, am a physician licensed to practice in the State of Nevada.
Physician's Full Name

I examined _____, an adult, on _____.
Proposed protected person's Full Name Date of Exam

This proposed protected person suffers from (Diagnosis) _____

_____

_____

_____

which is a _____ Permanent Condition _____ Temporary Condition.

I certify that this proposed protected person is unable to respond (check all that apply; at least one must be provided:

_____ To a substantial and immediate risk of physical harm.

_____ To an immediate need for medical attention.

_____ To a substantial and immediate risk of financial loss.

Describe immediate risk or need: _____

_____

_____

Attached hereto is (check all that apply; at least one must be provided):

_____ A copy of my report of the above exam which includes my findings, opinion and diagnosis regarding the proposed protected person and his/her mental condition and/or capacity.

_____ A copy of the proposed protected person's chart notes which support and/or detail my findings, opinion and diagnosis regarding the proposed protected person and his/her mental condition and/or capacity.

_____ A letter, signed by me, detailing my findings, opinion and diagnosis regarding the proposed protected person and his/her mental condition and/or capacity.

My opinion of the proposed protected person's mental capacity and/or ability to function independently without assistance of others is _____

_____

_____

My opinion as to the proposed protected person's risk of harm and need for supervision is as follows:

The proposed protected person's risk of harm to self is:
_____ Mild _____ Moderate _____ Severe

The proposed protected person's risk of harm to others is:
_____ Mild _____ Moderate _____ Severe

The proposed protected person's level of needed supervision is as follows:
___ Locked Facility ___ 24 Hour Supervision _____ No Supervision
_____ Independent Living/Some Supervision ___ No Supervision When Taking Meds

My opinion as to the proposed protected person's everyday functions is as follows:

CARE OF SELF (ACTIVITIES OF DAILY LIVING (ADL's) AND RELATED ACTIVITIES

Maintain adequate hygiene, including bathing, dressing, toileting, dental
_____ Independent ___ Needs Assistance ___ Total Care
Prepare meals and eat for adequate nutrition
_____ Independent ___ Needs Assistance ___ Total Care
Identify abuse or neglect and protect self from harm
_____ Independent ___ Needs Assistance ___ Total Care

FINANCIAL (IF APPROPRIATE NOTE DOLLAR LIMITS)

Manage and use checks, deposit, withdraw, dispose, invest monetary assets
_____ Independent ___ Needs Assistance ___ Total Care
Enter into a contract, financial commitment, or lease arrangement
_____ Independent ___ Needs Assistance ___ Total Care
Employ persons to advise or assist him/her
_____ Independent ___ Needs Assistance ___ Total Care
Resist exploitation, coercion, undue influence
_____ Independent ___ Needs Assistance ___ Total Care

MEDICAL

Give/Withhold medical consent
_____ Independent ___ Needs Assistance ___ Total Care
Admit self to health facility
_____ Independent ___ Needs Assistance ___ Total Care
Make or change an advance directive
_____ Independent ___ Needs Assistance ___ Total Care
Manage medications
_____ Independent ___ Needs Assistance ___ Total Care
Contact help if ill or in medical emergency
_____ Independent ___ Needs Assistance ___ Total Care

HOME & COMMUNITY LIFE

Choose/Establish abode
_____ Independent ___ Needs Assistance ___ Total Care
Maintain reasonably safe and clean shelter
_____ Independent ___ Needs Assistance ___ Total Care
Drive or use public transportation
_____ Independent ___ Needs Assistance ___ Total Care
Make and communicate choices regarding roommates
_____ Independent ___ Needs Assistance ___ Total Care
Avoid environmental dangers such as stove and poisons, obtain medical help
_____ Independent ___ Needs Assistance ___ Total Care

The proposed protected person should _____ or should not _____ be required to attend a hearing on the petition for guardianship. If the proposed protected person should not attend, please explain:

_____
_____
_____

Because I do not believe the proposed protected person should attend a guardianship hearing, I informed the proposed protected person of his/her right to an attorney in the guardianship proceedings.

