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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

1999-00

(session year)

Assembly

(Assembly, Senate or Joint)

Committee on ... Judiciary and Personal Privacy (AC-JPP)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Mike Barman (LRB) (May/2012)

Assembly

Record of Committee Proceedings

Committee on Judiciary and Personal Privacy

Assembly Bill 742

Relating to: requiring payment from a ward's estate of reasonable attorney fees and costs for successful petitioners in incompetency and guardianship proceedings.

By Representatives Handrick, La Fave, Owens, Musser, Plale, Porter, Plouff and Sherman; cosponsored by Senators Darling, Panzer, Rosenzweig, Roessler and Schultz.

February 10, 2000 Referred to committee on Judiciary and Personal Privacy.

March 1, 2000 **PUBLIC HEARING HELD**

Present: (8) Representatives Huebsch, Gundrum, Suder, Grothman, Sherman, Colon, Hebl and Staskunas.

Excused: (1) Representative Walker.

Appearances for

- Representative Joe Handrick, 34th Assembly District
- Jim Villa, on behalf of Senator Alberta Darling, 8th Senate District
- Jim Jaeger, Elder Law Section, State Bar of WI
- Betsy Abramson, Coalition of WI Aging Groups

Appearances against

- Jeff Myer, Legal Action of Wisconsin
- Dianne Greenley, WI Coalition for Advocacy
- Chuck Kreimendahl, Public Interest Law Section of State Bar of WI

Appearances for Information Only

- None.

Registrations for

- Jenny Boese, Real Property, Probate, and Trust Law section of State Bar of Wisconsin
- Kevin Lewis, DHFS

Registrations against

- None.

March 16, 2000 **EXECUTIVE SESSION**

Present: (9) Representatives Huebsch, Gundrum, Walker, Suder, Grothman, Sherman, Colon, Hebl and Staskunas.
Excused: (0) None.

Moved by Representative Staskunas, seconded by Representative Hebl, that **Assembly Bill 742** be recommended for passage.

Ayes: (9) Representatives Huebsch, Gundrum, Walker, Suder, Grothman, Sherman, Colon, Hebl and Staskunas.
Noes: (0) None.
Excused:(0) None.

PASSAGE RECOMMENDED, Ayes 9, Noes 0, Excused 0

Robert Delaporte
Committee Clerk

Vote Record

Assembly Committee on Judiciary and Personal Privacy

Date: 3-16-00
Moved by: Stask
Seconded by: Hebl
AB: 742
AB: ____ SB: ____
AJR: ____ SJR: ____
A: ____ SR: ____
Clearinghouse Rule: ____
Appointment: ____
Other: ____

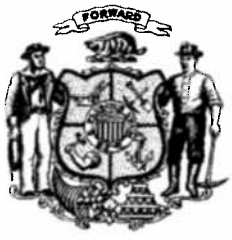
A/S Amdt: ____
A/S Amdt: ____ to A/S Amdt: ____
A/S Sub Amdt: ____
A/S Amdt: ____ to A/S Sub Amdt: ____
A/S Amdt: ____ to A/S Amdt: ____ to A/S Sub Amdt: ____

Be recommended for:
- [X] Passage
- [ ] Introduction
- [ ] Adoption
- [ ] Rejection
- [ ] Indefinite Postponement
- [ ] Tabling
- [ ] Concurrence
- [ ] Nonconcurrence
- [ ] Confirmation

Committee Member	Aye	No	Absent	Not Voting
Rep. Michael Huebsch, Chair	[X]	[ ]	[ ]	[ ]
Rep. Mark Gundrum	[X]	[ ]	[ ]	[ ]
Rep. Scott Walker	[X]	[ ]	[ ]	[ ]
Rep. Scott Suder	[X]	[ ]	[ ]	[ ]
Rep. Glenn Grothman	[X]	[X]	[ ]	[ ]
Rep. Gary Sherman	[X]	[ ]	[ ]	[ ]
Rep. Pedro Colon	[X]	[ ]	[ ]	[ ]
Rep. Tom Hebl	[X]	[ ]	[ ]	[ ]
Rep. Tony Staskunas	[X]	[ ]	[ ]	[ ]
Totals:	9	0	____	____

[X] Motion Carried [ ] Motion Failed


WISCONSIN STATE LEGISLATURE


FORWARD

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January 5, 2000

AB 742 folder COPY

Honorable Gary R. George
State Senator
P.O. Box 7882
Madison, WI 53707

RE: Proposed SB 158 (Guardianship Petitioner's Fees)

Dear Senator George:

I support SB 158; I was on the Elder Law Board when it considered (and initially drafted) the proposal. I agree with the comments of the proponents of the legislation and do not intend to repeat them here. The purpose, then, of this letter is to offer a short response to the proffered solution by opponents to the legislation that the guardian ad litem can pursue the litigation once a pro se petitioner files the "check the box" form.

I hope this letter explains that the GAL is not a "fall-back" attorney for the petitioner. It is dangerous to conclude that because the GAL represents the best interests of the ward, the GAL must therefore draft, file, and serve all the documents subsequent to the petition, and must also orchestrate and conduct the trial. It is the petitioner's obligation to properly instigate and pursue the proceedings. It is the petitioner's obligation to prove the case. It is the duty of the GAL to assure that the ward's interests are protected at all stages of the proceedings. During the course of the proceedings, the GAL may be adverse to the petitioner, or to certain "interested persons," or even to the proposed ward. To require the GAL to be responsible for anyone's case other than the GAL's places an inappropriate burden on the GAL and potentially requires the GAL to act in a way that violates the code of professional conduct.

The guardianship procedure is initially somewhat complex and time-driven. I won't go into the various possible permutations here, but will only highlight the standard "every case" steps. At the same time the petition is filed, the petitioner must also file a proposed Order Appointing Guardian ad Litem, Notice and Order for Hearing, Order for Comprehensive Evaluation (if protective placement is included in the proceedings), and Order Appointing Physician or Psychologist. Though these documents are signed by the judge, they are created by the petitioner. They must be signed by the judge and then appropriately distributed by the petitioner. Simultaneously, the petitioner must obtain authenticated (court-stamped) copies of the initial documents and arrange for proper, personal service on the proposed ward. In making arrangements for service, the petitioner must also draft and provide a statutorily required certificate/affidavit of personal service that differs somewhat from the form used in regular civil actions. In addition, the petitioner must serve copies of all the documents on interested persons at least ten days before the hearing. After these initial steps, the petitioner has a great many tasks to complete, not the least of which is preparing for a court hearing. I know that this paragraph looks "gray," so I am enclosing a copy of a checklist from my short practice book (*Guardianship and Protective Placement for the Elderly in Wisconsin*).

The order appointing guardian ad litem is mailed to the GAL by the petitioner, often at the same time that the initial documents are mailed to the interested persons. At this point, the GAL has specific duties. The GAL must notify the proposed ward of the ward's rights orally and in writing. The GAL conveys the proposed ward's objections or request to the court. The GAL is an independent advocate working for the best interests (as perceived by the GAL) of the ward and, as such, conducts the GAL portion of the case in the way the GAL believes is appropriate and necessary to represent the proposed ward's best interests. The investigation differs from case to case and is highly fact-specific. To summarize the role of the GAL, I have again attached a checklist from the handbook.

Removing a person's legal rights is a deadly serious matter. It is not a matter of "check box" law. Each person, and each attorney, has a specific role. If a petitioner is pro se, then the petitioner is acting as petitioner's own attorney. It isn't the job of the GAL to represent the petitioner. Indeed, a guardian ad litem who helps petitioner properly start a case only to discover later that the guardianship is not in the ward's best interests, will have violated the rules of professional conduct. In many, if not most, guardianship cases, the GAL would not be aware of jurisdictional shortcomings (service of process or the like) until the shortcoming is a disqualifying jurisdictional defect. In some cases, having the case dismissed on a technicality may be in the proposed ward's best interests. In others, having the case dismissed may be disastrous. Since the GAL will not know what the best interests of the ward are until much later in the case, the GAL should never assist petitioners in starting guardianship cases.

Whatever else is said in favor or against the proposed legislation, the claim that the GAL must complete the process once started by the petitioner is both impractical and potentially unethical.

I would be most willing to talk to you, to members of the committee, or to staff members if you have questions or concerns about the role of the GAL in guardianship/protective placement actions. I sincerely appreciate your attention to this area of law.

Sincerely yours,

VINEY & VINEY

Gretchen Viney

enc.

ments may be useful. Finally, a pretrial conference may be an effective means of limiting the dispute and determining both the nature of the contest and the roles of the participants in the trial.

