ILLINOIS GUARDIANSHIP AND ADVOCACY COMMISSION
OFFICE OF STATE GUARDIAN

MIDWEST UNITED STATES
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.

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Who May Serve As Guardian

In Re Guardianship(s) of Edward and Betty Keller, Ohio Appellate Court, 2003 Ohio 3168, 2003 Ohio App. LEXIS 2824 (2003). Two stepsisters petitioned for guardianship for the Kellers. The trial court appointed a neutral party, an attorney, as guardian instead. In response to the appeal challenging the lawyer's appointment by one of the stepsisters, the court found that the trial court's appointment was proper. Both stepsisters had actually consented to the appointment at trial, although the appellant claimed that her consent was delivered by her attorney and not by her. The attorney-guardian had 27 years experience and was highly recommended by the court and a guardian ad litem.

In Re Conservatorship of Mary Larkin Smith, Minnesota Appellate Court, 655 N.W.2d 814, 2003 Minn. App. LEXIS 49 (2003). An elderly woman's doctor had served as an agent under a power of attorney arrangement. However, the woman's son prevented the mother from being evaluated by a neurologist to evaluate her cognitive state, refused to provide medication as prescribed by doctors, opposed 24-hour care in the woman's home and prevented contact with other family members. The son also hired an attorney to change his mother's will, trust agreement, and health-care directive, attaining power of attorney over her affairs. He then fired the doctor and became health-care agent. At this point, a daughter pursued a conservatorship petition and a trial court appointed an independent, non-family conservator of the mother's person and estate. The court found that the son's fiscal irresponsibility and failure to show a commitment to his mother's welfare made him ineligible to serve. The mother objected to the trial court's ruling that Minnesota civil procedure rules, particularly rules of pretrial discovery relating to the exclusion of witnesses not properly divulged by a party wishing to call them at trial, were applicable to a conservatorship proceeding. The appellate court found that civil practice rules were applicable in any civil matter, including a conservatorship proceeding.

In the Matter of Karla A. Iwen, Proposed Conservatee, Minnesota Appellate Court, 2003 Minn. App. LEXIS 542 (2003). Unpublished Opinion. Karla Iwen had two children, Heinz and Thomas. When Thomas saw a decline in his mother's health and suspicious financial matters, he petitioned for conservatorship for Karla. Heinz objected and sought his own appointment. Pursuant to a stipulation by the two brothers, the court appointed an independent party, an attorney named Karl Bushmaker as an interim conservator of the estate and person. The brothers then litigated the issue of who may serve. The appellate court supported the trial court finding that an independent party was preferable, noting that 1) Heinz had done a poor job with housecleaning, feeding his mother and keeping her clean; 2) there was evidence that Karla was

afraid of Heinz.. As the court noted, Karla often said things (to Heinz) like, "I promise to be good, I will be good."; 3) Heinz also gave home health care aids a hard time, causing more than one to quit in protest. He also failed to follow doctor's advice and failed to keep prescribed medication handy. The trial court also ordered that visits of the two sons with their mother be in a monitored area in the nursing facility and that communications occur in English, rather than German. The appellate court upheld all of the above except for the restriction on speaking German, which it found not to be against the ward's best interests.

In the Matter of Erma Z. Oliva, Incapacitated/Disabled. John Oliva, Jr., R.W. Shakelford and Martha pollard, Limited Guardian and Conservator for Erma Z. Oliva, Missouri Appellate Court, 2003 Mo. App. LEXIS 1328 (2003). After developing Alzheimer's Disease symptoms, Erma Oliva requested that her son be appointed guardian and conservator for her. After the limited appointment, she wandered away from home and siblings requested a change in the guardianship and conservatorship, which was temporarily suspended. The trial court found it appropriate to appoint a public guardian as a successor, due to the family discord. The public guardian then moved the woman to a nursing home. The appellate court reversed the trial court, giving great weight to the wishes of the woman that her son be appointed as guardian and conservator. The appellate court noted that Missouri law required the appointment desired by an incapacitated person (prior to incapacity) absent substantial evidence establishing good cause. The court also found that a nursing home placement was an overly restrictive placement for the woman, and supported the son's attempt to care for her at home.

In the Matter of The Conservatorship of Dorothy Lee, Ohio Appellate Court, 2002 Ohio 6194, 2002 Ohio App. LEXIS 6037 (2002). Dorothy Lee's brother asked attorney Charles Cromley to institute guardianship proceedings and a probate court appointed Cromley as guardian of Lee's person and estate. Lee's nephew challenged the appointment, arguing that the court was required to consider family as prospective guardians and could only appoint a non-family member after finding family candidates to be unsuitable. The trial court rejected the argument and the nephew appealed. In rejecting the nephew's appeal, the appellate court found no basis in Ohio law for a preference for a prospective ward's next of kin in a guardianship case. The court also noted that the nephew lacked standing to complain of the trial court's action because the nephew had failed to apply for guardianship.

Residential Placement Decisions Made by a Guardian

In the Matter of the Guardianship of Sandra Muellner, v. Blessing Hospital and Office of State Guardian, 335 Ill.App.3d 1079, 782 N.E.2d 799, 2002 Ill. App. LEXIS 1207, 270 Ill. Dec. 240 (2002). A hospital petitioned for the appointment of the Illinois Office of State Guardian (OSG) for Ms. Muellner, along with placement in a nursing facility's behavioral mental health unit. The court appointed OSG and authorized the placement. The Protection and Advocacy provider for Illinois then challenged the trial court's decisions. The appellate court upheld the guardianship appointment, but found that the placement into the behavioral mental health unit contravened the state's Mental Health and Developmental Disabilities Code (Code). The Code provides that involuntary civil commitment of a person with mental illness may only occur under the procedures detailed in the code, which were not strictly followed in the trial court proceeding. Absent a hearing and court order obtained under the Code, Illinois guardians lack the ability to consent to involuntary psychiatric placement in mental health settings, both state operated and community based settings. The appellate court gave no clear direction about which community mental health facilities are covered by the court's holding, other than to note that the facility in the case at bar met the test.