_____ Yes _____ No

_____ The proposed protected person has requested appointment of an attorney.

_____ The proposed protected person would not comprehend the need for attorney representation.

_____ Discussing the need for attorney representation with the proposed protected person would be detrimental to his/her mental health.

Response of proposed protected person: _____
_____
_____

My opinion as to the proposed protected person's need for a guardian is as follows:
_____ The proposed protected person does not need a guardian.
_____ The proposed protected person needs only a guardian of the person.
_____ The proposed protected person needs only a guardian of the estate.
_____ The proposed protected person needs a guardian of the person and estate to make medical and financial decisions.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____ _____
Physician's Signature

_____
Print Physician's Name Address: _____

PCRT
ATTORNEY NAME
BAR NUMBER
ATTORNEY ADDRESS

PHONE NUMBER
FAX NUMBER
EMAIL ADDRESS
Attorney for the Petitioner(s),

DISTRICT COURT
_____COUNTY, NEVADA

In the Matter of the Guardianship of the person and estate of _____, a Protected Person.	Case No.:G-__-_____ Family Court Dept. No.:

PHYSICIAN'S CERTIFICATE

Date of Hearing:
Time of Hearing:

STATE OF NEVADA)
: ss:
COUNTY OF CLARK)

_____, being first duly sworn according to law, deposes and says:

I am a physician for_____, the above-named proposed protected person, and am licensed to practice in the State of Nevada.

I have been informed that _____, the _____(relationship) of the above proposed protected person, are filing with the court a verified Petition for Appointment of General Guardian(s) in order to secure his/her/their appointment as the General Guardian(s) of the person and estate of _____.

_____ suffers from _____
_____
_____.
As a result, it is my opinion that _____ needs a guardian of:

_____ Person only;

_____ Estate only;

_____ Both Person and Estate.

It is my opinion that _____:

_____ Is able to attend the Guardianship hearing;

_____ Would not comprehend the reason for the Court hearing or be able to contribute to the proceeding;

_____ Should not attend the Court hearing as it would be detrimental to him/her, and therefore his/her presence from court should be excused.

It is my opinion that _____ is unable to respond (check all that apply):

_____ To a substantial and immediate risk of physical harm;

_____ To a substantial and immediate risk of financial harm;

_____ To an immediate need for medical attention;

_____ None of the above.

Further, due to the condition of _____, he/she should not be allowed to own a gun.

Under the penalty of perjury, the undersigned declares the foregoing Affidavit to be true and correct.

DATED this _____ day of _____, _____.

Sign Name: _____

Print Name:

TAB 6

COMMISSION ON SERVICES FOR PERSONS WITH DISABILITIES LETTER

Commission on Services for Persons with Disabilities

3416 Goni Rd., Suite D-132 • Carson City, NV 89706
775/ 687-4210 (Telephone) • 888/ 337-3839 (Toll Free) • 775/ 687-4264 (Fax)

July 7, 2016

Chief Justice James W. Hardesty c/o
Stephanie Heying
Administrative Office of the Courts
201 S. Carson Street, Suite 250
Carson City NV 89701-4702

Chief Justice Hardesty, and members of the Commission to Study the Administration of Guardianships in Nevada's Courts

As Chair of the Commission on Services for People with Disabilities I ask that the Guardianship Commission in its final report recommend actions to address the issues raised in the attached letter from Thomas F. Coleman Legal Director, Spectrum Institute in order to fulfill Nevada's responsibilities under Title II of the Americans with Disabilities Act to ensure that guardianship respondents with intellectual and developmental disabilities receive access to justice in guardianship proceedings. As the letter explains in great detail, they especially need access to effective advocacy services.

