ILLINOIS GUARDIANSHIP AND ADVOCACY COMMISSION
OFFICE OF STATE GUARDIAN

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CASE LAW SUMMARY

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Note: This work was prepared as a guide to guardianship practitioners, and is intended as an informational guide, not as a complete listing of all case law. Before relying on any of the information presented in this summary, users are encouraged to consult with counsel familiar with guardianship law and other legal issues. Although this information is in the public domain, the Commission asks that any references to this Summary contain proper attribution.

Office of State Guardian

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I. PERSONAL RIGHTS AND DECISION MAKING

Alternative Decision Making Devices

Although many states, including Illinois, have adopted surrogate decision making statutes which enable a guardian or another surrogate decision maker to decide medical issues on behalf of a ward without resort to court review, we feel that it may be helpful to include Illinois case law that guided guardians before the enactment of the Health Care Surrogate Act. Although the precedential value of the cases may have been diminished, they may helpful to understand the development of the law, and are included below.

The Health Care Surrogate Act, 755 ILCS 40/1, et seq., a direct response to the **Longeway** case, was created in 1991 to enable a surrogate to make health care determinations for an incapacitated person who requires medical decision-making. Under this law, a guardian, parent, spouse, child, sibling, relative, or a friend of a person who lacks capacity to consent or refuse medical decisions, can act as a substitute decision maker. The Act requires no court intervention.

The surrogate decision maker may act without court appointment, and is legally authorized to decide to forego life sustaining treatment, where a doctor has found a qualifying medical condition, such as terminal illness, or a persistent vegetative state, to be in place. The doctor must also find that the person lacks decisional capacity as it relates to the issues of the case, and a consulting physician must also agree with the diagnosis and the absence of decisional capacity. The process provided for under this law may be invoked where no guardian has been appointed, and no power of attorney or living will have been executed.

In addition, a guardian may act as a surrogate decision maker without court order, even on decisions involving the right to make medical treatment decisions such as decisions to forgo life-sustaining treatment. Section 11a-17(d). Consequently, guardianship may be used as a way to use the features of the HCSA.

End of Life Decision Making

In re Estate of Longeway, Illinois Supreme Court, 549 N.E.2d 292, 133 Ill.2d 33, 139 Ill. Dec. 780, (1989). It was permissible, under defined circumstances, for a trial court to authorize a guardian of an incompetent, terminally ill patient to consent to the withdrawal of nutrition and hydration. The Court emphatically stated that it did not condone suicide or active euthanasia in Illinois. A procedure to be followed in court, requiring proof of terminal illness, and that the patient was either irreversibly comatose, or in a persistent vegetative state was mandated. An attending physician and at least two other consulting physicians were also required to concur with the diagnosis, and most likely to testify in court. The court required a balancing of the patient's right to end treatment against four legitimate state interests, none of which would normally override a patient's refusal of artificially administered food and water:

1) the preservation of life
2) the protection of the interests of innocent third parties
3) the prevention of suicide, and
4) maintain the ethical integrity of the medical profession.

The Court also required inquiry into the patient's personal value system, using a basic substituted judgment process where the surrogate decision maker attempts to establish, with as much accuracy as possible, what decision the patient would make if competent to do so.

Finally, the Court mandated trial court involvement. Trial court intervention was considered necessary to uphold the strong public policy of preserving the sanctity of human life.

In re Estate of Sidney Greenspan, a Disabled Person (Patrick T. Murphy, Public Guardian of Cook County and Guardian of the Person of Sidney Greenspan), Supreme Court of Illinois, 558 N.E.2d 1194, 137 Ill.2d 1, 146 Ill. Dec. 860 (1990). A public guardian has the same standing to pursue a withdrawal of a treatment petition as a private guardian. Though a guardian's duty is to act in a ward's best interest, such a standard is necessarily general and must be adapted to particular circumstances. One such circumstance is a ward's wish to exercise common law, statutory, or constitutional rights, which may sometimes influence or even override a guardian's own perception of best interests. A public guardian is not barred by a best-interests standard from seeking relief consistent with a ward's wishes as determined by substituted-judgment procedure.

In Re Estate of Lucille Austwick, Legal Advocacy Service; Guardianship and Advocacy Commission, v. Patrick T. Murphy, Cook County Public Guardian, Illinois Appellate Court, 656 N.E.2d 773, 275 Ill. App.3d 665, 212 Ill.Dec. 176 (1995). A guardian may not consent to placement of a

Ado not resuscitate order≅ in wards= nursing home chart without court approval, where the ward is not terminally ill or in a persistent vegetative state and without decisional capacity. Under Illinois law, a guardian may consent to withhold or withdraw life-sustaining treatment only under the provisions of the ***Health Care Surrogate Act,* 755 ILCS 40/1, et. seq.** Under the Act, a surrogate, including a guardian acting as a surrogate, may consent where the ward is found by the attending physician to lack decisional capacity and to have a terminal illness or to be in a persistent vegetative state.

In the Matter of Guardianship and Protective Placement of Edna M. F., Wisconsin Supreme Court, 210 Wis. 2d 558, 563 N.W.2d 485 (1997). The Supreme Court reiterated the position that it outlined in the *L.W.* case, below, and considered whether a guardian of a ward who was not in a persistent vegetative state could agree to the cessation of life sustaining treatment (here, artificial nutrition.) The court drew a distinction between patients that clearly had no substantial hope of recovery and those in a persistent vegetative state, and refused to extend the *L.W.* holding to such cases. The Court expressed fears that doing so, coupled with the reality of medical service delivery, could lead to a sanctioning of euthanasia for persons with disability.

The holding did not address other life-sustaining treatment issues, such as assisted breathing devices, the refusal of intensive resuscitation efforts after agreeing to a "no-code" or related areas. The Court's holding was based in large part on the finding that the ward in this case had failed (when competent to do so) to adequately state her wishes with regard to removal of treatment. By inference, the Court appears to allow a guardian to agree to withdraw or forgo such treatment where the ward's wishes can be clearly ascertained, as where an advance directive was made at a time when the ward had capacity. Unlike, the *L.W.* case, the Court did not outline any particular procedure for applying it's holding.

In the Matter of Guardianship of L.W., Incompetent: Paul J. Lenze, as Guardian ad Litem, v. L.E. Phillips Career Development Center, Guardian, Wisconsin Supreme Court, 482 N.W.2d 60, 167 Wis.2d 53 (1992). The right to refuse all unwanted life-sustaining medical treatment extends to incompetent as well as competent individuals. That right to refuse also extends to artificial nutrition and hydration. The Court held that where there can be no reliable ascertainment of the incompetent's wishes, only the best interests standard can be applied. Further, the Court held that where the determination has been made that withholding or withdrawing life-sustaining treatment is in the best interests, ***the guardian has not only the authority to but a duty to consent to the withholding or***

withdrawal of treatment.

A guardian may consent to the withholding or withdrawal of life-sustaining medical treatment on behalf of one who was never competent, or a once competent person whose conduct never was of a kind from which one could draw a reasonable inference upon which to make a substituted judgment, when: 1) the incompetent patient's attending physician, together with two independent neurologists or physicians, determine with reasonable medical certainty that the patient is in a persistent vegetative state and has no reasonable chance of recovery to a cognitive and sentient life; and 2) the guardian determines in good faith that the withholding or withdrawal of treatment is in the ward's best interests. To make the best interest determination, the guardian begins with the presumption that continued life is in the best interests. That presumption may be overcome upon a good faith assessment of the following factors: the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; the various treatment options; and the risks, side effects, and benefits of each of those options. Court approval of the guardian's decision is not required, so long as adequate notice of the decision is given to identified interested parties, and no objections are encountered. The court noted that the judicial process is an unresponsive and cumbersome mechanism for decisions of this nature. Court review remains appropriate where any interested party objects to the decision of the guardian.

Other Medical Decision Making

Broadening of Scope of Health Care Surrogate Act

The Illinois General Assembly amended The Health Care Surrogate Act, 755 ILCS 40/1, et seq., in August 1997, with House Bill 725. With the new provisions, all surrogates, including guardians of the person, can consent to most medical treatment without court approval. The legislature expanded the surrogate powers first established in 1991. In the 1991 law, the surrogate’s powers could be invoked only where a patient was found to have a qualifying medical decision. Under the 1997 amendments, the qualifying condition requirement is eliminated, thus opening the law up to virtually any medical decision-making not specifically covered elsewhere in Illinois law.

The effect of this is to enable surrogates to act where medical decision-making is required, without resort to court proceedings to appoint a guardian, if a surrogate can be found. In cases where a patient has no health care power of attorney and no one able or willing to act as a surrogate, guardianship will still be a

health care provider=s only alternative, but the new law is expected to drastically reduce the need for guardianship for medical decision-making.

Young V. Oakland General Hospital, Michigan Appellate Court, 437 N.W.2d 321, 175 Mich.App. 132 (1989). Applying a state statute that gave family members the right to act as health care surrogates under particular circumstances, the reviewing court held that a hospital was correct in accepting the medical consent of a daughter in a case where a grandson disagreed with the recommended treatment that was consented to by the daughter. The grandson, a Jehova=s witness, objected to a blood transfusion. The court found that the daughter had a higher degree of affinity with the patient, her mother, and that relationship qualified the daughter as the legal representative. Neither the daughter/decision maker nor the mother/patient were Jehova=s Witnesses.

Residential Placement Decisions Made by the Guardian

In Re Conservatorship of Brady , Minnesota Supreme Court, 607 N.W.2d 781, 2000 Minn. Lexis 176 (2000). In a case where a daughter sought to have the ward live with her in Pennsylvania, and other family members argued in favor of an institutional placement in Minnesota, the court held that a blanket conclusion that living in a private home is always less restrictive of a ward's civil rights and personal freedom than living in an assisted-living or other health care facility is unwarranted. The facts of each case should be considered. Properly considered factors would include whether the ward would be closer to family; whether the ward would remain in the community where the ward had lived; whether insurance might pay costs of care in one setting or another; whether the ward had thrived in one type of placement or another; whether a particular choice could meet expected future needs; whether the court would be able to monitor care in one setting or another.

Frey v. Blanket Corp., Nebraska Supreme Court, 255 Neb. 100, 582 N.W.2d 336 (1998). A guardian placed an adult ward with a chronic mental illness in a nursing home operated by Blanket Corporation. After the ward was killed after an assault by another patient at the home, the personal representative of the ward's decedent's estate brought a wrongful death action against the guardian, the nursing facility, and nursing staff. The action alleged that the guardian should have known of the dangerous proclivities of the patient who assaulted the ward. The trial court dismissed the claim against the guardian on summary judgment, finding that the guardian was entitled to quasi-judicial immunity.

In a quirky procedure, the Nebraska Supreme Court "pursuant to (its) authority to regulate the caseloads of the Nebraska Court of Appeals and this court, ….removed the case to (the Supreme Court's) docket on our own motion." The Supreme Court rejected the quasi-judicial immunity argument and sent the case back to the trial court for further proceedings. The Supreme Court found that "unlike the functions of a guardian ad litem, prosecutor, or court-appointed expert, ***the role of a guardian in selecting a residence for an incapacitated ward is not closely related or ancillary to a court's adjudication of a particular matter***." (emphasis added.)

In explaining the ruling, the Supreme Court noted that "quasi-judicial immunity is not necessary to enable a guardian for an incapacitated person to perform his or her functions without the threat of liability for ordinary negligence, because the guardian cannot have such liability by virtue of the quasi-parental nature of the guardian's duty" as spelled out in the Nebraska guardianship statute. The statute characterized the guardian's duty to an adult ward as equivalent to that owed by a parent to an unemancipated child; under Nebraska law, minors cannot maintain negligence actions against parents, unless the conduct involved relates to "brutal, cruel, or inhuman treatment inflicted by a parent." Accordingly, although the guardian may be immune from actions alleging ordinary negligence, actions for activities that transcend ordinary negligence may apparently still be maintained.1

In re Medworth, Minnesota Appellate Court, 562 N.W. 2d 522 (1997). A conservator may change a ward=s abode only where doing so is in the best interests of the ward. Although a trial court properly determined that a ward needed 24-hour medical services, the court failed to evaluate whether out-of-state relocation was in wards= best interests, or was necessary to provide needed care or services. The welfare of the ward is of paramount importance.

Visitation Rights – Access to the Ward

In Re Casarotto, Illinois Appellate Court, 2000 Ill. App. LEXIS 769 (2000). A mentally disabled adult's guardian challenged a trial court's order, pursuant to the Marriage and Dissolution of Marriage Act, that

1 Illinois law appears to offer guardians the same protection from negligence actions. Under 755 ILCS 5/11a-23 (d), a guardian who acts or refrains from acting is not subject to criminal prosecution or any claim based upon lack of his or her authority or failure to act, if the act or failure to act was with due care and in accordance with law.

required visitation between the ward and his estranged father. The appellate court found the trial court's order to be void for lack of subject matter jurisdiction. The Marriage and Dissolution Act provisions relating to custody of children are only applicable to minor children.

Patient Dumping

Jane M. Roberts, Guardian for Wanda Y. Johnson, Petitioner v. Galen of Virginia, Inc., formerly dba Humana Hospital-University of Louisville, dba University of Louisville Hospital, United States Supreme Court**,** *On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit* January 13, 1999. Per Curiam. No cites available.

The Emergency Medical Treatment and Active Labor Act, as added by ∋9121(b) of the Consolidated Omnibus Budget Reconciliation Act of 1985, 100 Stat. 164, and as amended, 42 U.S.C. ∋ 1395dd (EMTALA), places obligations of screening and stabilization upon hospitals and emergency rooms who receive patients suffering from an Aemergency medical condition.≅ The Court of Appeals held that in order to recover in a suit alleging a violation of ∋1395dd(b), a plaintiff must prove that the hospital acted with an improper motive in failing to stabilize her. Finding no support for such a requirement in the text of the statute, the Supreme Court reversed.

Divorce

In re Marriage of Burgess, Illinois Supreme Court, 189 Ill. 2d 270; 725 N.E.2d 1266; 2000 Ill. LEXIS 312; 244 Ill. Dec. 379. (2000). Illinois Appellate Court, 302 Ill.App. 3d 807, 707 N.E.2d 125, 236 Ill. Dec. 280 (1999). As the appellate court succinctly said, "(c)an a disabled adult's plenary guardian (a guardian of both the individual's estate and person) continue a dissolution of marriage action originally filed by the disabled adult prior to the filing of a petition for guardianship and prior to a finding of disability?"