In the Matter of Sarah Handelsman, a Protected Person, Stephen C. Albery, Guardian and Conservator v. Rochelle Schultz and Frances Goldman, Michigan Appellate Court, 2003 Mich. App. LEXIS 2065 (2003). Unpublished Opinion. Schultz, the daughter of the protected person, challenged a probate court order on a petition brought by Albery to authorize moving. Handelsman from Florida to Michigan. Albery did not give the protected person notice on the hearing for residential placement, and Schultz argued that this was error. The appellate court rejected the argument, finding that notice is personal and cannot be challenged by anyone other than the person entitled to notice, (or in this case, her guardian and conservator.) The court also questioned what benefit notice would have been in this case, considering the ward's physical and cognitive state. The court felt Handelsman would have been 'unable to assist in any meaningful way; she almost certainly would not have benefited from being heard. Schultz also believed that it was error not to appoint a guardian ad litem to consider her mother's interests, but she failed to ask the trial court for such an appointment and the appellate court found no requirement for such an appointment on the part of the trial court. Finally, Schultz argued that the probate court's failure to hold an evidentiary hearing to consider her mother's personal interests in relocating was error, but the appellate court rejected the argument. The court found it acceptable that the conservator-guardian's wished to move his ward closer to where he lived so that he could better monitor her financial situation and care.

In the Matter of Erma Z. Oliva, Incapacitated/Disabled. John Oliva, Jr., R.W. Shakelford and Martha Pollard, Limited Guardian and Conservator for Erma Z. Oliva, Missouri Appellate Court, 2003 Mo. App. LEXIS 1328 (2003). After developing Alzheimer's Disease symptoms, Erma Oliva requested that her son be appointed her guardian and conservator. After the limited appointment, she wandered away from home and siblings requested a change in the guardianship and conservatorship, which was temporarily suspended. The trial court then appointed a public guardian as a successor, due to the family discord. The public guardian then moved the woman to a nursing home. The appellate court reversed the trial court, noting the wishes of the woman that her son be appointed as guardian and conservator. The appellate court noted that Missouri law required the appointment desired by an incapacitated person (prior to incapacity) absent substantial evidence establishing good cause. The court also found that a nursing home placement was an overly restrictive placement for the woman, and supported the son's attempt to care for her at home.

Marriage and Divorce

Jon Houghton, Guardian and Conservator of Joann Houghton Johnson v. Ronald Paul Keller, Michigan Appellate Court, 256 Mich. App.336, 662 N.W.2d 854, 2003 Mich. App. LEXIS 1014 (2003). With this appeal from a divorce decree where a guardian litigated on behalf of an incapacitated wife, the appellate court was asked to decide whether a guardian could pursue a divorce action. The court, finding nothing in the Michigan guardianship law that prohibited a guardian from doing so, rejected the husband's appeal and held that a guardian could bring such an action.

Shelly Jean Walters v. Robert Allen Walters, by his Guardian, Linda Walters, Missouri Appellate Court, 2003 Mo. App. LEXIS 1093 (2003). After a 15 year marriage, a wife filed for divorce. During the divorce, the husband was seriously injured in a car accident, and the husband's mother was appointed as his guardian. The guardian was then substituted as the respondent in a divorce case. The issue on appeal was whether the mother could exercise the incapacitated son's marital visitation rights with his children, which the trial court had allowed. The appellate court reversed, finding that the prime criteria in considering visitation rights for the children should have been the children's best interests, rather than the interests of the father. Since the wife had (consistent with court rules) filed a proposed parenting plan and shown her ability to parent to the trial court, and the husband (by his guardian) had done nothing, the appellate court felt that the trial court had abused its discretion, and remanded with directions to consider the matter as outlined above.

Housing Rights

Guardianship of Matthew M. v. Walworth County Dept. of Health and Human Services, Wisconsin Appellate Court, 2003 WI App 89, 662 N.W.2d 679, 2003 Wisc. App. LEXIS 288 (2003). Unpublished Opinion. After a severely disabled man's foster parents died, he was placed in the custody of a former caretaker who was named his guardian. The guardian applied for residential programs and services, but was denied, and the ward was placed on a waiting list. The guardian sought to have the court order the community placement, arguing it to be superior to, and less costly than a nursing home placement. However, the trial court found that the county had made a good faith effort to find and fund reasonable housing for the ward and was not required to expend unlimited county funds and had no obligation to do anything more.

Testamentary Capacity

In Re Estate of Robert A. Butler, Jr., Wisconsin Appellate Court, 2003 WI App 67, 261 Wis. 2d 878, 659 N.W.2d 507, 2003 Wisc. App. LEXIS 178 (2003). Unpublished Decision. In a case that did not involve guardianship, a court was required to determine issues related to the ability of a dying incapacitated man to execute a will and power of attorney naming his girlfriend as his agent. The man's attorney appeared on his behalf in the final hearing of the man's divorce case on May 11, 2001 at around 4:30 pm, explained why his client could not appear in court, and obtained the final divorce decree. The attorney had visited the man in the hospital at around 2:30 pm to confirm that he wanted the divorce and the man gave him a clear "yes" in reply. The lawyer returned to the hospital at 5:00 pm and advised the man and his mother of the finality of his divorce. At 6:00 pm, the man ostensibly executed a will and POA that was given to him by his girlfriend. The executions revoked the man's prior estate plan. The man died about 12 hours later. The man's wife and child challenged the purported execution of the documents in his decedent's estate and the trial court found the power of attorney to be invalid as a matter of law for failure to adhere to statutory requirements. In addition, the court found that the facts showed that the man lacked testamentary capacity. The man was actively dying, his capacity was greatly impacted by Dilaudid, a narcotic pain medication, and he had a temperature of 106.2 at 4:00 pm on the day in question.