VI. [§ 4.37] Checklist

√ Checklist: Duties of the Petitioner's Attorney in Uncontested Guardianship/ Protective Placement Proceedings

- ☐ Consider ethical issues.
- ☐ Obtain information at an office conference.
- ☐ Draft initial documents:
  - ☐ Petition to Circuit Court
  - ☐ Order Appointing Guardian ad Litem
  - ☐ Notice and Order
  - ☐ Order for Comprehensive Evaluation
  - ☐ Order Appointing Physician or Psychologist
- ☐ Have the petitioner sign the documents.
- ☐ Obtain the judge's signature on the Notice and Order, Order Appointing Guardian ad Litem, and Order Appointing Physician or Psychologist.
- ☐ File the Notice and Order, Petition, Order Appointing Guardian ad Litem, and Order Appointing Physician or Psychologist.
- ☐ Serve the documents on interested persons at least 10 days before the hearing.
- ☐ Serve or arrange for service of the documents on the proposed ward.
- ☐ Draft a Certificate/Affidavit of Service for the person serving notice on the proposed ward and arrange for its completion.

- ☐ Contact the doctor or psychologist.
- ☐ Send copies of the documents to the agency ordered to do the comprehensive evaluation.
- ☐ Follow-up with the guardian ad litem.
- ☐ Arrange for transportation of the proposed ward to the hearing
- ☐ Send the medical evaluation and comprehensive report to the guardian ad litem (and the proposed ward, if appropriate), if these were not distributed directly.
- ☐ Draft documents for the hearing:
  - ☐ Determination and Order
  - ☐ Letters of Guardianship
  - ☐ Bond (if required)
- ☐ Prepare for the hearing.
- ☐ Attend the hearing.
- ☐ Follow-up with the guardian as requested or retained.

b. [§ 5.20] Roles of Participating Lawyers

If the proceedings are contested, the proposed ward may be represented by advocacy counsel as well as by a guardian ad litem. The guardian ad litem continues to participate as advocate for the best interests of the proposed ward.[37] Once the guardian ad litem has determined what outcome would be in the proposed ward's best interests, the guardian ad litem has the responsibility to present that case at the hearing.[38] To avoid duplication of effort, the guardian ad litem first determines what witnesses and evidence will be presented by the petitioner's attorney and the proposed ward's advocacy counsel. The guardian ad litem then prepares the "best interests" case.

At the hearing, the petitioner's attorney presents the petitioner's case, after which the advocacy counsel presents the proposed ward's defense. By tradition, the guardian ad litem goes last, even if generally aligned with either the petitioner or the defense. As a result, the guardian ad litem often does not present any additional witnesses or testimony.

Caveat. If the guardian ad litem is the primary contestant—which can be the case if there is no advocacy counsel for the proposed ward—the guardian ad litem will serve as the proposed ward's lead "defense" attorney as well as the proposed's ward's advocate.

c. [§ 5.21] Witnesses and Evidence

The guardian ad litem generally relies on the witnesses called by the other participants at the hearing. However, as advocate for the proposed ward's best interests, the guardian ad litem must evaluate whether reliance on other participants' witnesses is warranted in the particular case. The guardian ad litem will not be permitted to base his or her report on any fact not in evidence at the time of trial.[39] Thus, he or she must be aware of the

[37] *See* Wis. Stat. § 880.331(7).

[38] The responsibilities of the guardian ad litem also continue through any appeal of the case. Wis. Stat. § 880.331(7); *see infra* § 5.24.

[39] See a parallel discussion regarding the duties of the guardian ad litem (in family court actions) in *Hollister v. Hollister*, 173 Wis. 2d 413, 417–21, 496 N.W.2d 642 (Ct. App. 1992).

facts underlying the "best interests" case and of the way those facts will be introduced into evidence at trial.

G. [§ 5.22] Checklist

Checklist: Duties of Guardian ad Litem in Uncontested Guardianship/ Protective Placement Proceedings

- ☐ Review the statutes.
- ☐ Review the initial documents and set up the file.
- ☐ Sign consent to act as guardian ad litem, if applicable.[40]
- ☐ Draft a written notice of the legal rights of the proposed ward.[41]
- ☐ Interview the proposed ward and advise the proposed ward of his or her rights.
- ☐ Follow up as necessary with medical/psychological/social service evaluators.
- ☐ Determine whether any formal court requests are necessary.
- ☐ Confer with the proposed guardian.
- ☐ Review the medical/psychological/social service evaluations.
- ☐ Consider the possibility of a limited guardianship.
- ☐ Consider the issue of "least restrictive environment."
- ☐ Determine whether the proposed ward is able to attend the hearing.

[40] *See infra* Appendix B (sample order appointing guardian ad litem and consent to act).

[41] *See infra* Appendix B (sample notices).

- ☐ Prepare an affidavit/report.[42]
- ☐ Consider the appropriate role for the guardian ad litem if advocacy counsel is appointed.
- ☐ Attend the hearing and file the report.
- ☐ Submit a bill according to county policy.
- ☐ Close the file and index it for future retrieval.

III. [§ 5.23] Role of Advocacy Counsel

Under section 880.33(2)(a)1., the proposed ward is entitled as a matter of law to advocacy counsel if, at least 72 hours before the hearing:

1. The proposed ward requests advocacy counsel;
2. The guardian ad litem or any other person states that the proposed ward is opposed to the guardianship petition; or
3. The court determines that the interests of justice require that the proposed ward be represented by advocacy counsel.[43]

Section 880.33(2) applies in protective services/placement proceedings,[44] and presumably the person subject to the proceedings would be entitled to counsel if he or she opposed the petition for protective services or placement.

Practice Tip. Advocacy counsel is to represent the position of the proposed ward, who is the client. Representing the proposed ward's position can be very difficult when the proposed ward is unable to formulate a coherent position. In those cases, advocacy counsel will be constrained by the rule of professional conduct governing representation of a client under disability.[45] Application of this rule to guardianship cases is baffling at best.

[42] *See infra* Appendix B (sample affidavit; sample long/short-form report).

[43] Wis. Stat. § 880.33(2)(a)1.

[44] Wis. Stat. § 55.06(6).

IV. [§ 5.24] Appeals

After entry of the order for guardianship, or for guardianship and protective placement,[46] any party may initiate an appeal in the same manner as any other civil case.[47] The guardian ad litem may initiate or participate in an appeal.[48] More typically, though, the appellate counsel for the proposed ward is the advocacy counsel.

A discussion of appellate court practice is beyond the scope of this book.[49]

[45] *See* SCR 20:1.14.

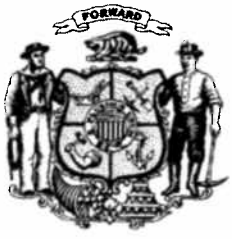
[46] *See supra* § 4.31.

[47] *See* Wis. Stat. §§ 880.33(2)(a) ("Any final decision of the court is subject to the right of appeal."), 55.06(18) ("An appeal may be taken to the court of appeals from a final judgment or final order under this section...by the subject of the petition or the individual's guardian, by any petitioner or by the representative of the public.").

[48] Wis. Stat. 880.331(7).

[49] *See* Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* (State Bar of Wisconsin CLE Books 2d ed. 1995 & Supp.).

WISCONSIN STATE LEGISLATURE



February 29, 1999

VIA FAX

The Honorable Michael D. Huebsch
Chair
Assembly Committee on the Judiciary and Personal Privacy
State Capitol: 119 North
P.O. Box 8952
Madison, WI 53708

Re: AB 742 Fees and Costs of Petitioner in Guardianship Appointment

Dear Representative Huebsch:

I understand that the above-referenced bill is scheduled for public hearing on March 1, 2000 before the Assembly Committee on Judiciary and Personal Privacy. The Milwaukee Bar Association (MBA) Board of Directors supports the legislative language included in AB742.[1]

The MBA, founded in 1858, has continually operated in Milwaukee County for 141 years; currently it has a voluntary membership of over 2500 attorneys. Its Bench/Bar Probate Committee (consisting of over 20 members of the bench and bar who address guardianship petitions as a matter of daily practice) unanimously recommended that the MBA Board support the language of this legislation, as drafted. The Board received input from members on two separate occasions, and engaged in deliberations before voting to support the language included in AB472. The rationales supporting this position center on the bar's interest in legislation which aids and improves the administration of justice. This legislation serves that end for some of the most vulnerable persons in our county: incompetent adults, not afforded the protections and care giving which guardians provide.

Milwaukee County agencies concerned with guardianships/protective placements including the Department on Aging, Adult Services and Mental Health Division, report that new guardianship/protective placement proceedings are not being commenced for hundreds of Milwaukee County adults identified (by health care personnel, family members and neighbors) as unable to make decisions for themselves and are without guardians for medical and financial decision making. Adult persons needing guardians live in private residences, adult foster care homes, group homes, community-based residential facilities, nursing homes, and in both mental health and general hospitals. They are in need of guardians due to infirmities of aging, developmental disabilities (including incompetent minors attaining age 18 and therefore legally responsible for themselves for the first time), chronic mental illness and other mental incapacities.

[1] The Board supported passage of SB158; it included the same language as that in AB742.