In February 2000, the Illinois Supreme Court found that "(i)n other cases involving guardians' authority to make personal decisions on behalf of a ward, Illinois courts have held that the guardians may make such decisions under section 11a-17 even though the power to do so is not specifically enunciated. For example, courts have held that guardians may decide on behalf of a ward to withdraw artificial nutrition and hydration (see *In re Estate of Longeway*, 133 Ill. 2d 33, 45-46 (1989); *In re Estate*

of Greenspan, 137 Ill. 2d 1, 16 (1990)), may consent to an adult ward's adoption (*In re Adoption of Savory*, 102 Ill. App. 3d 276, 277-78 (1981)), and may consent to an abortion on behalf of a disabled ward (*In re Estate of D.W.*, 134 Ill. App. 3d 788, 791 (1985))."

The Supreme Court then expressly overrode the Appellate Court and reversed its own longstanding decision in the Drews case, finding Drews to be factually dissimilar, and also finding policy reasons in support of a new position.

Among other things, the court found that a 1997 amendment to the Probate Act that required guardians to consider the wards' previously expressed wishes allowed the guardian to continue the previously filed divorce action.2 The court also noted that its' new position was consistent with a July 16, 1999 amendment to the Probate Act that allows guardians of the person to maintain previously filed divorce actions on behalf of adult wards.3

A note to the Appellate Court's opinion listed the following summary:

> Of the 17 jurisdictions that allow institution (of divorce actions), four allow such action pursuant to express statute or rule (Florida, Massachusetts, Michigan, and Missouri). Eight appear to allow the action outright (Alabama, Arizona, Hawaii, New Mexico, Oregon, Tennessee, Texas, and Washington); and five require some degree of competency on the part of the ward to express a desire for dissolution (California, Delaware, Ohio, Pennsylvania, and South Carolina).

In re Marriage of Herbert J. Drews, Jr., a disabled person, and Sue Ann Carrothers Drews, Illinois Supreme Court, 503 N.E.2d 339, 115 Ill.2d 201, 104 Ill.Dec. 782 (1986). Guardian of estate and person, absent a statutory authorization, cannot maintain an action for a ward for the dissolution of marriage.

2 The amendment, which was drafted by the Illinois Guardianship and Advocacy Commission, adopted the National Guardianship Association's position with respect to surrogate decision making.

3 The statute added the following language to the section that lists the duties of the person guardian, 755 ILCS 5/11a-17 (a-5):
(a-5) If the ward filed a petition for dissolution of marriage under the Illinois Marriage and Dissolution of Marriage Act before the ward was adjudicated a disabled person under this Article, the guardian of the ward's person and estate may maintain that action for dissolution of marriage on behalf of the ward.

Matter of Parmer, Missouri Appellate Court, 755 S.W.2d 5 (1988). Where a wife had filed a divorce action before her adjudication of disability, the guardian had authority to pursue the action for dissolution on the wife's behalf.

Brice-Nash V. Brice-Nash, Kansas Appellate Court, 615 P. 2d 836, 5 K.2d 332 (1991). The decision to sue is a personal one, requiring a voluntary consent and volition on the part of the party bringing suit, which is incompatible with the ability of a person adjudicated Aincapacitated≅ with respect to his person and estate does not possess the requisite capacity to file a divorce action.

Marriage

In Re Estate of David Crockett, Deceased , Illinois Appellate Court, 728 N.E.2d 765, 312 Ill. App. 3d 1167, 245 Ill. Dec. 683 (2000). This appeal arose from a challenge to a marriage that occurred four days before the death of the decedent. At the time of the marriage, the decedent suffered from a malignant brain tumor, and was unable to appear at the county clerk's office to obtain a marriage license. He was also unable to take his marriage vows at a purported bedside marriage ceremony, and a third party surrogate recited the vows on his behalf. The court held that the Illinois General Assembly did not intend to permit marriage by proxy, and reversed the lower court ruling, instructing the trial court to consider whether the marriage was void *ab initio* or merely voidable.

Jean A. Pape et al. , V. Wilma Louise Byrd, Illinois Supreme Court, 582 N.E.2d 164, 145 Ill.2d 13, 163 Ill.Dec. 898 (1991). The appointment of a guardian of a person is not sufficient, by itself, to show that the person was incompetent to have consented to a marriage, in the same way that the appointment of a conservator is not conclusive on the issue of possession of sufficient mental capacity to execute a will, but may be considered as evidence on that issue.

In re Guardianship of Mikulanec, Minnesota Supreme Court, 356 N.W.2d 683 (1984). A person with a mental illness, incapacitated with respect to choosing a spouse, may have a conservator appointed for the limited purpose of approving a marriage, in accordance with a statute that gives a guardian power to restrict a ward=s civil rights and personal freedom so long as the restrictions are no more than necessary.

Witt v. Ward, Ohio Appellate Court, 573 N.E.2d 201, 60 Ohio App.3d 21 (1989). The appointment of a

guardian is conclusive evidence of a ward=s incapacity to do any act that conflicts with the authority given to the guardian. Therefore, there is no conclusive presumption that a ward is competent to enter into a binding contract or deed. However, the appointment of a guardian is only prima facie evidence of incompetency. Therefore, guardianship is only prima facie evidence as to a ward=s capacity to marry, make a will or commit a crime.

Power of guardian to grant or object to divorce or annulment of marriage. 32 A.L.R. 5th 673.

Parental Rights

Guardian as Necessary Party - Termination of Ward's Parental Rights

In Re K.C., a Minor, Illinois Appellate Court, 2001 Ill. App. Lexis 479 (2001). A mother, who was an adult disabled ward of the state of Illinois, was served with notice on a hearing to terminate her parental rights and appoint a guardian to consent to the child's adoption. However, the mother/ward's guardian was not served and was not a party to the proceeding. The trial court adjudicated the mother's rights. On appeal, the appellate court found that the mother's plenary guardian (the Office of State Guardian) was a necessary party to the parental rights termination proceedings. Consequently, the trial court lacked subject matter jurisdiction, and the termination order was void.

In the Interest of Baby Boy Bryant, a/k/a Roy Bryant, A Child Under the Age of 18 Years, 689 P.2d 1203, 9 K.2d 768. When the State seeks to sever the parental rights of an incompetent parent of an infant, due process requires that service be had on one who is known by the court to be the guardian or conservator of the incompetent parent. Failure to serve the known guardian/conservator of a ward with notice of the severance proceeding is a denial of due process of law. A guardian has a duty to protect and aid the ward in a child severance proceeding brought to sever the ward's parental rights to an illegitimate infant. That duty is so strong that the State specifically prohibits a guardian from consenting on behalf of a ward to the termination of the ward's parental rights.

Abortion/Sterilization

Margaret and Kevin Vaughn Sr. v. Sutton Ruoff, et. al, Eight Circuit U.S. Court of Appeals – WD Missouri, 253 F. 3d 1124, 2001 U.S. App. Lexis 13874 (2001). Although the woman involved in this case was not under guardianship, the issue may be of interest to guardians. The holding is well articulated in the closing statement of the Court of Appeals: "any reasonable social worker—indeed, any reasonable person, social worker or not—would have known that a sterilization is compelled, not voluntary, if it is consented to under the coercive threat of losing one's children, and hence unconstitutional." The Court of Appeals upheld the District Court's denial of qualified immunity to Ruoff, a social worker who had arranged for the sterilization of Margaret Vaughn, who was mildly mentally retarded.

David and Debra McDaniel vs. Anita Ong , Illinois Appellate Court, 724 N.E.2d 38, 311 Ill. App. 3d 203, 243 Ill. Dec. 729 (2000). Plaintiff guardians sued a nursing home physician for negligence in failing to diagnose a pregnancy that occurred while the profoundly disabled ward resided in the facility. The appellate court upheld the lower courts dismissal on summary judgment, noting that the prior guardian (the deceased father of the plaintiffs) had indicated that he would not have pursued an abortion, had he known that his daughter/ward was pregnant. The court found that the Doctor's actions caused a loss of the chance to consider an abortion, not the chance to obtain an abortion, and found a lack of proximate cause.

In re Wirsing, Michigan Supreme Court, 573 N.W.2d 51, 456 Mich. 467 (1998). A Probate court has statutory jurisdiction to hear a guardian=s petition for authorization to consent to tubal ligation (sterilization) procedure for a developmentally disabled ward for birth control purposes. A best interests standard applied and the court was entrusted to exercise sound discretion rather than applying a clear and convincing evidence standard.

In re Estate of D.W. (Margaret Jolivet, Guardian ad Litem, et al.) Illinois Appellate Court, 481 N.E.2d 355, 134 Ill.App.3d 788, 89 Ill.Dec. 804 (1985). Absent any proof that the guardian was not acting in the best interest of the ward, the trial court had no legal authority to deny the guardian=s request for authority to consent to an abortion for the ward. A guardian has broad authority to act in the best interest of a ward; a court=s duty in this regard is to ensure that the acts and decisions of the guardian reflect the best interest of the ward by judicially interfering if the guardian is about to do something harmful.

Electroconvulsive Therapy (ECT)

In re Hatsuye T., Illinois Appellate Court, 293 Ill.App.3d 1046, 228 Ill.Dec. 376, 689 N.E.2d 248 (1997). An agent acting under a mentally ill person=s health care power of attorney petitioned to be appointed guardian in order to consent to the involuntary administration of electroconvulsive therapy (ECT). The trial court appointed the agent temporary guardian and authorized as many as ten ECT treatments. The Appellate Court objected to this use of guardianship, and held that the trial court lacked subject matter jurisdiction to authorize a guardian to consent to ECT treatment. In this case, the respondent/ward had executed a valid health care power of attorney that specifically excluded the power to consent to ECT. The reviewing court would not allow the trial court to use the guardianship law to lay aside the clearly expressed intent of the ward, which was made in the power of attorney form at a time when the ward was competent.

In Re Winifred Branning, Illinois Appellate Court, 674 N.E.2d 463, 285 Ill.App.3d 405, 220 Ill.Dec. 920 (1996). The Appellate Court found state ECT statute to be unconstitutional, holding that the refusal of unwanted ECT, psychosurgery and the like to be a significant liberty interest. Adopting the Illinois Supreme Court=s reasoning in the case of ***In Re C.E.***, *161 Ill.2d at 214, 204 Ill.Dec. at 127, 641 N.E.2d at 351,* the court found that the treatment is of a Asubstantially invasive nature≅ and has Asignificant side effects.≅ The court also concluded that the procedure had potential for misuse and subversion to Apatient control rather than patient treatment.≅ With respect to guardianship, the court held that Awardship is not determinative ... of the question of whether a patient is able to make a rational decision regarding treatment.≅ The court held that A(a) ward is not by definition unable to make a rational decision regarding treatment. When a court is presented with a petition for the involuntary administration of psychotropic medication, it must find by clear and convincing evidence that the potential recipient is unable to make a rational decision regarding treatment.≅

In criticizing the state statute which had authorized guardians to consent to ECT, the court said that the statute Adoes not specify the level of evidence by which anything must be proved, nor for that matter does it state *what* must be proved except that the guardian has given informed consent and believes the services are in the ward=s best interest.≅ The court then suggested criteria which should be present to make a hearing satisfy basic due process considerations. The court said that A(a)t a minimum, . . . the ward must receive a hearing at which he will be allowed to appear, present witnesses on his own

behalf and cross-examine witnesses against him. He must receive competent assistance at this hearing, although due process does not require that the assistant be a lawyer. The ward must be shown to be unable to make a reasoned decision for himself about the treatment and the treatment must be shown to be in his best interest, which allows consideration of the ward=s substituted judgment and includes a requirement that the treatment be the least restrictive alternative. The ward is also entitled to an independent psychiatric examination.≅

In Re the Estate of Lucille Austwick, a Disabled Person, Legal Advocacy Service, Guardianship and Advocacy Commission, v. Patrick T. Murphy, Cook County Public Guardian, Appellate Court of Illinois, 656 N.E.2d 779, 275 Ill.App.3d 769, 212 Ill.Dec. 182 (1995). The court required a substituted judgment test to be used, with clear and convincing evidence required to show that the ward lacks capacity to accept or reject electroconvulsive therapy The court adopted the same stringent requirements set in place for administration of psychotropic medication. Guardian may agree to treatment only with court approval, and acts as hand of court, and is always subject to court=s direction in the manner in which guardian provides for care and support of a disabled person.

Admission of Ward to Mental Health Facility

In re Ronald Eugene Gardner, Appellate Court of Illinois, 459 N.E.2d 17, 121 Ill.App.3d 7, 76 Ill. Dec. 608 (1984). Guardian may not consent to involuntary admission of a ward to psychiatric facility; to do so would provide an alternative means to admit patient that was not intended by the General Assembly. The Mental Health Code provisions relating to involuntary civil commitment are the exclusive remedies available.

Guardian as Necessary Party – Ward's Petition for Conditional Release From State Institution

Allen Preston v. State of Missouri, Missouri Appellate Court, 33 S.W. 3d 574, 2000 Mo. App. Lexis 1528 (2000). Although a guardian is not required to join in a petition brought by a ward for conditional release from a secure state operated mental health facility, the guardian must at least be joined as a necessary party in the matter, a jurisdictional requirement in considering the matter. "The guardian has a statutorily created interest in a ward's conditional release proceeding, which would be impaired or

impeded by the guardian's absence there from."

Guardian as Necessary Party – Right to Participate in Administrative Hearing to Consider Issues of Abuse of Ward by Care Providers

Tiano v. Palmer, as Director of Iowa Dept. of Human Services, et al., Iowa Supreme Court 2001, 621 N.W. 2d 420, Iowa Sup. Lexis 14 (2001). The Iowa Human Services Department conducted an administrative hearing to review a decision that placed the names of abusing caretakers in a state registry, without providing notice or an opportunity to be heard to the parents and guardian of the alleged victim of abuse. At the administrative hearing, the Department withdrew the findings of abuse and settled the case, and a lower court supported the decision, finding that the guardian had no standing to participate in the administrative hearing. The Supreme Court overturned this decision, and concluded that a guardian had standing to participate and was entitled to notice of the hearing.

Guardian's Right to Notification/ Involvement in P&A Investigation or State Agency Administrative Hearing

Iowa Protection and Advocacy Services, Inc. v. Gerard Treatment Programs L.L.C., U.S. Dist. Ct. ND Iowa, 2001 U.S. Dist. LEXIS 8918 (2001). A residential care facility argued that guardians or legal representatives must be allowed to be present during any interviews by IPAS, the Iowa Protection and Advocacy Service. The court, relying on the Protection and Advocacy for Individuals With Mental Illness Act, 42 U.S.C.S. Sec. 6000 *et seq*., found that guardians or other representatives had no right to prevent, be present at, or to terminate such interviews. The court hastened to add that IPAS should not take a "high-handed" approach to excluding parents or legal guardians from interviews or from the decision making process concerning whether interviews of specific residents are necessary. IPAS is encouraged to involve parents and guardians in these parts of its investigation in furtherance of the interest in family involvement articulated, for example, in the 1991 amendments to the PAMII Act, (citations.)