Sincerely

Brian M. Patchett
Chairperson, Commission on Services for Persons with Disabilities

Disability and Guardianship Project

9420 Reseda Blvd. #240, Northridge, CA 91324
(818) 230-5156 • www.spectruminstitute.org

January 19, 2016

Chief Justice and
Associate Justices
Nevada Supreme Court
201 S. Carson Street
Carson City, NV 89701

Re: Request for Modifications (Per ADA and Section 504)
Access to Effective Advocacy in Guardianship Proceedings

To the Court:

The Disability and Guardianship Project of Spectrum Institute submits this request to the Supreme Court of Nevada in its administrative role as a "public entity" responsible for ensuring that the judicial branch provides access to justice to people with disabilities in legal proceedings conducted in Nevada. A copy of this request is therefore being sent to the court's ADA coordinator.

This request for modification of policies and practices is made pursuant to Title II of the Americans with Disabilities Act. Because the judicial branch of Nevada receives federal funding for one or more of its functions, the request is also being made pursuant to Section 504 of the Rehabilitation Act of 1973.

The request is made on behalf of two classes of individuals who have not received or will not receive access to justice in guardianship proceedings. The first class includes adults with intellectual and developmental disabilities who are currently under an order of guardianship due to a finding of incapacity to make decisions in one or more major life activities. The second class includes adults with such disabilities who are currently involved in such a proceeding as a respondent or who will be so involved in the future.

Due to cognitive and communication disabilities, these classes of individuals are not able to make a request for modification of policies and procedures on their own behalf. However, a request for modification is not required when a public entity is aware that persons who use its services have a disability, that the disability impairs them from having meaningful participation in such services, and that the nature of the disability precludes or impairs their ability to request modifications or accommodations that would allow them to have meaningful access to such services. Even though a request is not necessary, this request is being made to alert the court to its sua sponte duties.

The general nature of the services that are the focus of this request involve access to justice in guardianship proceedings. Due to cognitive and communication disabilities, adults who have such conditions are not able to participate in these proceedings in a meaningful way – to defend their

existing rights and to advocate for the retention of such rights – without an appropriate accommodation. One way the judicial branch provides such accommodation is by appointing an attorney to represent a respondent in such proceedings. A court-appointed attorney – if he or she provides effective assistance to the respondent – is an important method of ensuring that such respondents have access to justice.

Because important liberty interests are at stake in these proceedings – the right to make decisions regarding residence, education, health care, sexual relations, social contacts, and marriage are in jeopardy – the appointment of counsel is required by due process and federal mandates under the ADA and Section 504. Appointment of counsel may also be required by state law.

Once counsel is appointed – whether due to statutory or constitutional requirements – due process requires that counsel must provide *effective* assistance. Otherwise, the right to counsel would be an illusory protection.

The judicial branch provides a variety of procedural methods to ensure that the right to effective assistance of counsel is being enforced, including procedural methods for clients to complain when court-appointed counsel is violating professional standards or ethical requirements. Such methods include: (1) a motion for new counsel (known as a "Marsden motion" in California); (2) an appeal; (3) a petition for writ of habeas corpus; and (4) an administrative complaint with the state bar.

These procedures either alone or collectively work well for litigants who do not have cognitive or communication disabilities. It is not uncommon for them to be used by adults in cases involving criminal law, family law, civil law, and probate law. Such procedures are also used by teenagers involved in juvenile delinquency cases. Courts in Nevada regularly hear and adjudicate complaints of ineffective assistance of counsel in hearings on motions, writ proceedings, and appeals. The State Bar Nevada often hears and decides administrative complaints regarding ineffective assistance.

Unfortunately, these procedures are not accessible to respondents in guardianship proceedings due to their cognitive and communication disabilities. Adults with intellectual and developmental disabilities are generally not able to understand the constitutional and statutory protections available to them to defend their existing rights and to advocate for their retention. They do not know when their attorneys are not providing the advocacy services to which they are entitled and which are essential to having access to justice. As a result, they are generally not able to complain through the normal procedures established by the state and administered by the judicial branch – motions, writ petitions, and appeals. They are also not able to file administrative complaints with the state bar.

An investigation by the Supreme Court would confirm that such motions, writ petitions, and appeals by guardianship respondents are virtually nonexistent. An investigation by the State Bar would also confirm that administrative complaints by such respondents are rare, if they ever occur at all.