MILWAUKEE BAR ASSOCIATION, INC.

424 E. Wells Street Milwaukee, Wisconsin 53202-3746 414-274-6760 Fax 414-274-6765 E-mail mba@milwbar.org
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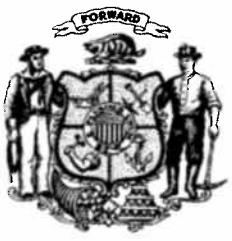
Elevator access at 807 North Jefferson Street


WISCONSIN STATE LEGISLATURE


FORWARD

Alberta Darling

Wisconsin State Senator

Committee on Judiciary and Personal Privacy
Representative Huebsch, Chairman
February 29, 2000

Testimony submitted by State Senator Alberta Darling
Assembly Bill 742

I am co-sponsoring Assembly Bill 742, a companion to Senate Bill 158, to permit payment of petitioner's attorney fees in guardians from the ward's estate in certain cases. This bill is in response to the 1997 case, Community Care of Milwaukee County v. Evelyn O., 214 Wis. 2d 433 (Ct. App. 1997).

In the Evelyn O. case, the Court of Appeals held that an adjudicated ward may not be charged for the petitioner's attorney fees. The court held that attorney fees followed the American rule, that each party paid for its own attorney fees, absent a statute specifically shifting the attorney fees of the "losing" party to the successful party. The petitioners in the case had argued that the attorney fees were payable as a ward's "just debts," under sec. 880.19, Wis. Stats. The court rejected the argument, explaining that the wards in the case clearly had not sought out the petitioners' attorneys' services (indeed the wards had opposed the guardianship) and further, the attorney fees were incurred before the court had declared them incompetent anyway.

As a result of this court case, elder law attorneys, county social service, adult protective service agencies and advocates reported to me that the court decision has made it very difficult for some functionally incompetent individuals to receive the protections of the guardianship system. This is a result of the financial burden on concerned family members about paying the petitioner's attorney fees.

A few individuals have indicated that they believe it would be fundamentally unfair to make an adjudicated ward pay for the proceedings that imposed the guardianship on him or her, and have suggested that individuals can file pro se petitions (costing petitioners no attorney fees) or request that corporation counsel file petitions. Proponents of the bill, however, have pointed out that the filing of pro se petitions can be difficult under the best of circumstances, much less situations where there is great family stress taking place. They have also pointed out that corporation counsel in most counties do not have the resources to assume responsibility for filing all of these petitions. Furthermore, they point out that guardianship should not be perceived as stripping individuals of their rights but rather as providing a conscientious substitute decision-maker to indeed make sure that a competent individual's rights are honored.

After consulting with advocates and attorneys active in guardianship matters, I agreed to author this legislation that I believe will carefully balance the interests of the adjudicated ward.

Committees: Education and Financial Institutions, Chair • Judiciary • Business, Economic Development and Urban Affairs • Administrative Rules

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P.O. Box 7882
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6373 North Jean Nicolet Road
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The relevant part of the proposal, AB 472, would create sec. 880.24(3), Stats., as follows:

FEES AND COSTS OF PETITIONER. (a) When a guardian is appointed, the court shall award from the ward's estate payment of the petitioner's reasonable attorney fees and costs unless the court finds after considering all of the following...that it would be inequitable to do so:

1. The petitioner's interest in the matter, including any conflict of interest that the petitioner may have had in pursuing the guardianship.

2. Whether the ward had executed a durable power of attorney under s. 243.07, Stats.,* or had engaged in other advance planning to avoid guardianship.

3. The ability of the ward's estate to pay the petitioner's reasonable attorney fees and costs.

4. Whether the guardianship was contested and, if so, the nature of the contest.

5. Any other factors that the court considers to be relevant.

*It is probable that an amendment will be suggested that will also include reference to the ward having previously executed a power of attorney for health care under ch. 155, Stats.

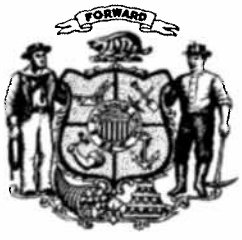
Additional language in the legislative proposal makes clear that the existence of the power of attorney, without at least one of the other factors may not preclude the awarding of attorney fees since, for example, an individual may have a power of attorney that is not comprehensive enough (e.g., only addresses some of their financial interests), so that a guardianship is later necessary. The proposal also identifies that it would first apply to petitions that were pending on the effective date of the law, if and when it passes.

The Elder Law Section of the State Bar of Wisconsin and the Coalition of Wisconsin Aging Groups' Elder Law Center worked very closely with me in drafting the bill's language and are supporting the bill. I am very grateful for their counsel and support.

I urge my colleagues to forward AB 472 to the full Assembly for debate and passage.

Thank you for your consideration. I would be happy to speak to any of you further if you have questions.

WISCONSIN STATE LEGISLATURE



LEGISLATION ANALYSIS – 1999 AB 742

FOR: ASSEMBLY COMMITTEE ON JUDICIARY & PERSONAL PRIVACY
BY: JEFFERY R. MYER, LEGAL ACTION O F WISCONSIN, INC.
DATE: MARCH 1, 2000

Executive Summary

1. AB 742 is not needed to protect persons who really need guardianship because the mandatory guardian ad litem **already has the duty** to do all legal work necessary to obtain a guardianship order. Guardianship of Agnes T., 189 Wis. 2d 520, 530-31, 525 N.W.2d 268 (1995).

2. AB 742 harms guardianship defendants by forcing them to pay for a third lawyer that they cannot control.

3. The "criteria" of AB 742 do not solve the problem of defendants having to supply the bullets to their adversaries, but instead invite expensive litigation paid for by frail, vulnerable citizens.

4. AB 742 creates a bizarre system where the guardian ad litem's compensation is capped at $45 per hour, but the prosecutor – **who the defendant must pay for**– is paid full market rates.

5. AB 742 creates a two-tier protective services systems which abandons the low-income elderly who need guardianship protection.

6. AB 742 increases the potential Medical Assistance costs of long term care by diverting private funds that could be used for long term care to petitioner's attorney's fees.

THE INTEREST AND EXPERIENCE OF LEGAL ACTION OF WISCONSIN IN GUARDIANSHIP LITIGATION

Legal Action of Wisconsin, through its SeniorLaw project, is a grantee of funds under the Older Americans Act. One of the federal priorities for representation with OAA funds is, under 42 U.S.C. §3030d(a)(6), guardianship proceedings. Legal Action does not provide simply "information and referral" services; Legal Action provides direct representation in court. Although most of the cases in which Legal Action provides direct representation are as the lawyer for the defendant (the ward or the alleged incompetent), because that is where the need is by far the greatest, Legal Action also represents petitioners and guardians.

Legal Action was defense counsel in the Wisconsin Court of Appeals decisions that highlighted the potential for abuse when guardianship petitioners come after the guardianship defendant's estate for payment of the petitioner's attorney's fees. See Yamat v. Verma L.B, 214 Wis. 2d 207, 571 N.W.2d 860 (Ct. App. 1997); Community Care Organization of Milwaukee County, Inc. v. Evelyn O. and Thyra K. 214 Wis. 2d 434, 571 N.W.2d 700 (Ct. App. 1997).

BACKGROUND SUMMARY OF GUARDIANSHIP PROCEDURE AND THE ROLE OF THE GUARDIAN AD LITEM

Guardianship litigation is the easiest **and** cheapest of all litigation to commence. Literally, "any person"[1] can file the petition that starts the guardianship process. A simple, "check the box" form is used. The form is available without charge from the local Register in Probate office. The form petition does not require any technical or medical information. Even these simple "check the box" "allegations" are not jurisdictional. See, Guardianship of Marak, 59 Wis. 2d 139, 143-44, 207 N.W.2d 648 (1973). The filing fee is $15.[2]

The ease and negligible cost to start a guardianship case has the beneficial result of allowing anyone with an interest in helping a disabled person to do so easily and without measurable cost. Well-meaning relatives, neighbors, social workers, church members, literally anyone, can, with little effort and little cost, bring to the attention of the court the genuine need for a guardian.

Unfortunately, the ease and negligible cost to start a guardianship also has a detrimental result. Greedy "heirs," disgruntled neighbors, and officious bystanders can, just as easily, invoke the judicial power of the State to attempt to strip any citizen of their most basic rights. The case of Yamat v. Verma L.B., 214 Wis. 2d 207, 571 N.W.2d 860 (Ct. App. 1997) is one example of abusive guardianship litigation, where an adult son, while living with his mother in her home, used the guardianship proceeding to remove her from her **own home**. Legal Action has successfully defended guardianship cases started by a landlord who used guardianship as an eviction device, a disgruntled home health care agency in a dispute with their client over the quality of services being provided, and a nursing home (which was later the subject of a

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[1]Section 880.07(1) reads, in part: "Any relative, public official or other person, may petition for appointment of a guardian of a person subject to guardianship."