Wisconsin Coalition for *Advocacy*, **Inc. v. Czaplewski**, U.S. District Court ED Wisconsin, 131 F. Supp. 2d 1039, 1051 (E.D. Wis. 2001). The District Court for the Eastern District of Wisconsin, in another case by a P & A seeking injunctive relief to obtain access to records under the PAMII Act, held

that the plaintiff P & A had the right to access resident records over the objections of a care facility, including those of a deceased resident under guardianship, notwithstanding the fact that the allegations of abuse and neglect concerning the deceased ward and another resident had been thoroughly investigated by other agencies and that the P & A's investigation would likewise reveal, if it had not already, that the deaths of the two residents were not the result of abuse or neglect. The court rejected the defendant's arguments, because the court concluded "that the defendant's refusal to provide the P & A with records that it is entitled to review (indeed, charged to review as a part of its responsibilities) does, in a very real and readily identifiable way, pose a threat to the P & A's being able to discharge its obligations and no amount of damages will remedy that sustained harm."

In Re Guardianship of Heidlebaugh (Rankin ex rel. Heidlebaugh v. Heidlebaugh), Illinois Appellate Court, 321 Ill. App. 3d 255, 747 N.E. 2d 483, 254 Ill. Dec. 443, 2001 Ill. App. Lexis 282 (2001). As the appellate court poignantly wrote, "On the morning of May 22, 1996, Joe Heidlebaugh's (parents) placed him on the bus so that he could be taken to the workshop he had been attending for five years. Joe did not get off the bus that evening. Instead, the driver of the bus handed Darlene a note that said Joe would not be coming home. No one told (the parents) where Joe had been taken. This case is about the necessity of sanctions for the conduct involved in these and related actions." After the school bus incident, the state Protection and Advocacy designee pursued an order of protection and also represented Joe in relation to guardianship proceedings initiated by the father. Joe's father was appointed guardian by a disapproving trial court. There was no evidence of the workshop or P&A having contacted the parents to inform them of any problems or concerns prior to instituting legal proceedings. In a derisively worded decision, a trial court chastised Equip for Equality, the Illinois Protection and Advocacy designee, and the human services agency that operated a workshop for persons with disabilities. Among other things, the P&A and its attorney were castigated for acting in a "high-handed manner" and their "self-righteous" manner in pursuit of what they saw as the rights of a person they sought to protect. However, the trial court declined to award sanctions against the P&A and its attorney. The appellate court found the trial court's refusal of imposition of sanctions against the P&A's attorney and her employer to be an abuse of the trial court's discretion, reversed the trial court's decision, and remanded the matter to determine the amount of sanctions. The appellate court found the conduct engaged in by the attorney ("specific (legal) maneuvers, stealthily accomplished, in an attempt to further the goals of the agency") to be sanctionable within the meaning of the Supreme Court Rule, and found that the P&A could also be sanctioned under an agent-principal theory.

Right of Non-Guardian Spouse to Visit Ward

Conservatorship of Kathleen Lord, Minnesota Appellate Court, 2001 Minn. App. Lexis 963 (2001). With physician medical opinion, a Conservator could limit a spouse's visitation with his wife-conservatee in a residential care facility, a woman suffering from multiple sclerosis and mental illness. The conservatee had argued that her equal protection and marital rights had been violated by the actions of the conservator, the woman's father, as there had been no medical documentation for the need to

restrict visitation. The conservator limited the visits, controlling the duration and appropriateness of the husband's behavior. The restrictions were necessary because the husband was unkempt and dirty, ate food at meals from the conservatee's tray, and brought other food into the facility for her to eat. Instead of bathing his wife as promised, he bathed himself in her room. On another occasion, he became upset that his wife was wearing a bra, and tore it off her person. The trial court and the appellate court found the conservator's restrictions to be reasonable and in the best interests of the conservatee, but remanded the case to the trial court to consider whether a physician might conclude that the husband's visits were medically contraindicated.

Consent to Psychotropic Medication

In Re the Estate of Lucille Austwick, a Disabled Person, Legal Advocacy Service, Guardianship and Advocacy Commission, v. Patrick T. Murphy, Cook County Public Guardian, Appellate Court of Illinois, 656 N.E.2d 779, 275 Ill.App.3d 769, 212 Ill.Dec. 182 (1995) See above.

Right of Ward to Enter into Contracts, Hire Counsel

In re Conservatorship of Nelson, Minnesota Appellate Court, 587 N.W.2d 649 (1999). After the establishment of a conservatorship of the person and estate, a ward attempted to hire an attorney who filed a petition requesting modification of the conservatorship, challenging the sale of the ward's real estate, and seeking attorney fees. The ward was not seeking termination of the guardianship. The appellate court held that, since the ward had lost the ability to contract (without the approval of the conservator) with the adjudication of disability, the ward lacked the ability to enter into a contractual agreement with the attorney. The ward argued, through his purported attorney, that Minnesota's statutory rights to petition for restoration of capacity, for modification of a conservatorship, and to prevent or initiate a change of abode could be illusory without legal representation. The appellate court disagreed, asserting that statutory safeguards exist to protect a ward's best interests, including the oversight of the court and the appointment of a court visitor.

Driving Privileges

In re Estate of Robert Walder Thompson, Appellate Court of Illinois, 542 N.E.2d 949, 186 Ill.App.3d 874, 134 Ill.Dec. 603 (1989). Ward should not be deprived of driving privilege absent a showing of

detrimental impact to wards= estate.

Testamentary Capacity

Estate of Gilbert Dokken, Deceased, South Dakota Supreme Court, 2000 SD 9, 604 N.W.2d 487, 2000 S.D. Lexis 8 (2000). Gilbert Dokken was under a Veteran's Administration guardianship for most of his adult life, until his death in 1997 at age of 82. In 1985, he executed a will that left his entire estate to Myrtle Cross, his sister. His grandnephew, Lee Thomas, challenged the will, claiming undue influence and lack of testamentary capacity. He stood to inherit one half of an estate worth over $400,000.

Both the trial court and the Supreme Court agreed that testamentary capacity was established. Using principles of forensic psychiatry, a psychiatrist found that Dokken had not suffered from psychiatric symptoms during the years of 1978 to 1990, although he was still schizophrenic. His schizophrenia made him withdrawn and complicated his ability to have interpersonal affairs, but based on interviews with those who knew him, the Doctor concluded that Dokken had abilities consistent with testamentary capacity at the time of executing the will.

Estate of Helen Verdi, Deceased v. Toland, Indiana Appellate Court, 733 N.E.2d 25, 2000 Ind. App. Lexis 1147 (2000). Peggy Toland served as guardian of the person of Cecil Toon, who had executed a will before being adjudicated disabled that left his estate to his sister-in-law. One month after being adjudicated disabled, the ward was examined by a physician who found him to lack capacity concerning financial matters, and because of his dementia was easily influenced. Two months later, the ward executed a new will that left his estate in equal shares to his sister-in-law and niece/guardian. The appropriateness of the second will was upheld on summary judgment by the trial court. The appellate court overturned the trial court, and found that the trial court should have considered the material issues concerning the ward's soundness of mind and testamentary capacity.

Confidentiality; Access to Records

Pennsylvania Protection & Advocacy, Inc. v. Houstoun 2000 U.S. App. LEXIS 24790, 3rd Circ., October 3, 2000. Investigating the death of a mentally ill inpatient who committed suicide, Protection and Advocacy Office was entitled to review the state operated facility's peer review documents about the incident. The state argued that state law prohibited release of peer review materials, but the 3rd Circuit, upholding the District Court, found that the Protection and Advocacy

for Mentally Ill Individuals Act, which granted the designated state advocacy agency broad access to all “records,” the definition of which included such reports, preempted state law.

II. FIDUCIARY ISSUES

Bank Liability / Reliance on Authority of Guardian or Agent

Guardianship of Darrell Clark Jr., A Minor, Ohio Appellate Court, 2000 Ohio App. Lexis 4596 (2000). When a minor's mother was murdered, a crime victims fund paid a guardian $47,500 for the minor's benefit. The minor's guardian was ordered to deposit the money in one bank, but placed it in a guardianship account in another bank, National City Bank. Although the Appellate Court found National City to be negligent in its release of all but a few hundred dollars to the guardian for inappropriate expenditures, the Court ruled that there was no actual bad faith on the part of the bank. The bank had authorized the initial deposit and subsequent withdrawals without having demanded a copy of the court's judgment order or a copy of the documentation for the guardianship court appointment. In the absence of bad faith, the court held the bank to be without liability under the terms of the Uniform Fiduciary Act provisions adopted in Ohio law. Accordingly, the trial court's finding of 75% liability on the part of the bank was overturned.

Rinehart v. Bank One, Ohio Appellate Court, 125 Ohio App. 3d 719, 709 N.E.2d 559 (1998). In a guardianship case, Glenn Parks was appointed guardian of the person and estate over his mother, and filed a guardian's bond issued by Ohio Farmers for $245,000. With the appointment, the court issued letters of guardianship to Parks that contained the following language.

> "The above-named Guardian (Parks) has the power conferred by law to do and perform all the duties of Guardian except as limited above; however no expenditures shall be made without prior Court authorization."

The letters of guardianship also contained the following notice:

> "Funds being held in the name of the within named ward shall not be released to the Guardian without a Court Order directing release of a specific fund and amounts thereof."

After the appointment, Parks opened a guardianship checking account with Bank One, which included a debit card allowing the guardian to make purchases or obtain cash advances against the guardianship account. Over $73,000 was subsequently withdrawn without court authorization. Parks also withdrew nearly $30,000 from a separate account with another bank. After the court removed Parks and appointed attorney Rinehart as successor guardian, Ohio Farmers reimbursed the estate for over $100,000.

After obtaining a default judgment against Parks, who was judgment proof, Ohio Farmers turned

to the bank for recovery. After debating whether Ohio Farmers had standing to pursue the claim, the court affirmed the probate court's ruling that Bank One had no duty to exercise control over Parks' spending of the Bank One account.

The appellate court agreed with the probate court's view that "Bank One had every legal right to disburse the funds at issue without the (probate) court's prior approval." The probate court, with the approval of the appellate court, drew a distinction between the bank's release of funds held in the name of *the ward* and funds held in the name of *the guardianship*. The real restriction on the guardian's use of the funds was the probate court itself, through the Ohio guardianship statute's annual reporting requirement and through the court's authority to order an accounting at any time.

In Re Thomas Estate, Michigan Appellate Court, 536 N.W.2d 579, 211 Mich.App. 594 (1995). A Michigan bank was held to be jointly and severally liable to a ward=s estate for misappropriation of funds by a guardian that occurred after the bank released money in estate accounts when the guardian presented a court order from a Vermont court directing release of the funds. The bank was on notice that a Michigan guardianship had been established, and the funds were on deposit in relation to the Michigan guardianship, which had not been terminated. The appellate court noted that there should have been a final accounting and resignation in the Michigan guardianship case before the assets were turned over pursuant to the Vermont guardianship case. The bank was surcharged for the loss, but the appellate court overturned the trial court? s award of attorney fees against the bank.

Bank's Reliance on Purported Agency Agreement

In re Estate of Addie Davis, v. Citicorp Savings n/k/a Citibank, Appellate Court of Illinois, 632 N.E.2d 64, 260 Ill.App.3d 525, 198 Ill.Dec. 5 (1994). A bank is not entitled to rely on provision of Power of Attorney Law that protects from liability persons who rely on an agency in good faith where the agency agreement in question was forged. As no real agency existed, the bank=s reliance was unavailing.

Johnson v. Edwardsville National Bank & Trust Co., et. al, Appellate Court of Illinois, 594 N.E.2d 342, 229 Ill.App.3d 835, 171 Ill.Dec. 490 (1992). A bank may not rely on provision of Power of Attorney Law that protects from liability persons who rely on an agency in good faith where the agency agreement in question was forged. Banks still had a duty to use reasonable diligence to verify both fact and extent of agents= authority.

Other Power of Attorney Issues

James R. Deason, **Guardian of the Estate of Pauline Crider, a Disabled Adult**, **v. Sherry Gutzler, Robert W. Crider**, and **Estate of Robert E. Crider, Deceased**, Appellate Court of Illinois, 622 N.E.2d 1276, 251 Ill.App.3d 630, 190 Ill.Dec. 959 (1993). When an agent enters into a transaction between the agent and the principal that benefits the agent, the transaction is presumptively fraudulent. To rebut the presumption, the agent must prove by clear and convincing evidence that the transfer was a gift. No presumption of a gift exists in a parent-child relationship or in a marital relationship. To determine the legitimacy of the gift, the intent of the principal should be examined, along with evidence of the benefit received by the principal.

Management of Real Property

Guardianship and Protective Placement of Carl F. S., Wisconsin Appellate Court, 2001 WI App 97, 242 Wis. 2d 605, 626 N.W. 2d 330, 2001 Wisc. App. Lexis 209 (2001). Carl and his wife deeded their home to three of their children and a grandchild. The deed was contemporaneous with a lease, allowing Carl and his wife to pay annual rent of one dollar plus taxes, insurance, utilities and repairs for the duration of their lives. The lease could be assigned or sublet by Carl or his wife, without the consent of his 'landlords.' Carl's wife died, and Carl became incapacitated. His guardian successfully petitioned the probate court for an order authorizing the abandonment of Carl's leasehold interest, effectively giving the property to the children and grandchild, arguing that the estate could not afford the taxes and Carl was unlikely to go home. Carla, Carl's daughter objected, and the appellate court reversed the trial court, finding that the trial court had failed to consider the alternative of renting the home for an amount at least equal to the amount of taxes, insurance, utilities, and upkeep. As the court held, "(t)enants almost always pay far more than that." Before deciding the substantive issue, the court also noted that Carla had standing to pursue the appeal, over the objections of the guardian, because "(w)ithout an interested party's ability to protest a guardian's gift of a ward's property, often there would be no check on a guardian's failure to follow the law."

Olga Freeman, Incapacitated Person, vs. Wozniak, Michigan Appellate Court, 2000 Mich. App. Lexis 162 (2000). A trial court set aside a mortgage foreclosure sale and canceling a sheriff's deed of sale. The appellate court overturned the trial court, finding that the ward, although incompetent due to dementia at the time of the foreclosure proceeding, could not allege fraud, accident or mistake, consistent with the terms of Michigan law. The ward's conservator argued that it would be inequitable to allow the sale because the service of the foreclosure action on the ward was tainted, due to the ward's disability, but the appellate court rejected the argument.