Right of Ward to Contract – Real Estate Conveyance

Estate of John T. Gleeson, Deceased, North Dakota Supreme Court, 2002 ND 211, 655 N.W.2d 69, 2002 N.D. LEXIS 276 (2002). A man under a conservatorship quitclaimed his realty interest in a residence while under the conservatorship. A challenge was subsequently made as to his capacity to convey his realty interest. The Supreme Court held that, under North Dakota law, a conservatorship adjudication has no bearing on the capacity of an individual and that a protected person could have the capacity to convey property. The court noted that the bar is higher for the appointment of a guardian (as opposed to a conservator) and with the lower standard associated with conservatorship, no inference could be made as to capacity. The court also refused to infer a 'de facto' guardianship.

Earl Fisher as Special Conservator, et al. v. Thomas Schefers, et al., Minnesota Appellate Court, 656 N.W.2d 592, 2003 Minn. App. LEXIS 199 (2003). After moving into a nursing home, an elderly man sold his farm to neighboring landowners. A few months later, the man was the subject of conservatorship proceedings and the man's conservator tried to set aside the conveyance, alleging undue influence, but the trial court refused and the conservator appealed. The trial court found that, although the man appeared to possess lower than average intelligence, but had the necessary capacity to convey his property at the time of the sale. The court also held that the neighbors were bona fide purchasers for value and did not subject the man to duress, coercion, or undue influence. The court heard testimony from a title abstractor who said that the man was "quite competent" on the day of the sale; he ably answered questions, was aware that the deed to the property was in a safe deposit box, and was quite clear on which items of personalty were included in the sale. The court rejected evidence obtained in a deposition of the conservatee some months after the real estate transaction that showed the man to be addled and instead favored the contemporaneous evidence establishing his capacity.

Management of Real Property

Ruth R. Millington v. Edwin J. Masters and Jackie Masters and Donald R. Cato and Charlotte M. Newton and David Newton, Missouri Appellate Court, 96 S.W.3d 822, 2002 Mo. App. LEXIS 2425 (2002). With probate court approval, a guardian conveyed a parcel of land to adjoining landowners, erroneously believing that the ward had a fee simple interest in the property when the ward actually had a life estate. When the error was discovered, remaindermen involved with the realty interest, including the guardian, executed quitclaim deeds to the buyer in

an effort to correct the problem. The guardian's quitclaim was purportedly on behalf of the estate. The buyer never filed a claim for the realty in the probate estate. The ward died after the conveyances, and litigation ensued in the decedent's estate. The appellate court held that the quitclaims were invalid, as no consideration was given. In addition, the appellate court held that because the trial court had granted a sale on representations that the ward owned the property outright, the sale should be voided, as it was based on a mistake.

Initiation of Cause of Action Against Or On Behalf of Estate

New Century Mortgage Corporation v. Kevin Roebuck and Steele & Loeber Lumber Co., U.S. District Court for Northern Illinois, 2003 U.S. Dist. LEXIS 10876 (2003). A guardian, a sister of her ward (a sister), sought to vacate a mortgage foreclosure judgment. The District Court upheld the mortgage foreclosure, finding that the guardian had failed to show extraordinary circumstances that would warrant setting aside the judgment. The guardian had alleged a forgery, but offered only copies of the sister's signatures on a deed alleged to be fraudulent and a will, with no expert testimony as to the signatures. The court also found that the guardian had failed to bring the matter to the court in a timely way.

Patricia Vlasek & Joseph Vlasek v. Michael Nemitz, U.S. Seventh Circuit Court of Appeals from U.S. District Court for Northern Illinois, 2003 U.S. App. LEXIS 13080 (2003). Unpublished Opinion. A mother sued a village health inspector on a 42 U.S.C.S. §1983 action, after the family's water was shut off and they were evicted from their residence. The case was brought in the mother's individual capacity and on behalf of her son, for whom she served as guardian of the person. After failing to comply with the trial court's discovery orders, the District Court dismissed the case. The 7th Circuit Court of Appeals ordered the dismissal vacated as to the son, deciding that the since the son was disabled and unrepresented by counsel, the dismissal was too harsh. Further, the court noted that the mother did not have estate guardianship, a requisite for bringing actions on behalf of an adjudicated ward or his estate under Illinois law.

Lisa Bukowski v. City of Akron et al., U. S. Sixth Circuit Court of Appeals, from U.S. District Court for Northern Ohio (see below), 326 F.3d 702, 2003 U.S. App. LEXIS 7131 (2003). In a civil action related to a previously reported criminal matter, the federal court of appeals dismissed tort actions against the city of Akron, Ohio and police officials who released a young adult incapacitated women into the hands of a man she had met in an Internet chat room. The man then repeatedly raped the incapacitated woman. The court found that public officials had

qualified immunity from such actions, as they were governmental officials acting within the scope of their duty. The court further found no 'state action' or state culpability within the meaning of prior case law holdings. Although the police officers were aware that the woman was mentally disabled and had traveled hundreds of miles to meet a man she had met on the Internet, they could not be considered to have acted in a deliberately indifferent manner when they released the woman into the custody of a man who (the police did not know) had raped the woman. The woman, in conversation and demeanor, gave the officers no reason to believe that she needed to be detained for her own safety. The court did allow an action against the rapist.