[2]There is a separate fee paid **after** a guardianship is imposed, but that fee is based on the size of the estate and is **paid from the guardianship estate**. See §880.07(4)

compliance proceeding over quality of care) involved in a dispute with a husband over the quality of care for his wife.

Once the "check the box" form petition is filed, the court is required to schedule a hearing.[3] The court is also required to appoint a guardian ad litem.[4] The guardian ad litem **must** be an attorney and must be completely independent of the other litigants.[5] The guardian ad litem's duty is to the "best interest" of the defendant. The guardian ad litem does **not** represent the petitioner. The guardian ad litem does **not** represent the defendant. Indeed, the guardian ad litem's role is so different from the role of defense counsel that the same attorney can **never** be both defense counsel and guardian ad litem. Guardianship of Tamara L.P., 177 Wis. 2d 770, 503 N.W.2d 333 (Ct. App. 1993). Defense counsel represents the defendant's wishes. The guardian ad litem represents the "best interest." In some cases, those two roles will coincide, such as where the guardian ad litem and the defendant both oppose the guardianship entirely or where the defendant agrees that the guardianship is desirable and the defendant and the guardian ad litem agree on who should be the guardian and where the defendant should live after the guardianship is imposed.

In some cases, however, the guardian ad litem will believe that a guardianship is in the "best interest" while the defendant opposes the guardianship. Because the guardian ad litem's duty is to the "best interest" of the defendant, if a guardianship **is** in the best interest, the guardian ad litem has the duty, if the petitioner cannot or will not prosecute the petition, to do all the legal work necessary to impose the guardianship. That is one of the holdings of Guardianship of Agnes T., 189 Wis. 2d 520, 530-31, 525 N.W.2d 268 (1995).

Just as the roles of defense counsel and guardian ad litem are different, the roles of guardian ad litem and the petitioner (and the petitioner's attorney) are different. The petitioner can, of course, prosecute the guardianship, and hire an attorney to represent the petitioner to prosecute the guardianship. That attorney, however, represents the **petitioner**, not the "best

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[3]Section 880.08 reads, in part: "Upon the filing of a petition for guardianship, and the court being satisfied of compliance with s. 880.07, the court shall order notice of the time and place of hearing as follows:"

[4]Section 880.331(1) reads: "The court shall appoint a guardian ad litem whenever it is proposed that the court appoint a guardian on the ground of incompetency under §880.33, protectively place a person or order protective services under §55.06, review any protective placement or protective service order under §55.06 or terminate a protective placement under §55.06."

[5]Section 880.331(2) reads: "The guardian ad litem shall be an attorney admitted to practice in this state. No person who is an interested party in a proceeding, appears as counsel in a proceeding on behalf of any party or is a relative or representative of an interested party may be appointed guardian ad litem in that proceeding."

interest." The petitioner's goals may coincide with the guardian ad litem's assessment of the "best interest." Or they may be different.

The important points are that guardianship is easy and cheap to start and that there is **always** as attorney appointed as guardian ad litem whose duty is to represent the "best interest." Under current law, the guardian ad litem's fee are paid **by the defendant**, even if the defendant prevails in opposing the guardianship. See §880.331(8). Where the defendant is indigent, the court directs the county to pay the guardian ad litem's fees.

ANALYSIS OF AB 742

1. AB 742 IS NOT NEEDED TO PROTECT PERSONS WHO REALLY NEED GUARDIANSHIP BECAUSE THE MANDATORY GUARDIAN AD LITEM ALREADY HAS THE DUTY TO DO ALL LEGAL WORK NECESSARY TO OBTAIN A GUARDIANSHIP ORDER.

Under current law and practice, guardianship actions are the easiest litigation to start. Literally, "any person" can start the process. It is started with a "check the box" form. A copy of the form is attached. As one can tell from the form, its does not require specialized knowledge.

The filing of the "check the box" form triggers both an automatic hearing and the appointment of an attorney as guardian ad litem. It is the duty of the guardian ad litem to see to it, if a guardianship is in the "best interest" of the defendant, that the guardianship is prosecuted. If the petitioner is unwilling or unable to prosecute, it is the guardian ad litem's duty. Guardianship of Agnes T., 189 Wis. 2d 520, 530-31, 525 N.W.2d 268 (1995). If the petitioner does not or cannot serve the defendant and other interested person, it is the guardian ad litem's duty. If the petitioner does not or cannot obtain medical evidence to prove incompetency, it is the guardian ad litem's duty. If the petitioner does not or cannot proceed, it is the guardian ad litem's duty.

Thus, it is **never** necessary to the protection of the best interest of the defendant to make the defendant pay for the **petitioner's** attorney. The defendant already pays for the guardian ad litem's fee under current law. If the guardianship is in the best interest of the defendant, and if the guardian ad litem must do additional legal work because the petitioner cannot or will not pursue the litigation, the guardian ad litem discharges his or her duty and the defendant pays for that "benefit" under current law.

2. AB 742 HARMS GUARDIANSHIP DEFENDANTS BY FORCING THEM TO PAY FOR A THIRD LAWYER THAT THEY CANNOT CONTROL.

Under current law, the guardianship defendant already has to pay for two lawyers – the defense lawyer who represents the defendant's wishes and the guardian ad litem who represents the defendant's "best interest." If the defendant is indigent, the county must pay for these two lawyers. §§880.33(3), 880.331(8).

Proposed AB 742 makes the defendant liable to pay for a third lawyer – the petitioner's lawyer. This third lawyer is completely beyond the control of the defendant. The petitioner's lawyer represents the petitioner, not the defendant, and not even the defendant's "best interest." The defendant cannot fire the petitioner's lawyer. The defendant cannot prevent the petitioner's lawyer from running up the costs of litigation. The defendant cannot influence the positions the petitioner's lawyer takes. The Court of Appeals in Community Care Organization of Milwaukee, Inc. v. Evelyn O. and Thyra K., 214 Wis. 2d 434, 441-42, 571 N.W.2d 700 (Ct. App. 1997) very aptly described the prospect of having to pay the petitioner's lawyer's bill as having to "supply bullets to their adversaries, either before or after the battle, even if the war is fought for what is ultimately determined to be in their benefit."

Unfortunately, there are many scenarios in which AB 742 would force defendants to "supply the bullets to their adversaries." The most obvious is when there is a dispute over whether the defendant is incompetent. This was the scenario in Yamat v.Verma L.B, 214 Wis. 2d 207, 571 N.W.2d 860 (Ct. App. 1997), where the adult son used a guardianship proceeding to oust his mother from her own home, and then used her money, through a temporary guardian, to finance his litigation against her for the permanent guardianship. Although the Yamat case was particularly egregious because of the obvious conflict of interest, AB 742 would make the result attempted in Yamat the law of this state.

There are other scenarios which are less obviously outrageous as the Yamat case, but would, under AB 742, still require defendants to "supply bullets to their adversaries." In many cases there is no dispute that the defendant is incompetent, but the dispute is over who should be guardian. This scenario includes the feeding frenzy of the "sibling rivalry" cases where two (or more) children are squabbling over which of them loves "Mom" more in order to be named the guardian. AB 742 makes "Mom" pay for **both** of the squabbling siblings' lawyers.

A third scenario where AB 742 harms the defendant is the "shirt-tail" relative scenario. There are increasingly a number of seniors who have outlived their children and whose adult grandchildren are scattered around the country. The closest responsible person may well be a neighbor or church member, but the "shirt-tail" relative uses a guardianship proceeding to gain

control of the defendant's estate. The dispute in this scenario is not whether the defendant is incompetent, but over who should be the guardian.

A fourth scenario of forcing the defendant to "supply bullets to their adversaries" is where the petitioner wants to place the defendant in a nursing home, but the defendant and the guardian ad litem support a less restrictive in-home placement or an assisted living apartment or a community-based residential facility.[6]

The fundamental flaw of AB 742 is that it rewards petitioners for litigating disputes. Under AB 742, the expense of fighting over who should be the guardian or what is the least restrictive placement falls entirely on the defendant. The defendant, under AB 742 has to pay not only for defense counsel **and** the guardian ad litem, but also for the squabbling siblings, the shirt-tail relative, and the nursing home's lawyers. The threat of fee-shifting in litigation is a powerfully destructive tool. The shirt-tail relative can demand in litigation placement in the most restrictive settings and then "compromise" if the shirt-tail relative is the guardian, the shirt-tail relatives **lawyer** gets paid from the estate, but the defendant gets to live at home. AB 742 puts all of the risk on the defendant – the very person we are supposedly attempting to protect – and gives all of the incentives for litigation to the defendant's adversaries.

3. THE "CRITERIA" OF AB 742 DO NOT SOLVE THE PROBLEM OF DEFENDANTS HAVING TO SUPPLY THE BULLETS TO THEIR ADVERSARIES, BUT INSTEAD INVITE EXPENSIVE LITIGATION PAID FOR BY FRAIL, VULNERABLE CITIZENS.