In the Matter of the Guardianship of Myrtle E. Mabry, Illinois Appellate Court, 666 N.E.2d 16, 216 Ill.Dec. 848 (1996). In planning for needs of a ward, transfer of wards= home should not be the first alternative considered. The ward=s wishes should be considered, along with input from the guardian of the person, in determining what may be in the ward=s best interest. Factors could include whether the ward would live in the home, sentimental value, reasonableness of the transaction from a financial standpoint, and the availability of other assets that could be used for the ward=s care and support. While the estate guardian is charged with conducting the ward=s litigation, its responsibilities generally go to the preservation of the ward=s estate and not to his or her comfort, self-reliance, or independence. The legislature has decided the latter interests merit a separate guardian for their protection, and the courts must give them careful consideration.

In re Guardianship of McPheter, Ohio Appellate Court, 642 N.E. 2d 690, 95 OhioApp.3d 440 (1994). Guardian was held liable for damages of $16,800 for failure to rent or sell the residence of a ward who was in a nursing home with no reasonable prospect of returning home, even though guardian relied on the advice of legal counsel.

In re Estate of William A. Murphy, a/k/a Willard Murphy, Illinois Appellate Court, 514 N.E.2d 1225, 162 Ill.App.3d 222, 113 Ill.Dec. 214 (1987). Where guardian/son failed to properly account for the conveyance of a farm to himself and other siblings during court accounting, guardian has not fulfilled his duty to the ward to protect and manage the estate. Guardian must both explain the transaction and show that it was just and proper; a determination should have been made of the ward=s capacity to make the conveyance, and whether the conveyance was beneficial to the estate.

Guardian/Conservator's Right to Modify Trust Agreement or Engage In Trust Planning

In Re Guardianship of Ida Garcia, An Incapacitated Person, Nebraska Supreme Court, 262 Neb. 205, 631 N.W. 2d 464, 2001 Lexis 122 (2001). An attorney-conservator sought approval from a probate court to amend the terms of a trust agreement, to move the trust assets to a bank that would be more convenient for him. Although the trial court allowed the modification and the Supreme Court agreed that the trial court had the legal authority to do so, the Supreme Court reversed the trial court's decision. The Supreme Court held that any modification should be based on clear and convincing evidence that the modification was necessary.

Estate of Naymat Ahmed, A Disabled Person, Illinois Appellate Court, 322 Ill. App. 3d 741, 750 N.E. 2d 278, 2001 Ill. App Lexis 370, 225 Ill. Dec. 697 (2001). Northern Trust Bank, as Guardian of the Estate of an Adult Disabled Ward with an estate in excess of $17 million dollars, sought approval of the Probate Court to transfer the corpus of the guardianship estate into a trust that would have been administered by Northern Trust. The Probate Court authorized only a partial transfer of funds, to establish a trust accessible to the ward's family in an amount equal to the then applicable $675,000 federal estate tax exemption. An amendment to the Illinois Probate Act authorized a court to approve a guardian's efforts to engage in tax planning to benefit the estate, or the application of funds not required for the ward's current and future maintenance and support, or the execution of any or all powers over the estate and business affairs of the ward that the ward could exercise if present and not under disability. However, the statute made each of these options conditional on the approval of the court, and gave the court discretion in agreeing to such transactions. The appellate court upheld the Probate Court judges' decision, finding it to be consistent with public policy, the legislative history and principles of statutory construction.

Charitable and Other Giving to Reduce Estate Taxes

Estate of Lucille R. Devlin, Deceased United States Tax Court, Tax Court Memo Lexis 559 (1999). Decedent/ward's guardian, while the ward was living, obtained authorization from a Nebraska probate court to make over $58,000 in cash gifts to the ward's daughter-in-law and grandchildren. At the time of

the ward's death, the estate lacked sufficient assets to make the gifts, but after the death, other assets were liquidated and the gifts were made. The court found that the gifts were not completed in time, and that the gifts were subject to estate tax limitations, and a part of the gross estate for tax purposes. The court, citing authorities, noted that *where the gift is one made out of an incompetent's estate by court decree, the gift is not complete until delivery of the thing or money to the donee. The decree (*court order*) by itself does not pass title or give the donee anything.*

In re Estate of Berry, Missouri Appellate Court, 972 S.W.2d 324, 19988 Mo. App. LEXIS 671 (1998). After Marion Berry was adjudicated disabled, a guardian was appointed for her person, and a conservator was appointed for her estate, valued at over two million dollars. When the conservator sought court permission to make charitable gifts on behalf of the estate in order to reduce estate taxes, the appellate court affirmed the trial court's denial. The appellate court found that "a conservator may be allowed to continue an established pattern, or take reasonable steps to maximize the after-tax estate, but there is no authority for the representative to initiate a course of action which depletes assets to which others may become entitled for the sole purpose of reducing the tax collector's share.

Initiation of Cause of Action on Behalf of Estate; Statutes of Limitations

Gina Trimble Parks v. Raymond Konacki, et al., Illinois Supreme Court, 2000 Ill. Lexis 1212 (2000). Plaintiff alleged that she had been repeatedly raped and abused by her parish priest. She sued both the priest and the Catholic Diocese in a negligence action. Among other arguments made by the plaintiff was a claim that she was under a legal disability caused by the repeated actions of the defendant, and that the purported disability prevented her from taking legal action and should have tolled the statute of limitations. The Supreme Court rejected this argument, stating that *the only manifestation of her alleged "legal disability" consists of an inability to file a civil complaint.* Citing authorities, the court noted that one need not be adjudicated disabled to have a legal disability, but must have some argument that the disability is one contemplated by the legislature. With no legally sustainable disability status, plaintiff could not argue that the statute of limitations should be tolled.

Lindsey v. Harper Hospital, Michigan Supreme Court, 564 N.W.2d 861, 455 Mich. 56 (1997). A Michigan medical practice statute of limitations suspended the tolling period for claims where a person was incapacitated, until such time as a personal representative of the estate was appointed. The statute

began to toll with the appointment of a temporary personal representative of the patient=s estate, rather than when she was later appointed personal representative.

Guardian Liability – Accountings Held Not to Be Binding on Devisees Who Were Not Provided Notice

Guardianship and Conservatorship of Leo Borowiak, An Incapacitated and Protected Person, Nebraska Appellate Court, 10 Neb. App. 22, 624 N. W. 2d 72, 2001 Neb. App. Lexis 62 (2001). Devisees of deceased incapacitated person demanded of guardian/conservator financial records for over six years of conservatorship activity. The information demanded went well beyond the information presented in court accountings, which was presumably available to the devisees. The conservator had presented annual accountings over this period, but without notice to the devisees. The trial court denied the demand, finding that they were not interested parties in the conservatorship estate, as the ward had died, and that the accountings had been approved over the years and the conservatorship closed. The appellate court overruled the trial court, finding the devisees to be "interested persons" who were entitled to receive suitable records of the conservator's administration from the beginning of the conservatorship. Since the devisees had not received notice of the accountings, they had no opportunity to appear and object, and make their demands in a timely manner. Accordingly, the accountings were held not to be binding on the devisees. The appellate court vacated the trial court order and remanded with instructions to order the conservator to provide the devisees with suitable records of the administration of the case from the time of its inception.

Liability of Estate for Ward=s Damages to Others/ Duty of Care to Others of An Institutionalized Person with Disability

Creasy v. Rusk, Indiana Appellate Court, 696 N.E.2d 442, (1998). In a case where a nursing assistant brought suit against a patient with a primary diagnosis of Alzheimer's Disease for personal injuries sustained when the nursing assistant attempted to put the patient to bed. The reviewing court held that the trial court should consider the extent to which a patient with Alzheimer's disease lacked capacity, to determine patient's relative degree of fault. The trial court should also weigh the extent to which a caregiver knowingly incurred risk of personal injury, and whether the caregiver's comparative fault exceeded that of the patient.

The public policy implications of imposing a duty on an institutionalized mentally disabled patient are dependent upon the degree of the patient's incapacity. The greater the patient's degree of impairment, the more the public policy concerns weigh against imposing a duty on him for the reasons set forth in Gould v. American Family Mutual Insurance Co., below. Whether a person is a child or an adult, that person's mental capacity must be factored into the determination of negligence and the determination of whether a legal duty exists.

Gould v. American Family Mutual Insurance Co., Wisconsin Supreme Court, 543 N.W.2d 282, 198 Wis.2d 450 (1996). An Alzheimer=s disease patient was not liable in negligence case to nurse for injuries from patients= pushing or striking nurse. In this case, the ward could not appreciate the consequences of his behavior, or have the capacity to control it. In addition, the court gave weight to the fact that a care giver in such a setting should be on notice as to the risk involved with providing care, noting that "when a mentally disabled person injures an employed caretaker, the injured party can reasonably foresee the danger and is not 'innocent' of the risk involved." 543 N.W.2d at 287.

Burch v. American Family Mutual Insurance Co., Wisconsin Supreme Court, 543 N.W.2d 277, 198 Wis.2d 465 (1996). A 15-year-old who functioned at the intellectual and physical level of an average preschooler aged three to six was capable of negligence unless she was so functionally incapacitated that she was incapable of negligence as a matter of law. The tort-feasor-ward=s mental capacity, without more, cannot be invoked to bar civil liability for negligence.

Insurance Issues

State Farm v. Burton Ewing, Jr., U.S. Court of Appeals, District of Minnesota, Case # 00-3380 (2001). Burton Ewing suffered from a bipolar affective disorder and schizoaffective disorder, with a history of mental illness dating to 1988. He was not under guardianship. During a psychotic episode, he killed his sister, who had visited him at the cabin where he lived, which was owned by his mother. The cabin was insured through a policy purchased by his mother through State Farm. The insurer declined coverage under a standard exclusion for intentional acts caused by an insured and also argued that Ewing was not an insured because he was not a part of the mother's household. The District Court found that Ewing was a member of his mother's household owing to his longstanding familial ties and high degree of dependence. The court also held that the conduct of a person with a mental illness may be considered to be unexpected and unintended for purposes of defeating the intentional acts exclusion in the mother's

homeowner policy. The Court of Appeals affirmed.

Duty to Protect Assets: Public Aid Spend Down and Burial Trusts

In re Estate of Dawn Calhoun, Illinois Appellate Court, 684 N.E.2d 842, 291 Ill.App.3d 839, 225 Ill.Dec. 851 (1997). Guardians must allow for having to pay off any Medicaid liens owed to the state before the balance can go into an OBRA payback trust, in order to shelter assets from a personal injury settlement.

In re Guardianship of Mary Jane Connor, Appellate Court of Illinois, 525 N.E.2d 214, 170 Ill.App.3d 759, 121 Ill.Dec. 408 (1988). Guardian had a fiduciary duty to ward to expeditiously obtain public aid; guardians= duty is similar to that of a trustee to a beneficiary; where guardians= failure to apply for benefits in a timely way resulted in loss to the estate and impoverishment of the ward, guardian could be required to reimburse estate up to the limit allowed under public aid.

Applications for Public Benefits; Medicaid Trusts

Wagner v. Ohio Dep't of Human Servs., Ohio Appellate Court, 2000 Ohio App. LEXIS 4545 (2000). Denial of Medicaid benefits for incompetent man was upheld as he was the beneficiary of a trust that was an available asset. He had a legal interest in the trust, a legal right to access the trust, and no restrictions for support use.

Carnahan v. Ohio Dep't of Human Servs., Ohio Appellate Court, 2000 Ohio App. LEXIS 4571, (2000). A retarded woman's mother established an irrevocable trust in excess of $500,000 that was funded solely with the mother's assets. In an administrative hearing, the State of Ohio cancelled the retarded woman's eligibility for Medicaid. The appellate court found that the trust should not have been treated as an available asset in determining her eligibility for Medicaid. Since the daughter was not the trustee, and she could not have revoked the trust and used the funds for her own benefit, and no payments had been made for health care.

Dependent Child Awards

Estate of Warren W. Degner, Deceased, Illinois Appellate Court, 518 N.E.2d 400, 164 Ill.App.3d 959, 115 Ill.Dec. 875 (1987). An adult disabled ward has a statutory right to money under the terms of Illinois statute providing for an award to all adult dependent children of a deceased with no surviving spouse, so long as the child can show an inability to maintain herself and the likelihood of becoming a public charge. Here, the ward was already supported by the Illinois Department of Public Aid, and had never shown an ability to support herself, having spent much of her life in institutions, dependent on public aid and the Social Security Administration to pay her care. According to the opinion, A(t)he ward was known to be retarded by the time she was six or seven. She also suffered a severe head injury while in elementary school. Apparently she was mistreated by her parents, beaten and scorned, and at the age of 20...thrown out of her parents= home.≅

Use of Totten Trust Funds

In re Estate of Peterson, Illinois Appellate Court, 431 N.E.2d 748, 103 Ill App.3d 481, 59 Ill.Dec. 247 (1982). Interest from Totten Trust assets could be used for care and support of the ward, as approved by the court, without defeating intent of settlor/ward or affecting the interest of a named beneficiary.

Penalties for Breach of Fiduciary Duties – Guardian or Attorney Misconduct

Board of Professional Responsibility v. Glynn, Wisconsin Supreme Court, 2000 WI 117, 238 Wis. 2d 860, 618 N.W. 2d 740, 2000 Wisc. Lexis 788 (2000). In the second round of disciplinary proceedings involving the same attorney and similar misdeeds, the Wisconsin Supreme Court supported an additional nine-month suspension to run consecutive to the prior one-year suspension. See following case.

Board of Professional Responsibility v. Glynn, Wisconsin Supreme Court, 225 Wis. 2d 202, 591 N.W.2d 606 (1999). A Milwaukee attorney who was appointed guardian in two routine guardianship cases was suspended from the practice of law for one year. “By collecting unreasonable attorney fees from three clients without the approval of the court in which their matters resided, by failing to file the

necessary reports with the court in those matters and act competently and timely in them, and by using false statements and documents to justify his excessive fees and to mislead the person investigating his conduct, Attorney Glynn has demonstrated a willingness to place his own pecuniary interests above the interests of the clients whose representation he undertook by court appointment and to create false documents to prevent that conduct from being discovered. In the administrative process brought against the attorney, the referee appointed to investigate the charges recommended only a six-month suspension, but the Board of Attorneys Professional Responsibility appealed and argued in favor of the one-year suspension.