Lisa Bukowski v. Leslie R. Hall, U.S. District Court for Northern Ohio, 165 F. Supp. 2d 674, 2001 U.S. Dist. LEXIS 15787 (2001). An adult incapacitated woman from Pennsylvania with an academic level of third or fourth grade met Hall in an America Online chat room, and after about two months of "chatting" arranged to meet Hall in his Akron, Ohio home. During the meeting, Hall engaged in numerous sexual assaults on the woman and was charged and convicted with rape and kidnapping and incarcerated in a federal penitentiary. The woman's guardian (her mother) filed a federal court claim for damages arising from Hall's actions, and requested judgment on the claim based on the prior criminal adjudication against Hall. In a display of legal audacity, Hall filed a counterclaim for damages, ostensibly based on false accusations that he says the plaintiffs made that damaged his character. Hall's counterclaims were dismissed, as the criminal conviction established the truth of the assertions against his character. However, the court found that the criminal conviction was not conclusive evidence of the facts in dispute, and rejected the ward's request for summary judgement.

Statutes of Limitations

McCall v. United States, United States Seventh Circuit Court of Appeals, from Northern District of Illinois, 310 F.3d 984; 2002 U.S. App. LEXIS 23450, (2002); US Supreme Court certiorari denied by McCall v. United States, 2003 U.S. LEXIS 2542 (U.S., Mar. 31, 2003). In a minor's guardianship case, the appellate court held that the Federal Tort Claims Act statute of limitations was not tolled during the period of a putative plaintiff's minority, even if the minor was mentally incompetent, when the minor had a competent parent or guardian that did not have an adverse legal interest and could be expected to make legal decisions in the best interest of the child. The court rejected the guardian's argument that the minor's constitutional rights were violated when the limitations period was not tolled for a minor but was potentially tolled for a mentally incompetent adult.

Penalties for Breach of Fiduciary Duties – Allegations of Guardian or Attorney Misconduct

Office of Disciplinary Counsel v. McCully, Ohio Supreme Court, 97 Ohio St. 3d 486, 2002 Ohio 6724, 780 N.E.2d 574, 2002 Ohio LEXIS 3053 (2002). Joanne McCully was guardian and attorney for the estate of an elderly woman who received a $22,000 check for the sale of the woman's residence. The attorney deposited the check into her own account, wrote checks to herself from the proceeds and never accounted for the receipt in the guardianship estate or in a subsequently filed decedent's estate. The attorney ultimately could not account for about $12,000 of the elderly woman's estate, and gave misleading and false replies to investigators attempting to sort out facts related to the misconduct. The attorney was suspended from the practice of law for two years, with one year stayed.

Office of Disciplinary Counsel v. Sims, Ohio Supreme Court, 96 Ohio St. 3d 465, 2002 Ohio 4798, 776 N.E.2d 18, 2002 Ohio LEXIS 2397 (2002). An attorney drafted a power of attorney for a client which named the attorney as agent for the client's finances and for her health care. As agent, the attorney failed to pay costs of care for the client's nursing home, resulting in her eviction. He also failed to pay bills and caused her to be ineligible for public assistance under Medicare or Medicaid. The attorney was suspended from the practice of law for two years. The Supreme Court rejected the recommendation of the master commissioner handling the disciplinary case that the attorney be indefinitely suspended, noting the attorney's remorse at a disciplinary board hearing.

In Re Katherine Ewanicky Alexander Jurczenko, Ohio Appellate Court, 2003 Ohio 3351, 2003 Ohio App. LEXIS 2995 (2003). A guardian filed for Medicaid ten months after her ward became eligible. The guardian also failed to pay more than $50,000 in creditors' claims against the guardianship estate and did not even disallow or deny the claims. The appellate court upheld the trial court's orders that 1) removed the guardian, 2) found the guardian's failures to be subject to the authority of the probate court, 3) held that the guardian's failure to pay gave rise to the debt against the estate, and 4) assessed the $50,000 claim against the guardian personally.

Richland County Bar Association et al. v. Brickley, Ohio Supreme Court, 97 Ohio St. 3d 285, 2002 Ohio 6416, 779 N.E.2d 750, 2002 Ohio LEXIS 2934 (2002). An attorney was charged with seventeen ethical violations, one of which was accepting $750 from a client to pursue a guardianship petition for the client's sister but performing no legal work. The attorney was ordered to make restitution and indefinitely suspended from the practice of law.

Estate of Milton T. Leonard v. Daniel Swift and William Werger, Iowa Supreme Court, 656 N.W.2d 132, 2003 Iowa Sup. LEXIS 24 (2003). As the Supreme Court's opinion begins, "Milton Leonard's refusal to pay federal income taxes has generated multiple legal proceedings and resulted in three appeals." Swift was a guardian ad litem and Werger was attorney for the estate conservator in involuntary conservatorship proceedings. After Leonard's farmland was sold to satisfy tax liens, the conservator redeemed the property, and Leonard passed away. Leonard's decedent's estate then sued the GAL and attorney, claiming that they had provided the conservatorship estate with bad advice related to the redemption. The Supreme Court upheld the lower court's dismissal of the suit against the GAL, finding that Swift enjoyed absolute immunity owing to his status as a court official. However, the lower court's dismissal of a third-party beneficiary claim against Werger was reversed. The Court found that an action could be brought against Werger to the extent that his legal advice had an impact on the preservation of the ward's assets, but that Werger owed no clear duty to any third-party beneficiaries.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Ronald Eich, Iowa Supreme Court, 652 N.W.2d 216, 2002 Iowa Sup. LEXIS 205 (2002). In an attorney discipline case, the Iowa Supreme Court upheld a 60 day suspension against an attorney who, among other things, had failed to file a conservatorship for a client and then failed to file a timely inheritance tax claim in her estate.