Proposed AB 742 lists five criteria which the circuit court can in theory consider to overcome a presumption of entitlement to payment of the petitioner's fees. Unfortunately, each of these criteria are a "fool's gold:" shiny and attractive, but worthless in the real world.

The first criterion is the "petitioner's interest" and whether the petitioner has a conflict of interest in pursuing the guardianship. The proposed statute, however, does not indicate whether a petitioner seeking to have the petitioner named guardian is a "conflict of interest." Certainly an evil child seeking to gain control of a parent's money in order to avoid "wasting" the "inheritance" on services for the vulnerable parent is a conflict of interst. But no evil child – especially one represented by a lawyer at the parent's expense – will admit that is the motive.

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[6]This is exactly the scenario of Community Care Organization of Milwaukee County, Inc. v. Evelyn O. and Thyra K. The defendant's attorney and the guardian ad litem stipulated that the defendants were "fit subjects for a guardianship," but the petitioner sought nursing home placements rather than leass restrictive community placements.

A good argument can be made that a petitioner seeking to have the petitioner named guardian is **always** a conflict of interest. A guardian's fiduciary duty is to preserve the ward's estate. This fiduciary duty prevails even if the guardian genuinely believes that the ward would want to divest the ward's estate. Michael S.B. v. Berns, 196 Wis. 2d 920, 40 N.W.2d 11 (Ct. App. 1995). the guardian's fiduciary duty is to resist payment of the petitioner's attorney's fees; but under AB 742 the petitioner's (i.e. the guardian's) interest is in having the petitioner's legal fees paid. The Court of Appeals has already held that an attorney temporary guardian employed by the petitioner's attorney has an "inherent, non-waiveable conflict of interest." See, Yamat v. Verma L. B., 214 wis. 2d 207, 216, 571 N.W.2d 860 (Ct. App. 1997) One of the conflicts in that case was exactly the conflict created by AB 742 – the payment of the petitioner's attorney's fees.

Another criterion is whether "the guardianship was contested, and if so, the nature of the contest." Unfortunately, this criterion gives absolutely no guidance on whether the existence of a "contest" weighs for or against forcing the defendant to "supply bullets to their adversaries." If the absence of a dispute weighs in favor of forcing the defendant to pay the petitioner's attorney's fees, then that is exactly the kind of case where fee shifting is not necessary under current law. In the **undisputed** case – where it is clear that a guardian is in the best interest of the ward, and it is clear who the guardian should be, and it is clear where the defendant should be protectively placed – current law **already** provides for a lawyer, the guardian ad litem, to ensure that this result is accomplished. In this **undisputed** cases, the petitioner's role is finished with the filing of the "check the box" form petition and paying the nominal filing fee. The guardian ad litem has the duty under current law to ensure that, in this undisputed case, the legal paper work is done.

This fact suggest that AB 742 intends that the existence of a "contest" on some issue is a criterion that weighs in **favor** of forcing the defendant to pay petitioner's attorney's fees. That, however, is precisely the situation that gives the petitioner a powerful economic incentive to force a "contest" on some issue. A petitioner, or more precisely, the petitioner's lawyer, can always create a "contest." The "contest" might be over whether the final order should be a voluntary conservatorship or a forced guardianship. or over who should be the guardian, or over whether the placement should be a locked nursing home or some less restrictivne placement. AB 742 creates a powerful economic incentive for petitioner's and their lawyers to create "contests."

The third problematic criterion in AB 742 is the "ability of the ward's estate to pay the petitioner's attorney's fees." Every single dollar that is paid out of the ward's estate for petitioners attorney's fees is one less dollar available to provide for the ward's continuing needs. Is a $100,000 ward's estate sizable enough to finance contentious litigation of at least three attorneys – defense counsel, the guardian ad litem and the petitioner's attorney? Three legal

meters running at the same time will deplete the accumulated wealth of a great number of citizens.

Unfortunately, all of the litigation over these issues will be financed by the defendant under AB 742. If a circuit court awards petitioner's attorney's fees even though the petitioner sought ("successfully") to have the petitioner named guardian, defense counsel and the guardian ad litem have a duty to appeal to clarify the intent of AB 742. But who pays for this appeal – three times over? The ward. The very person who needs the accumulated funds to pay for long term care. The very people who have been stripped of the power to manage their own money.

4. AB 742 CREATES A BIZARRE SYSTEM WHERE THE GUARDIAN AD LITEM'S COMPENSATION IS CAPPED AT $45 PER HOUR, BUT THE PROSECUTOR – WHO THE DEFENDANT MUST PAY FOR– IS PAID FULL MARKET RATES.

The legislature has seen fit to cap the guardian ad litem's compensation at $45 per hour for in court time and $35 per hour for out of court time. See §§880.331, 977.08(4m)(b). These are seriously sub-market rates. But it is the guardian ad litem whose statutory and ethical duty is to advocate for the best interest of the defendant.

Ironically, AB 742 requires full market rates – "reasonable attorney fees" – for the attorney who owes no duty to the defendant or to the defendant's best interests. It is not just a question of "supplying the bullets" to one's adversary. AB 742 supplies a lot more bullets to the adversary's lawyer than to the lawyer whose duty it is to advocate for the best interest of the defendant.

Without demeaning the service provided by attorneys who fulfill the important function of guardian ad litem, it is crazy to force the guardianship defendant to pay three or four times more for the petitioner's lawyer – whose duty is to the petitioner and not to the defendant – than is paid to the attorney whose statutory and ethical duty is to the best interest of the ward.

5. AB 742 CREATES A TWO-TIER PROTECTIVE SERVICES SYSTEMS WHICH ABANDONS THE LOW-INCOME ELDERLY WHO NEED GUARDIANSHIP PROTECTION.

If there is a perception that needed guardianship proceedings are not, despite the "check the box" form and the negligible filing fee, being filed, why would the Assembly abandon the poor person who needs a guardianship?

Guardianship is a protective service. It is no different than fire protection or police protection. We would not, however, tolerate a police department that provided protection only to those wealthy enough to pay a bill for that protection. We would not tolerate a fire department that claimed "insufficient funds" to put out fires in poor neighborhoods, but served neighborhoods wealthy enough to be separately billed.

Guardianship is every bit as important a protective service as fire protection and police protection. If there is a perceived need for more guardianships, then shame on those whose proposed "solution" is AB 742. It is fair to debate on a policy level whether the current system permits too few or too many guardianship actions to be commenced. But it is an affront to the principle of equal justice that only the rich deserve "protection."

6. AB 742 INCREASES THE POTENTIAL MEDICAL ASSISTANCE COSTS OF LONG TERM CARE BY DIVERTING PRIVATE FUNDS THAT COULD BE USED FOR LONG TERM CARE TO PETITIONER'S ATTORNEY'S FEES.

Guardianship cases do not exist in a vacuum. Persons so disabled as to be incompetent have extensive long term care needs. Frequently, those needs deplete the estate and force the ward onto public assistance. Every dollar drained from a ward's estate to pay the petitioner's attorney' fees is one less dollar available for the ward's long term care needs. It is bad fiscal policy to use a ward's life savings to finance the squabbling siblings or the shirt-tail relative's legal bills. The guardian ad litem protects the ward's best interest. The squabbling siblings and the shirt-tail relatives can fend for themselves.

CONCLUSION

AB 742 is unnecessary. Existing law provides for a guardian ad litem whose duty is to serve the best interest of the defendant. AB 742 harms defendants by forcing them to pay for a third (or fourth or fifth) attorney over whom the defendant has no control. The "criteria" of AB 742 compound the problem because they encourage "contests" and are so contradictory as to required litigation paid for, three times over, by the defendant. Further, AB 742 creates a two tier system under which the defendant must pay more for his or her prosecutor than for the lawyer whose duty is to represent the defendant's best interests, and, even if there is a perceived problem, leaves the poor defendant without a "solution." Finally, AB 742 diverts private funds which could be used for long term care needs to pay lawyer's.

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

IN THE MATTER OF THE GUARDIANSHIP OF

_____

_____
Date of Birth

PETITION FOR
☐ GUARDIANSHIP
☐ Temporary ☐ Successor
☐ Permanent ☐ Standby
☐ PROTECTIVE PLACEMENT

File No. _____

Under oath, I petition the court for:
☐ the appointment of the guardian of the ☐ person ☐ estate
☐ protective placement
of the above person, and state that:

1. The interest of the petitioner is _____

2. The proposed ward's
post office address is _____
residence is _____
telephone number is _____

3. The proposed ward is in need of a guardian, of the type checked above, for the following reasons:
_____
_____
_____

☐ 4. This is a family placement in a nursing home or CBRF under §50.06, Wisconsin Statutes, requiring a hearing within 60 days of filing.