In the Matter of Michael J. Friesen, Attorney Respondent, Kansas Supreme Court, 2001 Kan. Lexis 515 (2001). Attorney Friesen was temporarily suspended from the practice of law for failing to promptly account for his management of client funds, including funds held by the attorney on behalf of a client who had been the subject of a conservatorship proceeding. The attorney had written himself checks for amounts over $176,000 in a nine month period, ostensibly for payment of attorney fees to the lawyer's firm. When an appellate court ordered an accounting from the attorney, he refused, claiming client confidentiality. At a rule to show cause hearing, he continued to refuse to cooperate with the court, and the suspension resulted.

Cuyahoga County Barr Ass'n v. Lavin, Ohio Supreme Court, 92 Ohio St. 3d 102 748 N.E. 2d 1100, 2001 Ohio Lexis 1530 (2001). William J. Lavin, a Cleveland attorney, wrote at least 40 checks totaling roughly $91,800 from a client's (minor) guardianship account for his own use. He transferred another client's funds into the account to disguise the fraud, and manufactured false bank statements as attachments to court accountings as a part of his scheme. The attorney was sentenced to 15 months in prison for bank fraud and ordered to pay restitution on October 31, 1997. The Ohio Supreme Court recommendations of a disciplinary panel and disbarred the attorney. In commenting, the Court found the case to be remarkably similar to the Wherry case (see below) and said that "(t)he continuing public confidence in the judicial system and the bar requires that the strictest discipline be imposed in misappropriation cases."

Office of Disciplinary Counsel v. Judith Wherry, Ohio Supreme Court, 87 Ohio ST. 3d 584, 722 N.E.2d 515. 2000 Lexis 62 (2000). An attorney represented a guardianship estate from which she was found to have improperly withdrawn nearly $60,000, failed to account for more than $20,000, and misrepresented the nature of a loan of $9500. Counting the more than $14,000 in fees that the court demanded back from the attorney, the attorney's bonding company had to reimburse the guardianship $116, 914.86. The attorney argued that she had significant mental health difficulties, but the disciplinary panel rejected the mitigating arguments. The Supreme Court upheld the attorney's permanent disbarment.

Office of Disciplinary Counsel v. Madden , Ohio Supreme Court, 89 Ohio St. 3d 238, 730 N.E.2d 379, 2000 Ohio Lexis 1448 (2000). An attorney, acting as guardian and then as administrator of the decedent's estate of Josephine Jackson, caused losses of over $15,000 to the guardianship and over $6,000 to the decedent's estate. The attorney was also found to have misappropriated funds from several other decedent's estates. The Jackson estate received reimbursement from the attorney's bonding company. For the sum of these infractions, the attorney was permanently disbarred, despite evidence of his habitual depression.

In Re Guardianship and Conservatorship of Bessie R. Jordan v. George Remer and Garden Farms, Inc., Iowa Supreme Court, 2000 Iowa Sup. Lexis 171 (2000). Attorney Remer served as conservator of Bessie Jordan, his aunt, and controlled Garden Farms, Inc. (GFI), a corporation. Remer also acted in the capacity of farm manager for the farm owned by his aunt/ward and his mother, which was operated in partnership. Remer obtained court approval to sell Bessie's share in the farm to GFI, telling the court that his wife Carol owned the corporation, and that the sale was in the best interest of the ward. The property was appraised, and the court authorized the sale, with no notice to the ward or anyone else acting in her behalf. The ward subsequently died. Remer's wife was appointed as administrator for the decedent's estate, and Remer as attorney. Gail Lovell petitioned for removal of the Remer's and brought the issues of impropriety before the court when she was appointed successor administrator. The court found that Remer, while acting as conservator, had engaged in self-dealing and showed complete disregard for his obligations as a fiduciary and for the rights of his ward. Remer, his wife and his corporation were ordered to re-pay the estate over $87,000, and Remer was also sanctioned in the amount of $20,000 punitive damages. The trial court refused to revoke the land sale, but the Supreme Court reversed and ordered a return to the *status quo*.

Among other things, Remer was found to have failed to pay Bessie rents due her; failed to pay real estate taxes and charged Bessie for the tax penalties; improperly charged Bessie for accounting fees required to make sense of his own shoddy financial records; and improperly charged Bessie grain bin expenses and farm management fees. In upholding the imposition of sanctions against Remer personally, the Supreme Court said that "(m)ere negligence does not account for Mr. Remer's long course of self-dealing. The self-dealing resulted from his complete disregard for (his) obligations as a fiduciary and for the rights of his ward.

Iowa Supreme Court Board of Professional Ethics and Conduct V. Remer, Iowa Supreme Court, 2000 Iowa Sup. Lexis 173 (2000). Ethics panel responsible for the discipline of attorneys revoked

attorney's license. The panel relied on a trial court's finding (see above) that George Remer had engaged in self-dealing and showed complete disregard for his obligations as a fiduciary and for the rights of his ward. Remer, his wife and his corporation were ordered to re-pay the estate over $87,000, and Remer was also sanctioned in the amount of $20,000 punitive damages. The Supreme Court ordered the panel to conduct a new hearing on the matter, rejecting the panel's position that it could adopt the trial court's work under the practice of issue preclusion. The standard of proof used in the trial court was, in some instances, not the same that would be required before the panel.

State of Iowa v. Jacobs, Iowa Supreme Court, 607 N.W.2d 679, 2000 Iowa Sup. Lexis 47 (2000). Defendant acted as attorney in three decedent's estates and a conservatorship/guardianship case. He was questioned under oath concerning the loss of funds in one of the estates, and shortly thereafter was voluntarily admitted to a psychiatric facility. In total, the defendant stole over $185,000 from different estates and a conservatorship, using the funds to travel, acquire assets, pay bills, and make political and charitable contributions. He was also found to have forged documents and filed false reports with courts to conceal his crimes. The defendant did not contest the charges, and plead insanity and diminished responsibility, and the trial court found that he suffered from bipolar affective disorder, manic type. The defendant also offered substantial character evidence, to persuade the court that a person of his good character would have to have been influenced by mental illness to commit such crimes. The reviewing court found that the character evidence was relevant, but not dispositive, and upheld the lower court's convictions on charges of theft and other crimes. Because the trial court failed to provide reasons for imposing consecutive sentences, the lower court's combination of sentences that would result in jail time of up to thirty years was vacated, and the case was remanded for re-sentencing.

In the Matter of Thomas J. Leising, Kansas Supreme Court, 4 P.3d 586, 2000 Kan. Lexis 364 (2000). Thomas Leising, a Topeka attorney served as guardian and conservator of an incapacitated person, a mentally ill man in his mid-40's. In the course of an annual review by the court the guardian/attorney was found to have improperly removed $30,000 from the estate. He was made to pay double the amount of the loss, and personally reimbursed his bonding company for half the amount. The other half was paid by the ward's mother, who entered into a personal services arrangement with the attorney to work off the balance. The attorney used the misappropriated funds for travel to New York where he and the ward stayed at the Plaza Hotel and saw four Broadway shows (over $6700); meals for the attorney, his wife and children (over $948); personal payments to the attorney's wife for shopping trips (over $11,500); two trips to Baby Dolls by the attorney and the ward(over $450); a trip to Houston by the attorney and his wife ($845); two trips to Cancun for the attorney, the ward, and the attorney's wife

(over $26,000); a trip to Atlanta by the attorney to meet with trust officials, and to see the Atlanta Braves ; purchase of women's clothing and footwear for the attorney's family ($1600); a birthday party for the ward ($615.38); and other unauthorized expenses. The Supreme Court wrote that the attorney "apparently rationalized his actions as not hurting anyone and bringing happiness to those he wanted so much to please." The attorney also offered evidence of his alcohol consumption; he was drinking to excess, but not impaired. In a wonderful understatement, the court held that "(i)t is difficult to conceive of a more serious violation than what is before us." The Supreme Court upheld the attorney's indefinite suspension from the practice of law.

Nebraska v. Lester Burchard, Nebraska Appellate Court, 2000 Neb. App. Lexis 137 (2000). Unpublished opinion. Burchard served as guardian for a vulnerable adult. The supervising court found that the guardian, without court knowledge, sold a mobile home belonging to the ward, and did not account for the sale as required. Burchard claimed that the sale proceeds were used to pay estate related bills, but had no proof. The reviewing court upheld the trial court's sentence of 13 to 24 months imprisonment based on the trial court's determination that "granting probation (as opposed to jail time) would promote disrespect for the law and promote disrespect for a law that you should treat…vulnerable people…in a …completely humane manner."

Board of Attorneys of Wisconsin v. Sheehan, Wisconsin Supreme Court, 224 Wis. 2d 44, 588 N.W.2d 624 (1999). An attorney, who was appointed conservator for man who had been in a severe automobile accident and had cerebral palsy, suffered mental problems, and was physically dependent on others, was disbarred. Among other things, the attorney was found to have made disbursements of the ward's $80,000 personal injury settlement award to him and others without court oversight, with over $20,000 of these funds un-accounted for.

The Supreme Court, in reviewing the decision of a referee who investigated allegations of attorney misconduct, noted that attorney Sheehan engaged in unethical practices in two other unrelated matters as well as the conservatorship matter. With respect to the conservatorship, the Supreme Court adopted the referee's findings that the client/ward "regarded Attorney Sheehan as his friend and someone he could trust, but as a result of the mismanagement of his funds, he came to believe Attorney Sheehan stole his money and now finds it difficult to trust anyone."

Board of Professional Responsibility v. Glynn, Wisconsin Supreme Court, 225 Wis. 2d 202, 591 N.W.2d 606 (1999). A Milwaukee attorney who was appointed guardian in two routine guardianship cases was suspended from the practice of law for one year. "By collecting unreasonable attorney fees from three clients without the approval of the court in which their matters resided, by failing to file the necessary reports with the court in those matters and act competently and timely in them, and by using false statements and documents to justify his excessive fees and to mislead the person investigating his conduct, Attorney Glynn has demonstrated a willingness to place his own pecuniary interests above the interests of the clients whose representation he undertook by court appointment and to create false documents to prevent that conduct from being discovered. In the administrative process brought against the attorney, the referee appointed to investigate the charges recommended only a six-month suspension, but the Board of Attorneys Professional Responsibility appealed and argued in favor of the one-year suspension.

Toledo Bar Association v. Candiello, Ohio Supreme Court, 85 Ohio St. 3d 36, 706 N.E.2d 1216 (1999). After an attorney was appointed guardian of a woman who had been his client for 23 years, he maintained cash belonging to the ward in his office safe, with only a handwritten note identifying the source of the funds. He claimed to do so to frustrate those who would make claims against the ward's estate and make it difficult and expensive for them to trace her assets. The Supreme Court upheld the suspension of the attorney from the practice of law for two years.

Office of Disciplinary Counsel v. Romaniw, Ohio Supreme Court, 83 Ohio St. 3d 462, 700 N.E.2d 858 (1998). Cleveland attorney Chrystine Romaniw was appointed guardian of the person and estate of an 83-year-old ward and guardian of the estate of an 81-year-old ward. After the trial court found that the attorney misappropriated over $77,000 from the estate of the 81-year-old ward and nearly $35,000 from the estate of the 83-year-old ward, a complaint was filed for the Office of Disciplinary Counsel, and the attorney was disbarred. The Supreme Court upheld the disbarment, noting the fact that the attorney was suffering from multiple sclerosis and using the misappropriated funds to support her children in college and private secondary schools. Finding the mitigating facts unpersuasive, the Supreme Court reiterated it's past ruling that "the continuing public confidence in the judicial system and the bar requires that the strictest discipline be imposed in misappropriation cases."

Iowa Supreme Court Board of Professional Ethics and Conduct v. Stephen W. Allen, Iowa Supreme Court, 586 N.W.2d 383, 1998 Iowa Sup. LEXIS 275 (1998). An attorney was appointed guardian and conservator for his elderly aunt, and was found to have taken fees from the conservatorship without court approval, converted estate funds to personal use, and made unauthorized gifts to himself. The amount of disputed funds was $46,359. A lower Grievance Commission, an attorney disciplinary body, recommended a public reprimand, but the Supreme Court, acting as a reviewer, imposed a one-year suspension from the practice of law.

The attorney/guardian argued that his aunt had intended to funds to go to him and to his sister, and that the fees/gifts were consistent with his aunt's testamentary wishes and benefited the estate by reducing estate taxes. The probate court, basing it's judgment on a statutory requirement that guardian fees be approved in advance, disallowed the fees, ordered them to be repaid, and referred the matter to the attorney disciplinary body. The fees were repaid.

In a subsequent hearing, the attorney/guardian testified that he had taken the money in part due to his own dire financial circumstances, his and his wife's health issues, and the wedding of his son. He indicated that he did not feel that he could wait for the probate court to approve his fee requests, and that he felt that in any case, the court would not approve his requests. The attorney/guardian's sister did not object to the fees and supported her brother, and seven character witnesses testified in support of the attorney/guardian.

In explaining the rationale for a seemingly light penalty, the Supreme Court noted that the attorney/guardian had not covered up his actions. He accounted for all expenditures and fees in his annual and final reports to the probate court. However, the court noted that Mr. Allen had taken money from the estate on fifteen different occasions after his aunt had suffered a stroke, and that she was unaware of the specific amount of "loans" that he had made to himself. The court found a suspension to be in order based on the attorney/guardian's breach of his position of trust, noting that his duty was not lessened simply because of his close relationship with his aunt/ward.

Frey v. Blanket Corp., Nebraska Supreme Court, 255 Neb. 100, 582 N.W.2d 336 (1998). The Nebraska Supreme Court found that, as a matter of law, a guardian does not enjoy quasi-judicial immunity in making residential placement decisions for a ward, although the guardian cannot be liable for ordinary negligence. See discussion above, in personal rights section.

Clarence Conrad Bolton v. Velda Souter, Kansas Supreme Court, 872 P.2d 758, 19 K.2d 384 (1994). The Probate Code directs the imposition of double liability upon any person who has converted or embezzled personal property of a decedent or conservatee. However, that penalty cannot be applied when the proposed conservatee transfers money in an attempt to hide assets, and the transferee subsequently embezzles the funds.

In re Guardianship of McPheter, Ohio Appellate Court, 642 N.E.2d 690, 95 OhioApp.3d 440 (1994). Guardian was held liable for damages of $16,800 for failure to rent or sell the residence of a ward who was in a nursing home with no reasonable prospect of returning home, even though guardian relied on

advice of attorney.

Guardian=s Bond

Ohio Casualty Group of Insurance Companies v. Cochrane, Ohio Appellate Court, 586 N.E.2d 257, 67 Ohio App.3d 222 (1990). If a guardian breached a suretyship contract in failing to pay a premium for a guardianship bond as promised, that breach was not basis to render the bond unenforceable.