Although it was stated in a different procedural context, the Eleventh Circuit Court of Appeals recently observed: "it seems fanciful to expect intellectually disabled persons to bring petitions for habeas corpus. We agree with one of our sister Circuits that '[n]o matter how elaborate and accurate the habeas corpus proceedings available under [state law] may be once undertaken, their protection is illusory when a large segment of the protected class i.e., ["gravely disabled" persons committed to mental institutions] cannot realistically be expected to set the proceedings into motion in the first place." (JR v. Hansen, 803 F.3d 1315, 1326 (11th Cir. 2015)).

A state Court of Appeal in California recognized that respondents in conservatorship cases, due to their disabilities, would be denied access to justice if procedural rules require them to raise the issue of ineffective assistance of counsel on their own.

"[T]he parties agree Michelle is incompetent and unable to personally exercise her right to request new appointed counsel. That inability, however, does not mean Michelle is any less entitled to effective representation or any less entitled to request new appointed counsel if the representation she is receiving is ineffective. '[I]ncompetence does not cause the loss of a fundamental right from which the incompetent person can still benefit.' (Citation omitted)" (Michelle K. v. Superior Court, 221 Cal.App.4th 409 (2013))

The Supreme Court of Nevada and the State Bar of Nevada have probably not been aware of the dilemma faced by guardianship respondents with respect to the lack of access to justice associated with the issue of effective assistance of counsel; a procedure exists but they can't access it due to their cognitive and communication disabilities. That lack of awareness is being corrected by this letter, the references cited in it, and the enclosed White Paper.

The issue is not academic. Abuses in guardianship proceedings have been the impetus for reform efforts in states throughout the nation. New WINGS agencies have been created in many states (Working Inter-disciplinary Networks of Guardianship Stakeholders). Conferences, reports, and agencies have acknowledged the need for systemic reforms. However, their focus has not yet included the issue of effective assistance of counsel. In Nevada there is the Commission to Study the Administration of Guardianships. We are reaching out to them today with a separate letter.

The Disability and Guardianship Project is the leading advocacy organization in the nation on this issue. We have conducted several investigations in California and currently have a complaint against various public entities pending with the United States Department of Justice. We have submitted proposals to the Judicial Council of California and to the Los Angeles Superior Court. These efforts are based on a documented pattern and practice of ineffective assistance of court-appointed attorneys in limited conservatorship proceedings in California.

We do not file complaints without offering potential solutions. Our reports are numerous and they always contain specific and concrete recommendations for improvement. While they have involved virtually all aspects of guardianship or conservatorship proceedings, they are heavily focused on the right to effective assistance of counsel. If court-appointed attorneys were to consistently advocate in a competent manner, the other systemic problems associated with these proceedings would be cleared up through motions, writs, and appeals. Unfortunately, in California there are no motions, writs, and appeals involving the rights of people with intellectual and developmental disabilities in such proceedings. In all likelihood an investigation by the Supreme Court of Nevada or by the guardianship commission would show that the same is true in Nevada. The lack of such motions, writs, and appeals – and the lack of complaints to the State Bar of Nevada would confirm our premise that guardianship litigants are not receiving access to justice because they can't use existing remedial procedures. In this case, the specific problem is lack of access to effective advocacy, and lack of institutional procedures to reduce the likelihood of ineffective assistance or to address the problem when it does occur.

It is the responsibility of the Supreme Court to implement modifications of normal procedures to

ensure that these involuntary litigants have access to effective advocacy and there are methods to identify deficiencies when they occur and to remedy them. To the extent that the Supreme Court of Nevada oversees or gives approval to rules of professional conduct adopted by the State Bar of Nevada, or reviews discipline when it is meted out by the State Bar, it is also the duty of the court to ensure access to justice through these rules and administrative proceedings.