5. The proposed ward has or is entitled to:
☐ personal property, value: ..... $ _____
☐ real estate, value: ..... $ _____
☐ social security: ..... $ _____ per month
☐ Veterans Administration benefits: ..... $ _____ per month
☐ other claims, income, compensation, rent, pension, insurance or allowances, value: .. $ _____
☐ medical assistance

6. Of the present assets, $ _____ were derived from the Veterans Administration. The additional information required by the Uniform Veterans Act, if applicable, is _____

7. The present guardian is (if none, so state):
name: _____ telephone number: _____
post office address: _____

8. The person nominated as guardian of:
☐ person is: _____ telephone number: _____
post office address: _____
☐ estate is: _____ telephone number: _____
post office address: _____

☐ 9. The person nominated as a standby guardian is:
name: _____ telephone number: _____
post office address: _____

10. The person or institution having the care and custody of the proposed ward is:
name: _____
post office address: _____

11. The names and post office addresses of the spouse, presumptive or apparent adult heirs of proposed ward, and all other interested persons are:

NAME	RELATIONSHIP	POST OFFICE ADDRESS

12. The petitioner believes that the proposed ward should retain the following power(s), if any:
☐ vote ☐ marry ☐ contract ☐ hold or convey property
☐ obtain a motor vehicle operator's license or other state license
☐ other: _____
☐ none

13. If petitioner is requesting protective placement (§ 55.06, Wis. Stats.), complete the following:

a. The proposed ward suffers from the following disability(s):
☐ developmental disability ☐ infirmities of aging ☐ chronic mental illness ☐ other like incapacities and this disability is permanent or likely to be permanent.
Explain: _____

b. The proposed ward has a primary need for residential care and custody because: _____

c. The proposed ward is totally incapable of providing his or her own care or custody as to create a substantial risk of serious harm to oneself or others. Explain: _____

d. The least restrictive placement for the proposed ward is _____ or like facility and that ☐ a locked ☐ an unlocked unit is appropriate.

Subscribed and sworn to before me
on _____

_____
Notary Public, Wisconsin
My commission expires: _____

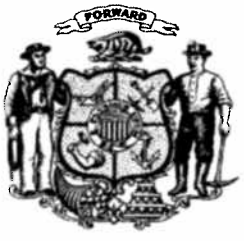
_____
Signature of Petitioner

_____
Typed Name of Petitioner

_____
Date

Name of Attorney	
Address	
Telephone Number	Bar Number

WISCONSIN STATE LEGISLATURE



TO: Members of the Assembly Committee on Judiciary and Personal Privacy

FROM: Carol J. Wessels, Attorney, 1723 North 58th Street Milwaukee WI 53208

RE: AB 742 - Relating to the Payment of attorney fees in guardianship proceedings

DATE: March 1, 2000

This written testimony is provided in opposition to AB 742. I am an attorney and the Director of SeniorLAW, a program of Legal Action of Wisconsin that serves individuals who are 60 and over. This testimony is provided in my personal capacity and does not express a position of SeniorLAW or Legal Action of Wisconsin. I am also a board member of the Public Interest Law Section and have been actively involved in the discussions with respect to SB 158, the companion Senate Bill.

Some history on the current status of positions on SB 158 might prove useful to this committee as the bills are identical. There has been a considerable amount of debate over SB 158 among groups of attorneys who represent various participants in the guardianship system, including the Elder Law Section (supports SB 158) , the Public Interest Law Section (opposes SB 158) , and attorneys in public interest and advocacy organizations (and in private practice) who represent persons who are facing the loss of their rights because of a guardianship proceeding (who oppose the bill), and the private practitioners who represent family members or others who want to start guardianship proceedings (who support the bill). Because of the differing positions of the State Bar Sections and individual attorneys, the various interested parties convened a meeting to determine if agreements could be reached that would protect the interests of the individuals whose liberties are at stake, and yet allow the private practitioners who are supporting the bill to receive payment of fees in some fashion. Those of us who are opposed to the bill offered alternatives that would build protections for proposed wards to alleviate serious deficiencies in the bill (which I describe in greater detail below) , such as a prohibition on fees in contested cases, a cap on fees to prevent the draining of funds from the wards estate and to prevent a chilling effect on the ward's ability to present a vigorous defense, the requirement of a showing that the county Protective Service agency refused to initiate the petition, a showing of the petitioner's inability to pay the fees, and parity of fee structure between Guardians ad litem, court-appointed defense counsel, and petitioners' attorneys. There has been no indication to us that the Elder Law section or those supporting the bill are willing to agree to these changes and accommodate our concerns over the bill in its present state. The attorneys who were involved in the meeting to discuss the bill and who appeared on behalf of those organizations and individuals opposed to the bill, remain willing to engage in further discussion but at this point no agreement has been reached and the parties positions, I believe, remain unchanged.

As to the merits of AB 742, I believe that it is the wrong solution to a perceived problem in the guardianship and protective placement system. The perceived problem is that persons who are in

dire need of guardianship and protective placement may flounder without protection unless a potential petitioner can be reasonably certain that he or she can pursue judicial proceedings without being made to pay the cost of his or her own legal counsel.

AB 742 is a flawed solution to this perceived problem because, not only is it unnecessary, but most significantly, it comes at the expense of the alleged incompetent's ability to vigorously assert his or her rights. Further, if the bill is a "solution" at all, it only "works" where an individual can afford the cost of three attorneys and thus leaves the neediest of all individuals, those who are incompetent and indigent, without protection.

The law is unnecessary because petitioners have always been free to proceed *pro se* in guardianship matters. After a minimal filing fee and the completion of simple forms, the petition is commenced. Books such as *The Do It Yourself Guide to Guardianship and Protective Placement* can assist individuals in the process. All probate courts have fill-in-the-blank forms for filing. Once the case has been filed, the court's *parens patriae* requires the court to guide the litigation. A guardian ad litem will be appointed who is an attorney and will have a *duty* to pursue the matter if in the ward's best interest. In the cases where the proposed wards are so in need of guardianships that it is a "service" to them to initiate the petition, the court should not have any great deal of difficulty in guiding the matter to a smooth conclusion and order appointing guardian.

The law is also unnecessary because county corporation counsel and protective services agencies are statutorily authorized to initiate these petitions. Where a concerned friend or family member cannot afford to hire an attorney *and* for some reason cannot complete the forms *pro se*, the county will investigate the matter and if a guardian and protective placement is necessary will pursue the case. This is one of the core functions of protective services that our government has established and citizens fund. It is like police protection, fire protection, and other public functions that serve private citizens. There is no more reason or sense for private attorneys to provide this government service than there is for individuals with a ladder and a hose to provide fire protection. Except that it is a fee generating tool for attorneys in private practice.

The pro-se filing of petitions, and the provision of these services by protective service agencies, as described above, address the "problem" that has been expressed without taking money from the wards. The ward's money would remain available to provide true services to the ward, such as health care, housing and support. Every dollar spent on attorney fees is one less dollar for long term care, and brings the individual that much closer to reliance on public benefits.

Further, the expressed problem and the proposed solution in AB 742 do not fit together. When I have discussed this bill with other attorneys, it becomes evident that the genuine issue is **not** how to handle the initiation of petitions for clearly incompetent wards. The real concern appears to be for the cases that become contested. Each time I have had this discussion it goes something like this: "If we don't pay the attorneys from the wards' estates then nobody will file the petitions. These incompetent people really need the guardians so this is a service to them." When I ask: "Why can't petitioners file the petitions *pro se*? The system was set up to allow it." The answer is: "Sure they can do that, but what about contested cases?" So it really turns into an argument about who should handle the **contested cases**. I haven't heard anyone claim that *pro se* petitioners

aren't capable of handling uncontested cases.

At the point the case is contested, this issue is no longer about only about the clearly incompetent, but instead is about the marginally incompetent or even those who are not incompetent but alleged to be so. It is also about the cases where the ward wishes to secure only a limited guardianship, or contest the appointment of a particular guardian or a particular placement, or where there is a fight among two or more individuals who want to be appointed guardian. I and the attorneys in the SeniorLAW program act as defense counsel representing individuals who are faced with a guardianship and sometimes also a protective placement petition that they wish to contest. The reasons for our clients' desires to contest the petitions have varied: some maintain that they are competent and thus not in need of a guardian, some are seeking to remain in their homes or a community setting when the petitioner wants them to be placed in a nursing home, some want a guardian who is different from the person named by the petitioner. Our clients' positions have been upheld by the court in a significant number of our cases, sometimes upon consent of the parties after negotiation, and other times only after vigorous litigation.