III. GUARDIANSHIP ADMINISTRATION ISSUES

Court/Guardian Relationship, Role of Guardian, Guardian ad Litem, Attorney

Guardianship and Protective Placement of Lillian P., Wisconsin Appellate Court, 2000 Wisc. App. Lexis 685 (2000). Attorney Patricia Cavey purportedly represented both Lillian, a ninety-year-old woman who had been adjudicated incompetent due to dementia, and her son Lester, in relation to the sale of the elderly woman's house. Lester lived in the home with Lillian, and the record suggested that Lester had not paid rent in a timely fashion. Lester had sought to purchase the home at a below-market cost, and Lillian had said that she hoped to return to the home as her domicile, after leaving her nursing home. Another viable offer for the house was received for $40,000 more than Lester's offer, but Cavey objected to the offer on behalf of both Lillian and Lester.

Attorney Cavey's dual representation was challenged by a court appointed guardian ad litem, but the trial court allowed the arrangement based on a written waiver signed by Lillian that authorized the dual representation and the fact that co-counsel was involved in the matter along with Cavey. When the guardian ad litem appealed, the appellate court overturned the trial court decision, finding that Cavey's dual representation was a conflict of interest. The court noted medical evidence that showed that

returning Lillian to her house would not be in her best interest, and that selling the house at the highest available price was more consistent with her best interest. The appellate court also found nothing in the record to suggest that Lillian had the capacity to knowingly consent to the dual representation proposed by Cavey, and that co-counsel's involvement would do nothing to negate the conflict of interest.

Estate of Wellman, Illinois Supreme Court, 220 Ill. Dec. 360, 673 N.E.2d 272, 174 Ill.2d 335 (1996), rehearing denied, cert. denied, **Murphy v. Young**, 117 S. Ct. 1554, 137 L.Ed. 2d 702 (1997.) The probate court controls a mentally disabled person=s person and estate and directs the guardian=s care, management, and investment of the estate.

In re Guardianship of Hicks, Ohio Trial Court, 624 N.E.2d 1125, 63 OhioMisc.2d 280 (1993). Statute authorizing probate court to function as superior guardian did not authorize court to interject itself into negotiations of minors= personal injury claim and require the guardian to enter into settlement.

In re Guardianship of Jadwisiak, Ohio Supreme Court, 593 N.E.2d 1379, 64 OhioSt.3d 176 (1992). The court having jurisdiction of the guardianship case is the superior guardian, while the actual guardian is deemed to be an officer of the court. The guardian may employ an attorney to initiate or defend a lawsuit on behalf of the guardianship estate.

In the Matter of the Guardianship of Myrtle E. Mabry, Illinois Appellate Court, 666 N.E.2d 16, 216 Ill.Dec. 848 (1996). A guardian ad litem appointed by a probate court represents the ward=s best interests, rather than the ward. A guardian ad litem is only required prior to a hearing on the ward=s competence, although a guardian ad litem or next friend may be appointed to represent the ward=s best interests in subsequent litigation.

Fees for Guardians, Guardians ad Litem, and Attorneys

Guardianship and Conservatorship of Leon C. Donley, An Incapacitated Person, Nebraska Supreme Court, 262 Neb. 282, 2001 Neb. Lexis 128 (2001). In a case of first impression, the court held

that "costs and attorney fees incurred in the good faith initiation of conservatorship proceedings constitute necessaries for the support or benefit of the protected person such that payment of reasonable costs incurred may be assessed against the protected person's estate." (citations omitted).

GFS Leasing & Management, Inc., dba Altercare of Louisville v. Vicki L. Dayton, Guardian, Ohio Appellate Court, 2001 Ohio App. Lexis 3499 (2001). A guardian who had executed a nursing home contract that agreed to pay for any and all nursing care charges was not personally responsible for the nursing charges, and was authorized to collect reasonable fees from the guardianship. The nursing home sought to hold the guardian personally responsible, even though she had signed the contract as her capacity as guardian. The appellate court rejected this argument and also held that "(i)t is common knowledge that a guardianship has fees and costs associated with it including probate court costs, guardian compensation and, possibly, as in this case, attorney fees. Further it is foreseeable that (the protected person) could incur other debts, such as doctor fees, ambulance or medical transportation costs or pharmacy expenses not otherwise included in the charges of the nursing home. If the contract language of 'any and all' was taken literally, the Guardian could pay none of these expenses but would be required to pay all of the ward's money to the nursing home for any charges incurred. We find such a literal interpretation absurd."

Estate of Bernadine C. Goffinet, Deceased, Illinois Appellate Court, 318 Ill. App. 3d 152, 742 N.E. 2d 874, 2001 Ill. App. Lexis 22, 252 Ill. Dec. 336 (2001). A guardian of the person submitted a claim for reimbursement of her services after the ward (her mother) had died. The claim covered nearly five years of personal services, which the guardian offered to document with a log prepared in the presence of her father, contemporaneous to the time of the services. A trial court disallowed the claim, citing the Illinois Dead-Man's Act provisions prohibiting testimony by a person with a direct interest in the action about conversations with the deceased. The appellate court reversed the trial court, holding that a guardian is entitled to reasonable compensation under the terms of the Illinois Probate Act. To apply the Dead-Man's Act restriction in this context would "so affect the compensation provision of the Probate Act as to practically invalidate it. This is true because a large portion of the acts performed as guardian of the person will necessarily be in the presence of the decedent (the ward, while living)." In dicta, the court also noted its desire that guardians of the person present the filing of claims for compensation of claims on a quarterly basis. The court noted that"(t)he fact that compensation for five years of services is sought in a single petition, after the death of the ward, may cast some doubt on the validity of the

claim."

In Re Charlene Battiato, Nebraska Supreme Court, 259 Neb. 829, 613 N.W.2d 12 (2000). The ward in this case resided in a nursing home and received over $800 monthly in Supplemental Security Income and Railroad Retirement Act benefits. Excess costs of care were paid by Nebraska's Department of Health and Human Services Finance and Support. The Department objected when the court authorized attorney fees to be paid from the ward's entitlement income, with the deficit in costs of care to be made up by the Department. The reviewing court found the arrangement to be proper, noting that the ward, if competent, could have use the federal entitlement income to pay attorney fees, and the ward's guardian should be able to do the same.

In Re Guardianship and Conservatorship of Lettie Tucker, Nebraska Appellate Court**,** 9 Neb. App. 17, 606 N.W.2d 868 (2000). An attorney petitioned for guardianship and conservatorship, both temporary and permanent, and guardians and conservators were appointed who challenged the attorney's bill of $798. The appellate court upheld the trial court's finding that the fees were appropriate, even absent a written fee arrangement. The court found that a contract could be implied, that the attorney rendered valuable services that were not objected to and were knowingly accepted by the ward, and that the attorney had a right to compensation.

In Re Estate of Chevalier, Missouri Appellate Court, 1999 Mo. App. LEXIS 1045 (1999). After parents petitioned for adjudication of disability for adult disabled daughter, the trial court ordered the parents, as petitioners, to pay a $3,100 guardian ad litem fee to an attorney who was appointed by the court. One week after the parents petitioned, a cross petition was filed by the Missouri Department of Social Services. The parents sought their own appointment, and the state asked for the appointment of a county public administrator. The court appointed the mother guardian. Apparently, the trial court agreed with a county attorney, and assessed costs against the parents, despite a Missouri statute that provided that such fees be paid from the assets of the adjudicated disabled person, if there are any, and by the county if the disabled person is indigent. The appellate court overruled the trial court, rejected the argument of the county attorney and ordered the fees to be paid by the county.

Sechler v. Furtado, Ohio Appellate Court, 1999 Ohio App. LEXIS 2036 (1999). In a case where separate parties were appointed guardian of the person and estate, the person guardian petitioned the probate court for the award of attorney fees. Finding that much of what was requested amounted to

the person guardian's court costs, the court denied the fee request. The court noted that the duties of a person guardian were spelled out in the statute to include "protection and control of the ward's person and suitable maintenance for the person."
The appellate court noted the statutory differences in duties between estate and person guardians, and that "any legal expenses incurred by the guardian of the person must directly benefit either the estate or ward" to be paid by the estate. Under Ohio law, "most legal expenses are borne by the guardian of the estate, who is specifically authorized to bring suit for the ward and appear and defend on behalf of the ward in suits."

Cripe v. Leiter, Illinois Supreme Court, 184 Ill. 2d 185, 703 N.E.2d 100, 234 Ill. Dec. 488 (1998). The Supreme Court found that a complaint for recovery of fees brought by a successor guardian against the attorney who had previously represented the ward prior to the adjudication of disability, brought under the Illinois Consumer Fraud Act, could not be maintained. The Court's ruling applied only to Consumer Fraud Act counts in the plaintiff guardian's complaint, and other counts brought under theories of fraud, constructive fraud, legal malpractice and breach of fiduciary duty are pending.

In re Matter of Estate of Shull, Illinois Appellate Court, 295 Ill. App. 3d 687, 693 N.E.2d 489, 230 Ill. Dec. 360, (1998). A reviewing appellate court found that the trial court's award of $500 and denial of the remainder of attorney fees and costs was inappropriate. The attorney fees were for work performed on behalf of a guardianship petitioner who was appointed temporary guardian for his 87-year-old great-aunt. The court denied fees related to the attorney's performance of legal services beyond those routinely required in a guardianship proceeding, including the negotiation of terms of the guardianship case, the removal of an agent acting under a power of attorney executed by the ward, and other matters. The appellate court found that compensation for these matters was fair, as they provided benefit to the ward's estate. The court considered the following issues in its decision:

Factors in Determining Reasonable Attorney Fees
1. The Work Involved
2. Size of the Estate
3. Skill Shown by the Work and the Time Expended
4. Success of the Efforts Involved
5. Good Faith and Efficiency

In re Estate of McInerny, Illinois Appellate Court, 289 Ill. App. 3d 589, 682 N.E.2d 284, 224 Ill. Dec. 723 (1997). Fee petitions from both guardian and guardian's attorney were denied where no guardianship estate existed, and ward was beneficiary of a discretionary supplemental needs trust with a spendthrift provision. The Appellate Court held that even though a guardian of the person was

statutorily entitled to reasonable compensation for services, the trust was not available to satisfy any claims. The guardian's assertion that she should be allowed, under Section 157(b) of the Restatement of Trusts to assert a creditor's claim against the trust, was also denied. Although the Restatement provision allows claims for "necessary services rendered to the beneficiary or necessary supplies furnished to him (her)", the guardian is not supplying necessary services. The Court found that the guardian is only required to represent the ward's interests, and not the services she sought reimbursement for, including grocery shopping, taking the ward to lunch, or taking the ward on vacations. The trustee had distributed funds from the trust for food, clothing, shelter and other miscellaneous items (primary support) at the guardian's request for the ward's necessities. The opinion also contained dicta that suggested that assumption of the guardianship was voluntary and that there was no evidence that the guardian had been misled about what might be reimbursable.

Flynn v. Scott, Missouri Appellate Court, 969 S.W.2d 260 (1999). In the third appeal to arise from the same guardianship case, the appellate court this time addressed the issue of payment of guardian's fees. See Matter of Estate of Scott, below. After reiterating that the underlying guardianship case was void for want of personal service on the ward, the court found that over $18,000 in guardian's fees would be disallowed, despite the guardian's good faith in discharging duties on behalf of the "estate."

Matter of Estate of Scott, Missouri Appellate Court, 932 S.W.2d 413 (1996). A guardian ad litem=s fee award is improper when the order appointing guardian is found to be void for want of jurisdiction.

Espevik v. Kaye, Indiv. and as Executor of the Estate of Peter Paul Reiner, Deceased, Illinois Appellate Court, 660 N.E.2d 1309, 277 Ill App.3d 689, 214 Ill.Dec. 360 (1996). Guardian ad litem fees may be allowed as costs and court has discretion to determine which party to assess fees against.

In re Sloan Estate, Michigan Appellate Court, 538 N.W.2d 47, 212 Mich. App. 357 (1995). An attorney in a guardianship case was entitled to reasonable compensation where services are necessary and provided on behalf of estate. AFee for fee≅ claims incurred to establish and defend a fee petition for work on behalf of the guardianship estate were disallowed, as such fees could not be shown to benefit the estate or increase or preserve estate assets.

In the Matter of the Estate of Jennifer C. Dyniewicz, Illinois Appellate Court, 648 N.E.2d 1076, 271 Ill.App.3d 616, 208 Ill.Dec. 154 (1995). Where co-guardians failed to file mandated court accountings in

a timely way, court reasonably charged co-guardians personally with the payment of guardian ad litem fees. The guardian ad litem appointment was warranted to investigate the co-guardian=s dereliction of duty in relation to final estate accounting. Denial of co-guardian=s fee request was also reasonable where fiduciary duty to the ward was breached by their failure to file annual accountings on nine separate occasions.

In re Rita Mary Serafin, **Alleged Disabled Person**, Illinois Appellate Court 649 N.E.2d 972, 272 Ill.App.3d 239, 208 Ill.Dec. 612 (1995). Guardian ad litem fees could properly be awarded against the estate of an alleged disabled person even where no adjudication of disability or estate administration occurred.

Robbins v. Ginese, Ohio Appellate Court, 638 N.E.2d 627, 93 Ohio App.3d 370 (1994). An attorney=s work as a guardian ad litem for children in custody dispute could be compensated at $100 per hour, even though that was the same hourly rate charged for Alegal≅ work.

In re Estate of Bickam, Ohio Appellate Court, 620 N.E.2d 913, 85 Ohio App.3d 634 (1993). A guardian who had faithfully and honestly discharged the duties of his or her trust is entitled to compensation, and the attorney whose services resulted in the establishment of the guardianship is entitled to compensation.

In re Estate of George Herman Nelson, Illinois Appellate Court, 621 N.E.2d 81, 250 Ill.App.3d 282, 190 Ill.Dec. 212 (1993). Court had inherent power to appoint guardian ad litem to investigate abuse allegations, and to authorize payment from estate.

In re Estate of Maria Stoica, Enid L. Kempe, Guardian ad litem of Maria Stoica, et al., Illinois Appellate Court, 560 N.E.2d 1152, 203 Ill.App.3d 225, 148 Ill.Dec. 555 (1990). Trial court lacks power to apportion fees of guardian ad litem; sole authority comes from statute permitting court to allow reasonable compensation.

In re Marriage of Lawrence Kutchins, Illinois Appellate Court, 510 N.E.2d 1300, 157 Ill.App.3d 384, 110 Ill.Dec. 269 (1987). An award of attorney fees is within the sound discretion of the court. Representation of a ward in restoration proceeding, where authorized by the court, is appropriate, and court may award fees.