Power of Attorney-Guardian Conflicts

In Re Conservatorship of Mary Larkin Smith, Minnesota Appellate Court, 655 N.W.2d 814, 2003 Minn. App. LEXIS 49 (2003). An elderly woman's doctor had served as an agent under a power of attorney arrangement. However, the woman's son prevented the mother from being seen by a neurologist to evaluate her cognitive state, refused to provide medication as prescribed by doctors, opposed 24-hour care in the woman's home and prevented contact with other family members. The son also hired an attorney to change his mother's will, trust agreement, and health-care directive, attaining power of attorney over her affairs. He then fired the agent-doctor and became her health-care agent. At this point, a daughter pursued a conservatorship petition and a trial court appointed an independent, non-family conservator of the mother's person and estate. The court found that the son's fiscal irresponsibility and failure to show a commitment to his mother's welfare made him ineligible to serve. The mother objected to the trial court's ruling that Minnesota civil procedure rules, particularly rules of pretrial discovery relating to the exclusion of witnesses not properly divulged by a party wishing to call them at trial, were

applicable to a conservatorship proceeding. The appellate court found that civil practice rules were applicable in any civil matter, including a conservatorship proceeding.

Elliott v. George Emig, et al., Ohio Appellate Court, 2003 Ohio 226, 2003 Ohio App. LEXIS 193 (2002). Vernon Thompson appointed Emig agent under a power of attorney. One month later Thompson applied for conservatorship and requested Emig's appointment as conservator, and revoked the power of attorney. A few weeks later, the probate court appointed Emig conservator. Emig then used the revoked power of attorney to alter the ownership of CD's held solely in Thompson's name, giving Emig's wife joint and survivorship interests. The ward then died, and the alterations of the CD's were challenged in the decedent's estate. The trial court set aside the transfers and rejected Emig's argument that his appointment as conservator gave him legal authority to alter the CD's, noting that he had been orally instructed by the court not to do so and advised in writing that all conservatorship expenditures were to be approved by the court. The appellate court affirmed.

In Re Guardianship and Conservatorship of Amelia Hartwig, Nebraska Appellate Court, 11 Neb. App. 526, 656 N.W.2d 268, 2003 Neb. App. LEXIS 11 (2003). An elderly woman executed a power of attorney naming her son as agent. A grandson who brought a petition for guardianship and conservatorship for the grandmother challenged the son's authority. The grandson alleged that the father was non-communicative with respect to care issues and the use of finances, but could offer no proof of actual wrongdoing. A representative from the State's Aging Ombudsman met with the ward and gave the opinion that the son was adequately caring for his ward/mother. A probate court granted the grandson's petitions and set aside the power of attorney. On appeal, the reviewing court reversed the trial court with directions to dismiss the petitions. The appellate court found nothing in the law that authorized the probate court to terminate the power of attorney as part of the appointment of a guardian or conservator (absent any wrongdoing on the part of the agent), although a guardian or a conservator would have that power. The appellate court held that the trial court appointments or guardianship and conservatorship were unnecessary on this record.

In Re Estate of Robert A. Butler, Jr., Wisconsin Appellate Court, 2003 WI App 67, 261 Wis. 2d 878, 659 N.W.2d 507, 2003 Wisc. App. LEXIS 178 (2003). Unpublished Decision. In a case that did not involve guardianship, a court was required to determine issues related to the ability of a dying incapacitated man to execute a will and power of attorney naming his girlfriend as his agent. The man's attorney appeared on his behalf in the final hearing of the man's divorce action on May 11, 2001 at around 4:30 pm, explained why his client could not appear in court, and obtained the final divorce decree. The attorney had visited the man in the hospital at around 2:30 pm and confirmed that he wanted the divorce and the man gave him a clear "yes" in reply. The

lawyer returned to the hospital at 5:00 pm and advised the man and his mother of the finality of his divorce. At 6:00 pm, the man ostensibly executed a will and POA that was given to him by his girlfriend. The executions revoked the man's prior estate plan. The man died about 12 hours later. The man's wife and child challenged the purported execution of the documents in his decedent's estate and the trial court found the power of attorney to be invalid as a matter of law for failure to adhere to statutory requirements. In addition, the court found that the man was actively dying, his capacity was greatly impacted by Dilaudid, a narcotic pain medication, and he had a temperature of 106.2 at 4:00 pm on the day in question.

Power of Attorney-Guardian Conflicts: Duty of An Agent

Estate of June Susser, a Protected Person, Betty Saari, Conservator v. Ronald Susser and Hazel Marie Susser, Michigan Court of Appeals, 254 Mich. App. 232, 657 N.W.2d 147, 2002 Mich. App. LEXIS 1899 (2002). Unpublished Opinion. Betty Saari was appointed conservator of June Susser. After her appointment, Betty claimed that Ronald Susser had used a power of attorney agreement naming him as agent in a wrongful manner by diverting part of June's financial estate and recording a quitclaim deed for June's house when her wishes were for him to take the house upon her death. The court held that Ronald owed June a duty to conserve her estate as a matter of law (the duty sprang from the POA.) Ron's arguments that the POA did not expressly state a duty and therefore, he was under no fiduciary obligation to June.