I firmly believe that AB 742 would prevent the guardianship defendants from asserting their positions because of the threat of running up significant expenses in order to prepare and present their case. The bill if passed would require defense counsel (and GALs) to advise the proposed ward that she has the right to contest the petition, to have a jury trial and to do everything legally allowable to promote a finding that she is not incompetent, but also that if she does so and loses, not only will she be responsible for paying defense counsel's fees, the fees of the GAL, the cost of the independent psychological and any other services she may employ in her defense, but she may have to pay the costs of a third attorney who represented the petitioner. One person will have to pay the costs of **three** attorneys if found incompetent. The harder she fights, the higher the cost of losing. How can this have anything other than a chilling effect on the proposed ward's ability to raise a defense?

Moreover, the proposal does not square it with basic fairness. The other day I was explaining this bill to my mother, who is 74. Thinking about how this bill could affect her, she was appalled at the possibility that not only would she have to pay the fees of **three** attorneys, but only **one** of those attorneys would have been of her choosing both as to the attorney involved and the fee to be paid. The petitioner's attorney under this bill is chosen by the petitioner and is paid according to a fee agreement worked out, **not** between that lawyer and the person paying the bill (the ward), but by the lawyer and the petitioner. My mother stated that she could not imagine being forced to pay for a lawyer that she had not hired, and could not believe that our system would allow such inequity. I explained to her that generally, the judicial system requires each party to pay its own attorney fees, and generally only in serious cases where one party has acted in bad faith or violated a law can that party be forced to pay the other party's lawyer fees. This bill, however, would expand that exception and force that penalty onto person whose only "wrongdoing" was to have succumbed to mental illness or infirmities of aging.

Putting it another way, the proposed statute gives petitioners **more** rights than proposed wards. A proposed ward must pay his or her own attorneys fees, whatever they may be. Where a proposed ward makes a showing that he or she is indigent, the court chooses, appoints, and pays for

defense counsel at the rate set by statute. Under the present proposal, the petitioner has complete choice of counsel at whatever rate the petitioner chooses, and the petitioner does not have to pay if the order is entered, regardless of whether or not the petitioner can afford to pay. The petitioner thus gets different and better treatment than the ward, *at the ward's expense!*

The proposal that grants petitioner's fees from the wards' estates also removes one of the natural checks on the system. Where the petitioner faces the possibility of incurring attorneys fees, for the most part only those who are truly concerned about the ward will swallow that liability and go ahead. Where the fees can be foisted off onto the ward, there is less incentive for the petitioner to give serious thought to his or her actions, and **more** incentive for persons with less-than-altruistic motives to go ahead with a petition. I have seen it happen in cases that I have been involved with. There is also less incentive for settlements short of guardianships because the attorneys fees will be paid only where the order is entered.

Another concern: this bill will not solve the "problem," if there is one, completely; rather it will "help" only those incompetents who have money. No private attorney will agree to represent a petitioner even in light of this bill, if there is insufficient money in the ward's estate to pay the fees. This will leave low and moderate asset elderly completely out of the picture, and no better "served" than before. I think it would be more consistent with a concern for the welfare of the elderly to create a solution that will help all, by promoting the use of county services such as corporation counsel and protective and human services, that are already in place and can be provided uniformly to all who are in need.

AB 742 goes about "solving" the problem of individuals in need of protection by putting them in the hands of private attorneys. Thus it throws aside a perfect opportunity for the incompetent individuals about the bill is concerned to become connected with the long term support services in their community. Where it comes to the frail elderly, I feel that County Human Services, Aging Departments and Protective Service Agencies are better connected than most private attorneys with the services that may be available to frail and disabled individuals. They already exist and are available to serve the elderly. They have the capacity to initiate protective placement and guardianship petitions where necessary. This statute granting fees does not limit the award to only those attorneys who really care about elderly and know the system. Any attorney can file a petition and get fees if successful. There is no assurance that there will be any sort of follow up once the order is entered and the money is pocketed. It thus concerns me that this bill would make the attorneys the "caretakers" or "service providers" to these frail individuals. The best way to serve the individuals about whom the bill is concerned is to assess their needs as a whole, and it is the county aging and human services departments who are best equipped and already in place to do this. The issue is of particular importance with the advent of long term care redesign in the Family Care program. Guardianship issues are quintessential long term care issues. These are the cases that should be brought **into** the system instead of pushing them out, and AB 742 would push them out, because it does not further the up-front involvement of the long term care system that will be put into place in the coming years.

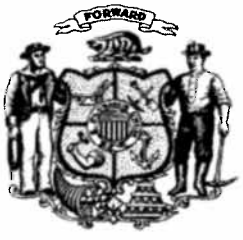
In closing, it is my experience that the "problem" of individuals going without guardianships where needed arises far less than the counterpart, the "problem" where individuals initiate

guardianship or protective placement proceedings unnecessarily or with improper motives. AB 742 is not only an inadequate solution to the first problem, but a means to increase the second problem and thus encourage abuse of the system. I would encourage this committee to await better options. I would be happy to provide additional information or consult with the committee if you wish. I can be reached at 414-443-0780.

Thank you for your consideration,

Carol J. Wessels
1723 North 58th Street
Milwaukee WI 53208
(414)443-0780


WISCONSIN STATE LEGISLATURE


FORWARD

CWAG

Elder Law Center

Coalition of Wisconsin Aging Groups

TESTIMONY IN PARTIAL SUPPORT OF SUPPORT OF AB 742
Payment of Guardianship Petitioner's Attorney Fees
by Betsy Abramson, Director, CWAG Elder Law Center
March 1, 2000

The Coalition of Wisconsin Aging Groups is a statewide consumer federation of over 640 member groups and 2000 individuals advocating for issues affecting older persons. The Elder Law Center is the Coalition's legal arm, providing individual and group representation on issues of public benefits, long-term care, guardianship, advance directives and elder abuse. Under a continuing contract from the state's Wisconsin Department of Health and Family Services, the CWAG Elder Law Center has operated the Wisconsin Guardianship Support Center since 1991. Under this project, the Elder Law Center answers over 2000 calls per year on a toll-free telephone, prepares and distributes a quarterly newsletter on guardianship issues and provides technical assistance to counties, courts and guardianship programs.

In this capacity, we have carefully followed the court case and discussions on the issue of guardianship petitioner's attorney fees. We believe that the legislative proposal before you makes a good attempt to properly balance the issues at stake in guardianship, by providing courts with discretion in determining whether or not to award the payment of petitioner's attorney fees from an adjudicated ward's estate.

When an individual is no longer competent and did not previously execute a power of attorney for finances and/or health care, the individual needs a court-appointed guardian. The individual who starts the court action to have a guardian appointed is called the "petitioner." The petitioner must hire an attorney to bring the guardianship petition and pay the attorney's fees. This proposal would allow, under certain circumstances, for payment of the petitioner's attorney fees from the ward's estate, if the court in fact finds the person is appropriate for guardianship. Under this bill, the court would have to approve of the request for attorney fees from the ward's estate after considering the following factors:

- Whether the petitioner had a conflict of interest in bringing the petition (e.g., was this a disgruntled family member trying to get at "mom" for one reason or another?);
- Whether the ward had previously executed a durable power of attorney (if so, this should raise questions about why a guardianship was pursued);
- The ability of the ward's estate to pay the fees;
- The reasonableness of the fees;
- Whether the ward had contested the guardianship and if so the nature of the contest; and
- Other relevant factors.

NOTE: These listed factors were not in the original bill. These improvements were added at the request of the CWAG Elder Law Center and the Elder Law Section of the State Bar.

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Due to a 1997 court case, arising out of Milwaukee County, the law now forbids payment of petitioner's attorney's fees from the ward's estate. *Community Care of Milwaukee County v. Evelyn O., 214 Wis. 2d 433 (Ct. App. 1997). Petition for review by Supreme Court denied.* As indicated above, the proposal would essentially reverse this court case, permitting the payment of the attorney fees from wards' estates in certain circumstances.

In our experience, most guardianships are done not to "take away" rights from individuals, but to help protect them by making sure that a properly appointed guardian is available to represent them and advocate for their rights. For most family members we advise on our Guardianship Hotline, the family has put in enormous amounts of time, energy and love in trying to keep a family member at home for as long as possible. This generally has resulted in extensive time and financial costs to the family in terms of lost work time, arranging rides, meals, health care, support services and other assistance. When that is no longer possible, a guardianship is often needed so that the elder may, unfortunately, be moved from home to a nursing home, group home or other placement setting. In these situations, the family is almost always already in a crisis mode with many emotional and logistical concerns to attend to. Requiring the family themselves to pay the attorney fees for the guardianship, adds to the stress and burden.

While we support the overall concept of the bill, we are uncomfortable with certain portions. For example, it is important to ensure that in situations where the family's motives are clearly bad the criteria listed for the judge to consider should prevent the ward from having to pay the attorney fees. This should include situations where the family (or others) are pursuing a guardianship because they don't like the choices an elder is making, or where petitions are trying to wrest away the control from a perfectly fine agent under a power of attorney "mom" had selected. We believe the bill should be amended to address these concerns.