In re Marriage of Herbert J. Drews, Jr., Illinois Appellate Court, 487 N.E.2d 1005, 139 Ill.App.3d 763, 94 Ill. Dec. 128 (1985). A wife whose husband suffered injuries resulting in adjudication of disability could seek reasonable attorney fees from husbands= estate, in action brought by husband=s guardian for dissolution of marriage.

Houston v. Zaner, Missouri Appellate Court, 683 S.W.2d 277 (1984). A probate court cannot arbitrarily create a fee schedule to determine what is Ajust and reasonable compensation≅ for a guardian, without taking into account evidence of the reasonable value of services rendered by the guardian.

Selection of Guardian: Who May Serve?

In The Matter of Hodge, Ohio Appellate Court, 2001 Ohio App. Lexis 3412 (2001). In a case where

siblings stipulated as to the need for guardianship for their mother, and siblings did not get along with one another, the court weighed several factors in choosing a brother as guardian for his mother, instead of choosing the brother's sister. As a preliminary step, the court carefully reviewed the stipulated evidence, to independently conclude that guardianship was necessary for the mother. Next, the court considered the qualifications of the siblings, noting that the brother had actually filed a petition for guardianship (the sister had only made an oral request) demonstrating the brother's serious interest in serving. In addition, the brother was willing to re-arrange his schedule to be available to care for his mother. By contrast, the sister worked outside the home, questioned whether her mother was incompetent and required guardianship, and had taken her mother from her brother's home without permission at a time when the brother served as temporary emergency guardian.

Conservatorship of Colleen Geldert, Minnesota Appellate Court, 621 N. W. 2d 285, 2001 Minn. App. Lexis 81 (2001). A mentally retarded woman had been a ward of the state since 1958. The ward's mother, brother and two sisters maintained close contact with her over the years. The ward lived in a group home where she had thrived, and had responded positively to efforts to control the effects of Prader Willi Syndrome (PWI). In addition to PWI, the ward had been diagnosed with end stage renal failure requiring either kidney dialysis or a transplant. The state guardian agreed with the recommended treatment, consenting to dialysis. The family concluded that recommended dialysis treatment would interfere with the ward's ability to enjoy life and aggravate her PWI symptoms, and petitioned for successor guardianship. The trial court, reasoning that the ward's best interests would be met by the appointment of a family member, removed the state guardian and appointed a sister. The appellate court overturned the trial court decision, finding that the trial court should not have applied the standard for appointing a guardian in the first instance, but rather should have considered whether the actions of the public guardian were inconsistent with the best interests of the ward. Although recognizing that public guardianship was the most restrictive form of guardianship, and should be imposed only when no acceptable alternatives exist, the appellate court insisted that the inquiry should have been on whether the public guardian failed to perform its duties or acted in a manner that was inconsistent with the best interests of the ward.

Guardianship of Mary Kate M., Wisconsin Appellate Court, 627 N. W. 2d 549, 2001 Wisc. App. Lexis 286 (2001). In 1985, Mary Kate was removed from her mother's home due to neglect and abuse. In 2000, the mother of the 39-year-old adult disabled woman petitioned for the removal of a ARC-

Milwaukee, a corporate guardian, claiming that she was a caring mother and that a corporate guardian should not be involved when a family member was willing to serve. As in Geldert, above, the appellate court found that in considering whether to remove a corporate guardian in favor of a family guardianship appointment, the trial court should not approach the matter as it might at the time of the original adjudication of disability. The focus should be on whether any allegations supported the removal of the current guardian. Since the petition failed to show any neglect or other failures on the part of the corporate guardian, the trial court denied the petition for removal and the appellate court affirmed.

In the Matter of Guardianship of Shawn Constable, Ohio Appellate Court, 2000 Lexis 2467 (2000). James Constable was denied guardianship for his adult mentally disabled son, and his access to his son was limited. The trial court found that, although James loved his son and Shawn loved James, James was found to be unsuitable as a guardian based on his animosity toward care providers. James was also found to have not required Shawn to take necessary medication, and not to require Shawn to wear protective headgear. The appellate court upheld the trial court's finding and also rejected James' claim that his parental rights were compromised.

Howse v. Johnson, Illinois Appellate Court, 303 Ill. App. 3d 696, 708 N.E.2d 466, 236 Ill. Dec. 880 (1999). Illinois does not employ a statutory hierarchy for selection of guardian. Although there may be a rational basis for preferring relatives to strangers, there is no rational basis for necessarily preferring one relative to another. The court listed a number of Illinois Appellate Court decisions that discussed considerations to be considered in selecting a guardian. In doing so, the court reiterated the best interest standard of In *re Conservatorship of Browne,* 54 Ill. App. 3d 556, 370 N.E.2d 148, and listed the following as important factors:

- Recommendations of persons with kinship or familial ties
- Relationships between the disabled person and the party being considered for appointment
- Conduct by the disabled person prior to being adjudicated disabled which manifests trust or confidence in the proposed guardian
- Prior actions by the proposed guardian which indicate concern for the well-being of the disabled person
- The ability of the proposed guardian to manage the incompetent's estate

- The extent to which the proposed guardian is committed to discharging responsibilities, which might conflict with his or her duties as a guardian.

In re Cynthia Schmidt, Illinois Appellate Court, 298 Ill. App. 3d 682, 699 N.E.2d 1123, 232 Ill. Dec. 938 (1998). In a contested guardianship case where a husband was appointed guardian for his wife over the objection of the wife's sister, the court held that a spousal relationship was properly considered by the trial court as one factor in determining who may serve as guardian of the person. The appellate court recognized the public policy of Illinois regarding spousal preferences, but did not establish spousal preference as a requirement in guardianship proceedings.

In Re Estate of Marjorie E. Roy, Illinois Appellate Court 265 Ill.App.3d 99, 637 N.E.2d 1228, 202 Ill.Dec. 492 (1994). Where the husband of a ward sought guardianship, but was denied on the basis of a 36-year-old felony conviction, as mandated by the Illinois Probate Act, husband was entitled to a hearing to show by a preponderance of the evidence that his appointment would be in the ward=s best interest and welfare. If the husband meets this showing, the court could find the statute was unconstitutionally applied and give due consideration to the ward=s preference to have her husband act as guardian.

In re Estate of Leon Mandel Barr, Illinois Appellate Court, 491 N.E.2d 1241, 142 Ill.App.3d 428, 96 Ill.Dec. 781 (1986). In determining the appropriateness of a person willing to serve as guardian, the court should consider the person=s past action and conduct with the ward, evidence of any self-serving motive, and whether the person has ample time and sufficient ability to discharge the duties of a guardian.

In re Estate of George Edward Robertson, Illinois Appellate Court, 494 N.E.2d 562, 144 Ill.App.3d 701, 98 Ill.Dec. 440 (1986). In determining the appropriateness of a person willing to serve as guardian, the court should consider the person=s business experience, age, and family situation. Evidence of fraudulent conduct in prior dealings between the proposed guardian and ward would preclude the selection as guardian.

In re Estate of Nellie Bania, Illinois Appellate Court, 473 N.E.2d 489, 130 Ill.App.3d 36, 85 Ill.Dec. 121 (1984). The paramount interest in the selection of a guardian is the well being of the disabled person, regardless of that person=s wishes.

In re Estate of Korman, Missouri Appellate Court, 945 S.W.2d 10 (1997). A Missouri statute establishes a hierarchy for trial courts to follow in appointing guardians (for the person) or conservators (for the estate). In this case, the trial court refused to appoint a brother as limited guardian and limited conservator, even though the ward had nominated him to be both guardian and conservator and had named him as a power of attorney within five years of the guardianship hearing. The appellate court found that the trial court had appropriately considered the evidence and found good cause to reject the brother, despite the statutory preference. However, the appellate court found that the trial court had erred in appointing a nephew, where the record showed adverse financial interests, family dissension and disharmony. In an unusual exercise of authority, the appellate court dissolved the trial court=s appointment of the nephew and appointed the public guardian, citing the need to finally dispose of the case since the ward had died during the course of the legal proceedings.

In re Estate of Romberg, Missouri Appellate Court, 942 S.W.2d 417 (1997). The preference expressed in the Missouri statute for the appointment of relatives in guardianship and conservatorship cases is not absolute. A non-relative may be appointed if the appointment would be in the best interests of the incapacitated person. This would be appropriate where there is dissension in the family, an adverse interest between the relative and the incapacitated person, or any other reason that would show a stranger to be the better choice.

Matter of Waldron, Missouri Appellate Court, 910 S.W.2d 837 (1995). A ward=s adult son was found to be unsuitable to serve as a conservator for his mother where he had surrendered his law license in part due to financial problems and the improper use of client funds, he owed more than $335,000 to a trust set up for the care of the mother under her deceased husband=s will, and he owed $185,000 directly to the mother=s estate. Not surprisingly, there was also dissension among siblings as to his serving in a position of trust.

Estate of Ewing v. Bryan, Missouri Appellate Court, 883 S.W.2d 545 (1994). Although a statute creates limited preference for appointment of relative as guardian and conservator, any eligible person named attorney in fact by the ward when competent would take priority over adult child relative, unless the incapacitated person is competent and able to nominate a reasonable choice at the time of the adjudication hearing.

In re Estate of Hancock, Missouri Appellate Court, 828 S.W.2d 707, 1992**.** Court chose a public administrator over an adult nephew of a ward where family disagreed about who should be appointed and court found nephews= proposed plan of guardianship to be inadequate.

Carr v. Carr, Indiana Appellate Court, 685 N.E.2d 92 (1997). Trial court did not abuse its discretion in appointing as successor guardian a bank in a new city in which ward would be residing after a move to a new nursing home.

Guardianship of Tina Marie W., Wisconsin Appellate Court, 573 N.W.2d 207 (1997). A father/guardian=s past sexual assault and abuse of his wife (mother of the ward) was deemed to be relevant evidence in an action to remove the father as guardian of his adult daughter. No person has a legal right to serve as a guardian; rather, the guardianship status is a privilege, with a concomitant duty, conferred upon the guardian by the trial court.

In re Guardianship of Sharon Kowalski, Minnesota Appellate Court, 478 N.W.2d 62 (1992). The trial court abuses its discretion where it denies a guardianship petition supported by uncontradicted expert testimony as to the suitability of the petitioner, and where there is insufficient evidence as to the chosen guardian=s qualifications or neutrality. See also, **In re Guardianship of Sharon Kowalski**, 382 N. W. 2d 861.

Schmidt v. Hebeisen, Minnesota Appellate Court, 347 N.W.2d 62 (1984). Court may appoint a disinterested third party as guardian for an adult where a family member was available and willing to serve, absent an objection as to the proposed guardian=s qualifications and willingness, if the court finds the appointment to be in the ward=s best interests. Best interests, not familial relationship, should be the decisive factor in choosing a guardian, with kinship a factor, but not the deciding one.

In re Medsker, Ohio Appellate Court, 583 N.E.2d 1091, 66 OhioApp.3d 219 (1990). Where a court finds a need for guardianship, the court has discretion as to the choice of the guardian, but must choose someone to whom the ward consents, per the state statute.

Matter of Estate of Williams, Michigan Appellate Court, 349 N.W.2d 247, 133 Mich.App. 1 (1984). Generally, relatives of a ward are preferred when selecting a guardian, but the best interests of the ward

are the paramount considerations. In this case, the failure to give notice to a daughter with a last name that was different to the alleged ward was found to be a jurisdictional defect. The reviewing court found that the appointment of a county public guardian was improper, given Michigan statute that established a preference for family members over strangers to the ward.

The Adjudication Process

Standards of Proof

Guardianship of Anthony Rich, Ohio Appellate Court, 2000 Ohio App. Lexis 5360 (2000). In overturning a trial court finding of incompetence, the appellate court applied a clear and convincing standard and found that the lower court's decision was against the manifest weight of the evidence. The record showed that the alleged ward cared for both himself and his infirm wife, including her medications; that he drove a car without incident; that he was vice president of the retirees chapter of his union local; and that he served on the City Housing Appeal Committee and Transportation Advisory Board. Although he may have showed poor judgment in giving over $14,000 to a neighbor to hold in trust, he did so to protect the money from his son, who had petitioned for guardianship.

In the Matter of Turnbough, An Incapacitated Person, Missouri Appellate Court, 34 S.W. 3d 225, 2000 Mo. App. Lexis 1843 (2000). Clear and convincing evidence showed that woman was in need of guardianship (county public administrator) and that the least restrictive environment was in a nursing home. Further, the appointment of a guardian was the least restrictive means to ensure the woman's well-being and safety, due to the woman's poor judgment as to her choice of residence and caregivers.

Matter of Guardianship of Hedin, Iowa Supreme Court, 528 N.W.2d 567 (1995). Clear and convincing evidence standard is appropriate one to apply in guardianship proceedings, including issues relating to appointment, modification, and termination of the guardianship. The burden of proof is on the petitioner.

In re Guardianship of Escola, Ohio Appellate Court, 534 N.E.2d 866, 41 OhioApp.3d 42 (1987).

The burden rests on the ward to show that there is no further need for guardianship.

Jurisdictional Issues – Notice, Service of Process, etc.

Joel Wells v. The Guardianship of Myrtle Farley Wells, Indiana Appellate Court, 731 N.E.2d 1047, 2000 Ind. App. Lexis 1081 (2000). Where a temporary guardian was appointed without notice to a ward's son, the appellate court found that an allegedly defective notice in the temporary guardianship proceeding did not prejudice the son, who appeared with counsel at the permanent guardianship hearing. The legislature intended for the courts to have wide discretion in such matters.

Flynn v. Scott, Missouri Appellate Court, 969 S.W.2d 260 (1999). In the third appeal to arise from the same guardianship case, the appellate court this time addressed the issue of payment of guardian's fees. See Matter of Estate of Scott, below. After reiterating that the underlying guardianship case was void for want of personal service on the ward, the court found that over $18,000 in guardian fees would be disallowed, despite the guardian's good faith in discharging duties on behalf of the "estate."

In re Estate of Sofia Gebis, Illinois Supreme Court, 186 Ill.2d 188, 710 N.E.2d 385, 237 Ill. Dec. 755 (1999). Two co-guardians of the person argued over whether one of the two should be entitled to fees for over $361,000 for caring for the ward at the end of the ward's life. The co-guardian sought her fees from the probate court supervising the guardianship, after the death of the ward.

After a trial court declared unconstitutional a provision of Illinois law that allowed for the award of custodial claims for care givers after the death of an adult ward, the Supreme Court vacated the lower court's judgment for want of jurisdiction. In doing so, the Supreme Court found that the probate court that had jurisdiction over the ward and her estate during her lifetime lacked jurisdiction to adjudicate a statutory custodial claim filed against the estate. The Supreme Court held that "once a disabled person dies, the guardianship terminates and the court supervising the guardianship estate loses jurisdiction to adjudicate a claim filed against that estate. The decedent's estate is the only avenue for recovery."