Recovery of Estate Assets

Guardianship of Lucille Lauder, Guardianship of Helen Bryan, Power of Attorney of Helen Bryan, Ohio Appellate Court, 2003 Ohio 406, 2002 Ohio App. LEXIS 7271 (2003). When a nursing home social worker alerted attorney Johnson that attorney Bond had been financially exploiting an elderly resident, the woman appointed Johnson as agent under a power of attorney and Johnson was shortly thereafter appointed guardian of her person and estate. The attorney-guardian brought concealment of assets actions against Bond, and charged the estate more than $155,000 in fees to recover assets worth about $290,000. Johnson believed the fees to be justified and payable by both the estate and under the power of attorney. The probate court declared that an appropriate fee for the work would have been between $30,000 and $40,000 and appointed another attorney, Fisher, as successor guardian. Fisher and Johnson agreed that Bond had absconded with estate assets but disagreed as to the amount of appropriate fees for Johnson's

legal work. When they fashioned a settlement agreement, the court rejected the deal and, on its own motion, subpoened documents, questioned Johnson regarding his actions and pursued the matter without notice to either Johnson or Fisher. The appellate court found that, although the probate court was the superior guardian of all wards subject to its jurisdiction, the lower court abused its discretion in inserting itself into the proceedings to the extent that it did. The trial court's order requiring fees to be re-paid was vacated and the matter remanded because of the court's apparent bias and the procedural problems noted above.

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

Office of Disciplinary Counsel v. Sims, Ohio Supreme Court, 96 Ohio St. 3d 465, 2002 Ohio 4798, 776 N.E.2d 18, 2002 Ohio LEXIS 2397 (2002). An attorney drafted a power of attorney for a client which named the attorney as agent for the client's finances and for her health care. As agent, the attorney failed to pay costs of care for the client's nursing home, resulting in her eviction. He also failed to pay bills and caused her to be ineligible for public assistance under Medicare or Medicaid. The attorney was suspended from the practice of law for two years. The Supreme Court rejected the recommendation of the master commissioner handling the disciplinary case that the attorney be indefinitely suspended, noting the attorney's remorse at a disciplinary board hearing.

In Re Katherine Ewanicky Alexander Jurczenko, Ohio Appellate Court, 2003 Ohio 3351, 2003 Ohio App. LEXIS 2995 (2003). A guardian filed for Medicaid ten months after her ward became eligible. The guardian also failed to pay more than $50,000 in creditors claims against the guardianship estate and did not even disallow or deny the claims. The appellate court upheld the trial court's orders that 1) removed the guardian, 2) found the guardian's failures to be subject to the authority of the probate court, 3) held that the guardian's failure to pay gave rise to the debt against the estate, and 4) assessed the $50,000 claim against the guardian personally.

Applications for Public Benefits; Medicaid and Special Needs Trusts

Guardianship of Scott G. G. : Marjorie A. G., Guardian, v. Dodge County Dept. of Human Services, Wisconsin Appellate Court., 2003 WI. App. 52, 261 Wis.2d 679, 659 N.W.2d 438, 2003 Wisc. App. LEXIS 203 (2003). A guardian requested probate court approval for the establishment of a Medicaid Payback Trust (MPT), and the court refused, requiring that Vaccine Compensation Act payments for the guardian's son be received as estate assets. In determining whether a guardian could, with court approval, transfer assets into a MPT trust, the appellate court held that such arrangements could provide for the ward's immediate financial needs and ordered the trial court to consider on what terms a transfer could be made.

In the Matter of Daniel J. Rosenbaum Trust, Appeal by Charles Rosenbaum, Guardian, Ohio Appellate Court, 2003 Ohio 1830, 2003 Ohio App. LEXIS 1751 (2003). The Social Security Administration denied an application for supplemental security income on the basis that a special needs trust established to benefit a ward was revocable because the beneficiary's estate was the only residual beneficiary. Consequently, a guardian sought court approval to amend the trust in a way that would be in compliance with Social Security Administration rules. The trial court refused, claiming that an amendment would be improperly exercising the ward's testamentary wishes. The appellate court upheld the trial court, but also noted that the determination made by the Social Security Administration was wrong, finding that "under the terms of 42 U.S.C. § 1396p (d) (4), it does not appear to matter whether a special needs trust is revocable or irrevocable." Note: The appellate court's dicta concerning the applicability of federal law was not dispositive on the matter. As the opinion noted, the Social Security appeal was still being litigated when the Ohio appeal was heard at oral arguments.

Estate Planning: Notice to Beneficiaries of Revocation of Estate Plan – Jurisdictional Defects

In Re Estate of Charlotte E. Barth, a Disabled Person, Now Deceased, Illinois Appellate Court, 792 N.E.2d 315, 2003 Ill. App. LEXIS 635, 275 Ill. Dec. 84 (2003). In a guardianship adjudication proceeding, agreed orders were entered by the trial court that declared Charlotte incompetent and appointed an estate guardian, authorized the invalidation of an amendment that she had made to her trust that had the effect of reinstating her son and daughter as estate beneficiaries and diminishing the interest of a charitable organization, and made distributions from the trust and from the proceeds of a liquidated annuity. The charitable organization and the Illinois Attorney General, on behalf of the state's interests in charitable estates, appealed the probate court order, alleging that the agreed order was void as no notice was given to affected

beneficiaries. The appellate court held that the trial court's entry of a judgment without joining beneficiaries whose rights were impacted was absolutely void.

Use of Jointly Held and Totten Trust Funds

Ferguson v. Walsh, et al., Ohio Appellate Court, 2003 Ohio 4504, 2003 Ohio App. LEXIS 3994 (2003). A guardian collected 'payable on death' accounts valued at approximately $44,500, and used the money for the ward's care. The accounts named two children as beneficiaries. A few months later the ward died. The children's mother filed a claim in the ward's decedent's estate for the full amount of the accounts, which was denied by the probate court. The appellate court affirmed the trial court's denial, noting that the guardian had a duty to care for the ward during the ward's lifetime, the bank owed no duty to the children as beneficiaries as their equitable interest would only vest upon the death of the account owner.