We realize that this is a difficult situation for the Supreme Court and the State Bar. Existing policies and procedures are based on an assumption that disgruntled litigants are able to identify deficiencies in attorney performance and complain about them through motions, writ petitions, appeals, or administrative complaints. Courts generally think about disability modifications and accommodations in terms of physical access (e.g. structural modifications) or communication adaptations (e.g., sign language interpreters). Literature about accommodations for litigants with intellectual and developmental disabilities is sparse. Except for publications of Spectrum Institute, literature about the ADA and access to effective advocacy for guardianship respondents is virtually nonexistent.

This issue is only now beginning to receive public attention and official recognition. The Daily Journal – California's leading legal newspaper – published several articles and commentaries on the ADA and the right to effective advocacy last year. The Judicial Council of California is considering proposals, submitted last year, for training and performance standards for court-appointed attorneys in limited conservatorship proceedings. The California Supreme Court received a letter similar to this one two months ago and the Supreme Court of Washington received one a few days ago. A complaint against state and local judicial branch agencies in California is currently pending with the U.S. Department of Justice. (http://www.spectruminstitute.org/doj/) Advocacy efforts are gaining momentum and the issue is ready for recognition and remedial action.

Several actions can be taken by the Supreme Court to address this request for modification of policies and practices to provide guardianship respondents access to justice in these proceedings, especially access to effective advocacy. Because of the inherent problem that such litigants are not able to identify ineffective advocacy or complain about it, most of the modifications may have to be pro-active and prophylactic. Nonetheless, whether reactive or preventive, action is needed.

The Supreme Court could involve the guardianship commission by asking it to investigate the adequacy of existing training programs, rules of professional conduct, and ethical standards for court-appointed attorneys who represent guardianship respondents. The commission could investigate the problem and advise the court on whether it should promulgate new training and performance standards for these cases. The court could also ask the State Bar to conduct an audit of a significant sample of such cases to determine, from a review of court records and attorney case files, whether clients are receiving due process and ADA-compliant legal advocacy. An audit of attorney performance in Los Angeles County revealed an embarrassing pattern and practice of inadequate advocacy services by court-appointed attorneys representing respondents in limited conservatorship cases. (http://disabilityandabuse.org/daily-journal.pdf) The same may be true in Nevada.

Something needs to be done. The issue of ineffective assistance of counsel for litigants with intellectual and developmental disabilities has been avoided or neglected for too long. With thousands, or even tens of thousands of such cases processed through the courts of Nevada for decades – without any attention being given to this issue – one wonders how many more years, or

even decades, will pass until the issue gets the attention it deserves. If normal procedures remain, without appropriate modifications, the issue may continue to be unresolved indefinitely.

We trust that the Supreme Court, now that the problem has been brought to its attention, will fulfill its responsibilities under Title II of the Americans with Disabilities Act and take appropriate action to ensure that guardianship respondents with intellectual and developmental disabilities receive access to justice in these cases – especially access to effective advocacy services.

To assist the Supreme Court in addressing this issue, we have included a White Paper titled "Due Process *Plus*: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Cases." (Available online at: http://www.spectruminstitute.org/white-paper/). It discusses the need for access to effective advocacy and offers specific methods to achieve that goal.

We also direct the court's attention to our website: http://spectruminstitute.org/guardianship/ where more information is available on our "what's new" page and our "publications" page.

Whatever steps the Supreme Court or the State Bar may take to investigate this problem, we hope that they will involve disability rights and disability services organizations in Nevada.

We welcome a response from the Nevada Supreme Court and are eager to be of assistance as the court takes steps to address the issues affecting these two classes of involuntary litigants who are unable, without appropriate modifications and accommodations, to participate in existing remedial procedures. Access to effective advocacy services is an issue that needs the court's attention.

Respectfully submitted:

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

p.s. We have included a page of information about projects approved by the Judicial Council of California to review our proposed training and advocacy standards for court-appointed attorneys with a view toward adopting new rules on this topic.

cc: Ms. Stephanie Haying
Court Services Analyst
Administrative Office of the Courts

Ms. Kimberly Farmer
Executive Director
State Bar of Nevada