Matter of Estate of Scott, Missouri Appellate Court, 932 S.W.2d 413 (1996). A guardian ad litem=s fee award is improper when the order appointing guardian is found to be void for want of jurisdiction.

In re Estate of David Steinfeld, Illinois Supreme Court, 630 N.E.2d 801, 158 Ill. 2d 1, 196 Ill. Dec. 636 (1994). The absence of a statutorily required physician=s report supporting an adjudication of disability was not a jurisdictional defect, and the adjudication could not be considered void where there was no contention that the individual was not disabled within the meaning of the law. Court had jurisdiction over individual by virtue of service of summons and a copy of the petition not less than 14 days before hearing.

Matter of Estate of Williams, Michigan Appellate Court, 349 N.W.2d 247, 133 Mich.App. 1 (1984). Generally, relatives of a ward are preferred when selecting a guardian, but the best interests of the ward are the paramount considerations. In this case, the failure to give notice to a daughter with a last name that was different to the alleged ward was found to be a jurisdictional defect. The reviewing court found that the appointment of a county public guardian was improper, given Michigan statute that established a preference for family members over strangers to the ward.

In re Guardianship of Ralph F. Sodini, Illinois Appellate Court. 527 N.E.2d 530, 172 Ill.App.3d 1055, 123 Ill.Dec. 67 (1988). The failure to give notice of the guardianship hearing to a sister of a respondent is a jurisdictional defect. The legislature desired to make service upon those relatives listed in the petition a requirement for obtaining proper jurisdiction.

Adult Protective Services and Protective Placements

Maureen Davis vs. Cuyahoga County Adult Protective Services, Ohio Appellate Court, 2000 Ohio App. Lexis 4754 (2000). Where evidence showed that alleged person in need of guardianship refused offers of services that were less restrictive than a full adjudication of guardianship, and where person suffered from Alzheimer's type dementia which caused her to live in a house that had been found by the Department of Public Health to be a threat to the immediate health and safety of the woman, a guardianship appointment was appropriate. The woman had open sores on her face and arms and was found to have horded animals and possessions. Three men worked for ten full days in protective suits to clean out the house, which was heated and lit with kerosene stoves, and infested with rodents, fleas, cockroaches and animal feces. The appellate court found that the trial court did not abuse its discretion in relying upon a doctor's report of incompetence.

Guardianship and Protective Placement of Goldie H., Wisconsin Supreme Court, 2001 WI 102, 629

N.W. 2d 189, 2001 Wisc. Lexis 453 (2001). Goldie H was protectively placed under a Wisconsin statute, meaning that she was 1) found by a court to have a primary need for residential care and custody, 2) was incompetent, 3) due to the infirmities of aging, and 4) the condition was likely to be permanent. The matter under appeal related to whether annual review of protective placements that had been previously ordered under the statute required a hearing and the entry of findings of fact. In this case, the reviewing court relied solely on the report of a *guardian ad litem*. The appellate court found that a hearing and findings of fact were required, but dispensed with the requirement in this case due to the persuasive nature of the GAL report. There was no evidence of any substantial argument in the case about Goldie H, or any of the statutory requirements. In a concurring opinion, a Wisconsin Supreme Court Justice concluded in dicta that the hearing requirement laid down by the majority court "may benefit no one but the attorneys paid to be present at such hearings."

Removal of Guardians

In Re Estate of Pittman, Missouri Appellate Court, 1999 Mo. App. Lexis 2376 (1999). Gerald Pittman was appointed guardian and conservator for his mother, Edra Pittman. On the ward's petition, the court removed Gerald and appointed his former wife as successor conservator and a county Public Administrator as guardian. The court rejected Gerald's claims that no one had told him that he had to file annual accountings, finding that he could have simply read the law. The court also found that his failure to file annual reports relating to the ward's physical and mental condition could contribute to a finding that the guardian is neglecting his responsibilities and duties. Finally, the court found that although a hostile relationship between a guardian and ward in itself does not warrant removal of the guardian, Gerald's nearly complete lack of a relationship with his mother was significant. The court found that their relationship deteriorated greatly after Gerald ordered the removal of a personal telephone from his mother's room, and that their only interaction occurred when Edra called Gerald to ask for money.

In re Conservatorship of Estate of Marsh, Nebraska Appellate Court, 566 N.W.2d 783, 5 Neb.App. 899 (1997). Irreconcilable differences and personality conflict between a conservator and a protected person (ward) were insufficient to constitute Agood cause≅ for removal of guardian.

Guardianship of Tina Marie W., Wisconsin Appellate Court, 573 N.W.2d 207 (1997). A

father/guardian=s past sexual assault and abuse of his wife (mother of the ward) was deemed to be relevant evidence in an action to remove the father as guardian of his adult daughter.

In Re the Estate of Lucille Austwick, Legal Advocacy Service; Guardianship and Advocacy Commission, v. Patrick T. Murphy, Cook County Public Guardian, Illinois Appellate Court, 656 N.E.2d 773, 275 Ill.App.3d 665, 212 Ill.Dec. 176 (1995). Improper authorization for administration of psychotropic medications was not grounds for removal of public guardian, but rather was a technical error that would not be repeated. Improper consent to a Ado not resuscitate order≅ was not grounds for removal of public guardian, but rather was a well-intentioned mistake that would not be repeated, where guardian had given consent after the ward had said she wanted the procedure, and guardian believed he was ratifying wards= wishes.

In re Estate of Josephine Debevec, Illinois Appellate Court, 552 N.E.2d 1043, 195 Ill.App.3d 891, 142 Ill.Dec. 302 (1990). A public guardian can be removed for reasons other than being unfit to remain as guardian; *other good cause* provision in the statute allows for removal where no malfeasance or misfeasance by the guardian occurs. When a sister of a ward was not given notice of the adjudication of disability where the Public Guardian of Madison County was appointed person guardian, and where the ward=s preference was to have the sister as guardian, and where the sister appeared to have a good and loving relationship with the ward, then the public guardian may be removed in favor of the relative.

In re Guardianship of Escola, Ohio Appellate Court, 534 N.E.2d 866, 41 OhioApp.3d 42 (1987). To warrant the removal of a guardian, a probate court need only find that the best interests of the ward would be served by the guardian=s removal.

Restoration of Legal Rights

Brown v. Hoffey, Ohio Appellate Court, 645 N.E.2d 1295, 96 OhioApp.3d 724 (1994). A guardian, as a fiduciary, has two procedural paths available upon receipt of notice of motion to terminated guardianship--contest the motion or order up a psychiatric evaluation.

In re Estate of Robert Walder Thompson, Illinois Appellate Court, 542 N.E.2d 949, 186 Ill.App.3d

874, 134 Ill. Dec. 603 (1989). Ward is entitled to retain counsel for purpose of appealing denial of a petition to restore legal rights, and right to appeal may be inferred from provisions of law that allow restoration of legal rights.

In re Estate of Bernard Berger, Incompetent (Restored), Illinois Appellate Court, 520 N.E.2d 690, 166 Ill.App.3d 1045, 117 Ill.Dec. 339 (1987). Upon restoration, the restored person may have all prior accounts investigated by the court. The court=s approval of the annual accounts in *ex parte* hearings are only *prima facie* evidence of the proper management of the estate; such proceedings are open to subsequent correction or challenge. Conservators= good faith does not excuse improper acts or justify defrauding wards= estate, where improper gifts and transfers were made of wards= assets to wards= daughters; trial court cannot approve or ratify acts that transcend conservators= statutory authority. Conservators= gift of $30,000 to wards= daughters to avoid inheritance taxes, where ward had an actuarial life expectancy of 22 more years, was improper.

IV. Post-Adjudication Conflicts Involving Guardians

Power of Attorney/Guardian Conflicts

In the Matter of Elsie Verlene Swearingen, Missouri Appellate Court, 42 S.W. 3d 741, 2001 Mo. App. Lexis 198 (2001). In 1998, a Probate Court appointed a daughter to serve as guardian of her mother's person, but not conservator of the mother's estate. The court declined to name the daughter conservator, due to an apparent conflict of interest, and instead named the mother's attorney as conservator. Prior to these adjudications, the mother in 1993 had opened a joint investment account (joint tenants with rights of survivorship and *not* as tenants in common) valued at about $400,000 with her grandson in 1993. This joint agreement appointed the mother and her grandson as the agent and attorney-in-fact for each other. In October 1995, at age 75, the mother was diagnosed with Alzheimer's Disease. One month later, the mother executed a durable power of attorney naming the daughter as attorney-in-fact. Relying on this agency agreement, the daughter sued an investment company and the grandson in January 1997 to obtain control over the assets. In October 1999, the Probate Court held that the daughter lacked standing to bring her suit. The trial court considered her status as guardian of the person, along with her individual status and that of attorney-in-fact and found no legally protectable interest in her mother's joint account. In rejecting her claim, the trial court held that only the conservator had standing to discover or recover assets. The appellate court affirmed the decision, finding the probate court's appointment of a conservator to have negated the daughter's authority under the power of attorney, and concluding that only the conservator had authority to petition to discover assets.

In the matter of the Guardianship and Protective Placement of Murial K., Alleged Incompetent, Wisconsin Appellate Court, 2001 WI App 147, 2001 Wisc. App. Lexis 566 (2001). Murial K was the subject of an elder abuse referral in November 1999. shortly after that, a guardianship petition was filed, and the court appointed temporary guardians of the person and estate and suspended all prior powers of attorney. Murial K had a large estate, and in June of 1999 had executed a Durable Power of Attorney to Jeffrey Knight, her longtime groundskeeper, noting that the powers granted "shall not be affected by (her) subsequent disability or incapacity." In late September of 1999, Murial K granted Norris and Jeffrey Knight a power of attorney for health care. The trial court found Murial K to have been neglected by her caregivers and purported agents, and denied their requests to reinstate their authority. The appellate court affirmed and further held that the Knights had no standing to pursue an appeal, since their status as attorney-in-fact had been severed by the trial court.

In Re Conservatorship of Anderson, Nebraska Supreme Court, 262 Neb. 51, 628 N.W.2d 233, 2001 Neb Lexis 113 (2001).A bank was appointed conservator of the estate of Mr. Anderson, a protected person, and two attorneys-in-fact under a previous power of attorney objected. The court concluded that 'no gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument itself and there is shown a clear intent on the part of the principal to make such a gift.' (citations) The two agents had made gifts totaling $100,000 during 1999 and 1990, arguing that they were part of a pre-existing gifting program and benefited the estate by reducing estate taxes. The power of attorney agreement did not authorize the gifts. The trial court found a conservatorship and revocation of the power of attorney to be necessary and the appellate court affirmed.

National Guardianship Statutes Citations, updated June, 1999

Alabama Code §§ 26-1-1-to 9-16 (1997)
Alaska Code §§ 13.26.005 to .410 (1997)
Arizona Rev. Stat. Ann. §§ 14-5301 to 5651 (1997)
Arkansas Stat. Ann. §§ 28-65-101 to 67-111 (1997)
California Prob. Code §§ 1400 to 3803 (1997)
Colorado Rev. Stat §§ 15-14-301 to 432 (1997)
Connecticut Gen. Stat. Ann. §§ 45-70 to 77 (1997)
Delaware Code Ann. 12 §§ 3901-3997 (1997)
District of Columbia Code Ann. §§ 21-2001 to 2077 (1997)
Florida Stat. Ann. §§ 744.101 to 747.531 (West 1997)
Georgia Code Ann. §§ 29-2-1 to 8-7 (1997)
Hawaii Rev. Stat. §§ 560.5-lot to 430 (1997)
Idaho Code. Ann. §§ 15-5-101 to 432 (1997)
Illinois Comp Stat. §§ 755-5-11a-1 to 23 (1997)
Indiana Code Ann.§§ 29-3-1-1 to 15 (1997)
Iowa Code Ann. §§ 633.552 to 679 (1997)
Kansas Stat. Ann. §§ 59-3001 to 3038 (1997)
Kentucky Rev. Stat. Ann. §§ 387.500 to 990 (1997)
Louisiana Civ. Code Ann. 389 to 426, La Code Civ. Proc. Ann. Art 4541 to 4557 (1997)
Maine Rev. Stat. Ann. ISA, §§ 18-5-101 to 614 (1997)
Maryland Est. & Trust Code Ann. §§ 13-201 to 806 (1997)
Massachusetts Gen Laws Ann. Ch. 201 §§1 to 31 (1997)
Michigan Comp. Laws Ann. §§ 27.5401 to 5461 (1997)
Minnesota Stat. Ann. §§525.539 to 614 (1997)
Mississippi Code Ann. §§ 93-13-121 to 267 (1997)
Missouri Ann. Stat. §§475.010 to 370 (1997)
Montana Code Ann. §§72-5-101 to 439 (1997)
Nebraska Rev. Stat. §§ 30-2617 to 2661 (1997)
Nevada Rev. Stat. §§156.013 to 201 (1997)
New Hampshire Rev. Stat. Ann. §§464.A: 1 to :44 (1997)
New Jersey Stat Ann. §§ 3B:12-24 to 66 (1997)
New Mexico Stat. Ann.§§45-5-301 to 432 (1997)
New York Ment. Hgy. Law Art. 6 §§80-85 (1997)

North Carolina Gen. Stat.§§35A 1101 to 1382 (1997)
North Dakota Cent. Code §§30.1-26-01 to 29-32 (1997)
Ohio Rev. Code Ann. §§ 2-1101 to 1151 (1997)
Oklahoma Stat. Ann. 30 §§1-101 to 5-101(1992)
Oregon Rev. Stat. §§126.003 to 126396 (1997)
Pennsylvania 20 Pa. Cons. Stat. Ann. §§5501 to 5553 (1997)
Rhode Island Gen Laws §§33-15-1 to 45 (1997)
South Carolina Code Ann. §§62-5-301 to 432 (1997)
South Dakota Codified Laws Ann.§§29 A 5-302 to 315 (1997)
Tennessee Code Ann. §§34-2-101 to 4-213 (1997)
Texas Prob. Code Ann. Art.108 - 1300 (1997)
Utah Code Ann. §§ 75-5-301 to 433 (1997)
Vermont Stat. Ann. Tit.14, §§2671 to 3081 (1997)
Virginia Code Ann. §§31-37 to 59(1997)
Washington Rev Code. Ann. §§11.88.005 to .92.190 (1997)
West Virginia Code §§27-11-1 to 44-10 A-6 (1997)
Wisconsin Stat Ann. §§880.01 to 39 (1997)
Wyoming Stat. §§3-1-101 to 4-109 (1997)