Guardianship of Emma W., Wisconsin Appellate Court, 2003 WI App 132, 666 N.W.2d 84, 2003 Wisc. App. LEXIS 508 (2003). Among items inventoried by a guardian in a guardianship estate were certificates of deposit held jointly by the ward and his sons. After the sons cashed the CD's, the guardian sought recovery, which was denied by the probate court, reasoning that both the sons and the father-ward had ownership rights to the money. The guardian appealed, claiming that the court should have allowed evidence of the ward's intent with respect to use of the funds, and the appellate court reversed the trial court's decision and on remand ordered such evidence to be considered.

Estate of Weiland, Deceased, Illinois Appellate Court, 338 Ill. App. 3d 585, 788 N.E. 2d 811, 2003 Ill. App. LEXIS 529, 273 Ill. Dec. 220 (2003). Helen Weiland executed three payable on death accounts naming individuals or charities as beneficiaries. Her guardian obtained probate court approval to liquidate accounts during her lifetime and use the proceeds for her care and estate expenses. Some funds were also used after the death of the ward for post-death expenses. The expenditures were challenged by the beneficiaries and the trial court found that the accounts were improperly liquidated, applying a 'preponderance of the evidence' standard in deciding the matter. The appellate court ruled that the proper evidentiary standard was 'clear and convincing'. The court noted that the guardian's intent at the time of liquidation was to use the proceeds from the account to pay tax costs that he believed would accrue after the death of the ward. The appellate court found that this was an improper use for a payable on death account.

Fees for Guardians, Guardians ad Litem, and Attorneys

Estate of James Clinton Buchanan, a Legally Protected Person Nichols & Eberth, P.C. v. Titan Insurance Co., Michigan Appellate Court, 2003 Mich. App. LEXIS 1884 (2003). Unpublished Opinion. Titan Insurance appealed a trial court order requiring it to pay legal fees supplied by Nichols related to tort claims on behalf of the conservatorship estate and other legal fees related to the estate's claim for personal injury protection benefits. The appellate court found that the payment of fees in such a case was a matter of law and that the trial court erred in ordering such a payment. Authorized expenses would have to be causally related to the injured person's care, recovery, or rehabilitation.

Estate of Henrietta Bishop, Illinois Appellate Court, 333 Ill. App. 3d 1113, 777 N.E. 2d 1059, 2002 Ill. App. LEXIS 908, 268 Ill. Dec. 136 (2002). An elderly woman was the subject of a guardianship petition filed by her daughters and a counter-petition filed by her son. The court appointed a guardian ad litem in the proceeding and assessed the GAL costs equally against the siblings. The son objected and appealed. The appellate court held that Illinois law allowed for GAL costs to be assessed to guardianship petitioners when the estate of the incapacitated person could not bear the expense, and that the son, as a counter-petitioner, was subject to this law.

Guardianship of Bertina Hards, Ohio Appellate Court, 2003 Ohio 1207, 2003 Ohio App. LEXIS 1145 (2003). A guardian hired an attorney to sue a brokerage company on behalf of his mother-ward's estate. The case was filed, but dismissed when the trial court found that the case was filed more than three years after the tolling of a statute of limitations. The attorney was paid more than $15,000 on the case, but sought additional payment of $12,861, which the trial court denied, based on findings by a special master that the lawyer failed to perform work that was of benefit to the guardianship estate. The appellate court upheld the denial, and further noted that a contingent fee arrangement that the lawyer produced in support of his claim for the additional fees was invalid as it had not been approved by the trial court.

Guardianship of Lucille Lauder, Guardianship of Helen Bryan, Power of Attorney of Helen Bryan, Ohio Appellate Court, 2003 Ohio 406, 2002 Ohio App. LEXIS 7271 (2003). When a nursing home social worker alerted attorney Johnson that attorney Bond had been financially exploiting an elderly resident, the woman appointed Johnson as agent under a power of attorney and Johnson was shortly thereafter appointed guardian of her person and estate. The attorney-guardian brought concealment of assets actions against Bond, and charged the estate more than $155,000 in fees to recover assets worth about $290,000. Johnson believed the fees to be justified and payable by both the estate and under the power of attorney. The probate court

declared that an appropriate fee for the work would have been between $30,000 and $40,000 and appointed another attorney, Fisher, as successor guardian. Fisher and Johnson agreed that Bond had absconded with estate assets but disagreed as to the amount of appropriate fees for Johnson's legal work. When they fashioned a settlement agreement, the court rejected the deal and, on its own motion, subpoenaed documents, questioned Johnson regarding his actions and pursued the matter without notice to either Johnson or Fisher. The appellate court found that, although the probate court was the superior guardian of all wards subject to its jurisdiction, the lower court abused its discretion in inserting itself into the proceedings to the extent that it did. The trial court's order requiring fees to be re-paid was vacated and the matter remanded because of the court's apparent bias and the procedural problems noted above.

Adjudication Issues: Motions In Limine, Proper Evidentiary Standard, Rules of Evidence, Physician Privilege

Beverly Sue Ryan, Public Administrator of Clay County, Missouri v. Rhonda Maddox, Missouri Appellate Court 2003 Mo. App. LEXIS 1294 (2003). After an adjudication that resulted in a woman having a guardian and conservator appointed, the woman appealed. The woman claimed that the trial court failed to meet the clear and convincing standard required for an adjudication and that the trial court should have excluded evidence of her refusal to take psychotropic medication and resultant hospitalization. The appellate court rejected the arguments, finding that the woman's refusal to take her medication was relevant to demonstrate her incapacity and incapable of managing her finances.

Guardianship and Conservatorship of Geralyn Stancin, Ohio Appellate Court, 2003 Ohio 1106, 2003 Ohio App. LEXIS 1042 (2003). Stancin appealed the appointment of her guardian and conservator, claiming that the trial court erred in allowing written evidence of an expert medical evaluation and findings of fact related to a prior municipal court proceeding in which health inspectors reported as to the unhealthy conditions of Stancin's home. The appellate court, in affirming the trial court's decision, noted that strict application of rules of hearsay in a non-adversarial hearing would prevent the court from "gathering and considering the very issues of incompetency that (the) statute (requires)".

Adjudication Issues: Domicile of a Ward for Purposes of Diversity Jurisdiction

Dakuras v. Edwards, United States Seventh Circuit Court of Appeals, from Northern District of Illinois, 312 F.3d 256; 2002 U.S. App. LEXIS 23506 (2002. The Circuit Court of Appeals held that "the responsibility for making the essential life choices of children and wards is vested not in them but in their parents or guardians, and we cannot see why the choice of domicile should not be treated as one of those life choices." However, even though plaintiff's significant other was the relatives' ward, the relatives should not have been allowed to gain a litigating advantage from having changed the significant other's domicile for an improper reason, to defeat federal jurisdiction.

Adjudication Issues: Use of Civil Practice Rules and Pretrial Discovery Procedures in a Conservatorship

In Re Conservatorship of Mary Larkin Smith, Minnesota Appellate Court, 655 N.W.2d 814, 2003 Minn. App. LEXIS 49 (2003). An elderly woman's doctor had served as an agent under a power of attorney arrangement. However, the woman's son prevented the mother from being seen by a neurologist to evaluate her cognitive state, refused to provide medication as prescribed by doctors, opposed 24-hour care in the woman's home and prevented contact with other family members. The son also hired an attorney to change his mother's will, trust agreement, and health-care directive, attaining power of attorney over her affairs. He then fired the agent-doctor and became her health-care agent. At this point, a daughter pursued a conservatorship petition and a trial court appointed an independent, non-family conservator of the mother's person and estate. The court found that the son's fiscal irresponsibility and failure to show a commitment to his mother's welfare made him ineligible to serve. The mother objected to the trial court's ruling that Minnesota civil procedure rules, particularly rules of pretrial discovery relating to the exclusion of witnesses not properly divulged by a party wishing to call them at trial, were applicable to a conservatorship proceeding. The appellate court found that civil practice rules were applicable in any civil matter, including a conservatorship proceeding.

Adjudication Issues: Attorney Malpractice While Representing a Guardianship Petitioner

John Brunstetter v. Leo Keating, Ohio Appellate Court, 2003 Ohio 3270, 2003 Ohio App. LEXIS 2908 (2003). Brunstetter hired Keating to pursue guardianship for Brunstetter's father. In the course of the proceedings, Brunstetter's sister Arlene obtained power of attorney over the father and transferred real and personal property to herself. The probate court noted in a court

journal entry that a settlement between the parties had been reached on property issues for the father's estate. Brunstetter subsequently brought a *pro se* legal malpractice action against Keating, claiming that the settlement had been entered into without his approval and that pending discovery matters had not been pursued by Keating. The appellate court found that Brunstetter failed to provide expert testimony as to the standard of legal representation in a guardianship proceeding and that this warranted the trial court's summary judgment order.

De Facto Guardianship

In Re Genevieve LeBlanc Living Trust, Michigan Appellate Court, 2003 Mich. App. LEXIS 1303 (2003). Unpublished Opinion. The court found that a trustee who had conveyed to himself a house which was subject to the trust after the death of the trust beneficiary would be required to convey the house to the deceased beneficiary's representative. The trustee was reluctant to convey the property to the beneficiary while living because of the beneficiary's clear incapacity. The settler (mother) on the trust expressed the intent that the property go for the support, care and education of the beneficiary (son). Although the son was never adjudicated and had no guardian or conservator, the court inferred a de facto guardianship or conservatorship on the part of anyone in control of the property interest subject to the trust.

Estate of John T. Gleeson, Deceased, North Dakota Supreme Court, 2002 ND 211, 655 N.W.2d 69, 2002 N.D. LEXIS 276 (2002). A man under a conservatorship quitclaimed his realty interest in a residence while under the conservatorship. A challenge was subsequently made as to his capacity to convey his realty interest. The Supreme Court held that, under North Dakota law, a conservatorship adjudication has no bearing on the capacity of an individual and that a protected person could have the capacity to convey property. The court noted that the bar is higher for the appointment of a guardian (as opposed to a conservator) and with the lower standard associated with conservatorship, no inference could be made as to capacity. The court also refused to infer a 'de facto' guardianship.

Protection and Advocacy Issues

Iowa Protection and Advocacy Services, Inc. v. Gerard Treatment Programs, L.L.C., U.S. District Court for Northern Iowa, 2003 U.S. Dist. LEXIS 13452 (2003). The Iowa Protection and Advocacy agency pursued a contempt citation against a psychiatric services provider,

claiming the right to access patient files maintained by the provider. The provider balked on the basis that no complaint had been lodged against the provider, and no evidence suggested that a client of the agency was even a client of the provider. The District Court sided with the mental health services provider, finding, among other things, no basis for accessing records in such cases in the federal enabling legislation for Protection and Advocacy agencies.

Guardianships and the Criminal Justice System

In the Matter of the Guardianship of James E. Goins, Jr., Ohio Appellate Court, 2003 Ohio 931, 2003 Ohio App. LEXIS 868 (2003). A prison inmate was the beneficiary of a structured settlement established when his father died. The proceeds were managed by a trust company while the inmate was a minor. The probate court responsible for overseeing the settlement recommended an adult guardianship for the duration of the now-adult inmate's sentence, which the trust company pursued. After the probate court established the adult guardianship, the inmate appealed. The appellate court upheld the lower court action, finding no error in the probate court's recommendation of adult guardianship to the trust company. In addition, the court found as a matter of law that an incarcerated inmate may be considered an incompetent person for the purposes of a guardianship adjudication.