Also, although we had originally supported the Senate bill, upon further discussion with other advocates, we have become concerned about situations where the ward has contested the guardianship. We believe further work should also be done on this bill to define a "contest" and then prevent the award of attorney fees from the ward's estate in appropriate contested situations.

In fact, a group of attorneys representing a wide variety of legal services, disability and elder law public interest organizations, along with private attorneys, have met to attempt to work out these differences. We believe that additional discussion will result in satisfactory language being developed. We urge you to wait to exec on this bill until the compromise language can be put forth as an amendment to the bill. Therefore, we ask that members of this Committee meet with members of the Senate Judiciary Committee, interested advocates, private attorneys, and county representatives to craft an appropriate compromise.

Thank you for this opportunity to present the position of the Coalition of Wisconsin Aging Groups.


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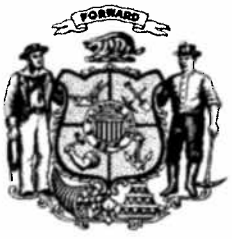
FORWARD

WISCONSIN COALITION FOR ADVOCACY

THE PROTECTION AND ADVOCACY SYSTEM FOR PEOPLE WITH DISABILITIES

March 1, 2000

To: Members of the Assembly Committee on Judiciary and Personal Privacy

From: Dianne Greenley, Attorney, Mental Health Advocacy
Jeff Spitzer-Resnick, Managing Attorney, Developmental Disabilities Advocacy

Re: Assembly Bill 742 – Payment of Petitioner's Fees in Guardianship and Protective Placement Proceedings

The Wisconsin Coalition for Advocacy, which is the state's protection and advocacy agency for persons with disabilities, wishes to express its opposition to Assembly Bill 742. This bill would overturn the holding in the Court of Appeals case, In the Matter of the Guardianship and Protective Placement of Evelyn O. (214 Wis. 2d 433 (1997)), and would require the ward's estate to pay the petitioner's attorney fees and costs in a guardianship and protective placement proceeding unless the court made an affirmative finding that it would be inequitable to do so. To make this change would be tantamount to requiring persons facing guardianship and protective placement to "supply bullets to their adversaries", to use the words of the Court of Appeals.

We believe that this change would place a chilling effect on a person who wished to contest proposed guardianship and protective placement proceedings. The harder the person fought the proceedings, the more the bill would run up for both their own attorney as well as the attorney (or attorneys if there are multiple petitioners) for those seeking the guardianship and possibly protective placement. In addition, the person may have to pay for experts for both sides of the case. This conflict between resisting a legal proceeding which may have profound effects for the individual and concerns about potential financial liability if the individual loses the contest, creates a fundamental unfairness. Giving the court the option of not ordering the payment of fees after the proceedings are over will do little to help the person in the midst of the proceedings.

We are aware that there is concern that some persons may not receive the benefits of guardianship and protective placement if this change is not made. However, in our experience this has not emerged as a major problem in the decades that the guardianship and protective placement statutes have existed. Existing law provides two possible remedies when family members or concerned friends do not have the financial resources to hire an attorney to pursue a guardianship. The first is that the county may provide assistance in petitioning for guardianship and protective placement as a protective service. (See Section 55.06 (1)(a), (b), and (c), Wis.

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Stats.) Under these provisions county protective services agencies may provide assistance in petitioning for guardianship and protective placement, with fees paid by the individual or petitioner based on ability to pay. Secondly, the law requires a guardian ad litem in every guardianship case. This person, who is an attorney, can move the case forward if the proceeding is uncontested and he/she believes that the guardianship is in the best interests of the individual.

Thus, we do not see a need for this legislation and if it is passed we believe it will substantially interfere with the ability of a person to actively resist an unwanted guardianship and protective placement.


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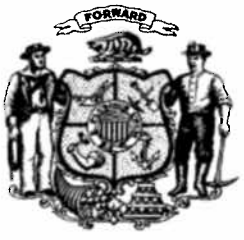
FORWARD

OPPOSE AB 742/SB 158: PROPOSED AMENDMENT TO GUARDIANSHIP STATUTE

A proposed change to guardianship law has been drafted as a negative response to court cases which uphold the rights of seniors and vulnerable adults. The court cases are: Guardianship of Evelyn O. and the companion case, Guardianship of Thyra K., and Guardianship of Verma B., 214 Wis. 2d 434 (Ct. App. 1997) and Yamat v. Verma L.B., 214 Wis. 2d 707 (Ct. App. 1997). The cases upheld that the elderly and others who may have guardianship petitions filed against them in court have the same legal rights as others who finds themselves in litigation. That is, they are responsible for their attorney fees (and the guardian ad litem fee) but not the attorney fees of their opponents.(We would be happy to fax copies of the cases to you; they are also available on-line.)

Advocates for the elderly and disabled including Legal Action of Wisconsin, Inc., Diversified Senior Services, Wisconsin Coalition for Advocacy, Consumer Justice Law Center, Mental Disability Law Center and others such as the State Bar of Wisconsin Public Interest Law Section are strongly opposed to a law change which will continue to undermine the protective service system for the elderly and disabled. The protective service system was designed to protect frail elderly and disabled persons who are not able to care for themselves or make decisions for themselves. Through the use of power of attorney documents and other planning techniques people are often able to plan, while mentally competent, for potential incompetency by selecting who they wish to take over decisionmaking in the event of incapacity or mental incompetence. Unfortunately, when guardianship work became lucrative for lawyers, these documents were ignored and guardianship petitions were filed despite the planning efforts by the elderly person. Both elderly women in Evelyn O. and Thyra K. had power of attorney documents, yet they were subjected to guardianship petitions and many thousands of dollars in legal fees which could have been better used to provide services to them.

For a number of years before I became an attorney, I worked as a social worker in the protective service system. For more than eleven years my law practice has focused on the protection of vulnerable adults. I have done thousands of guardianships: defense, prosecution and guardian ad litem work. As a practicing lawyer and an advocate for the elderly, I am appalled at the effects of a system which was designed to protect is now becoming focused on protecting the profit for lawyers rather than protecting seniors and the disabled. A system driven by attorney fees with the promised "protection" that the lawyers and judges will be the watchdogs is not protective of people's rights, it is protective of the lawyers' source of income.

Where families decide on their own to hire attorneys to obtain a needed guardian for mom or dad, the family, as the lawyer's client, directs the litigation and controls the expense of litigation. The check-off-the-box form system for guardianships permits any non-lawyer to file a petition with a nominal filing fee of $10.00. After the petition is filed, a guardian ad litem (neutral attorney) is appointed to 1) act in the best interests of the defendant, and

MENTAL DISABILITY LAW CENTER
P.O. Box 7722, Milwaukee Wisconsin 53207
Telephone: (414) 744-4581 FAX: (414) 744-2424

2) protect legal rights. The defendant already pays for the guardian ad litem and defense counsel if they choose to have an attorney. The guardian ad litem can, and has a responsibility to, prosecute the guardianship if that is in the best interest of the defendant. AB 742 adds an additional private, non-neutral lawyer who has no responsibility to the vulnerable adult.

A system which dumps all of the fees in litigation on the defendant is a system with no disincentive to unnecessary and costly litigation and does not insure the needed benefit of professionals who are involved because they have knowledge as to services which may be available to preserve the dignity and autonomy of our frail citizens. AB 742 provides a financial incentive to litigants at the expense of vulnerable adults.

Thank you for your continuing efforts to maintain dignity and respect for seniors and disabled people in Wisconsin.

Sincerely,

PATRICIA M. CAVEY, Attorney
e-mail: pcavey@execpc.com

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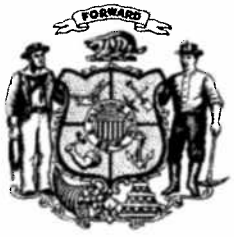

STATE BAR of WISCONSIN

5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

MEMORANDUM

To: **Assembly Committee on Judiciary and Personal Privacy**

From: Elder Law Section
Real Property, Probate and Trust Law Section

Date: March 14, 2000

Re: Support for Assembly Bill 742 - Guardianship Proceedings

Assembly Bill 742 is scheduled for a vote in the Assembly Judiciary Committee on Thursday, March 16.

Both the Elder Law Section and the Real Property, Probate and Trust Law Sections of the State Bar of Wisconsin urge your support for Assembly Bill 742 as authored by Representative Handrick.

The intent of AB 742 is to return Wisconsin to where it was prior to the 1997 case of *Community Care of Milwaukee County v. Evelyn O.*, which held that petitioner's attorney fees in guardianship proceedings were not to be paid for out of the ward's estate, even if the court deems that the guardianship is necessary. It is important to enact AB 742 this session so that the legal protection of guardianship is provided to the most vulnerable individuals of our society as it had for many years before the decision.

On its face, the implications of *Evelyn O.* appear to be financial in nature (ie: costs of petitioner's attorney fees). Unfortunately, in practice the ramification of *Evelyn O.* has been that needed guardianship proceedings are not being filed because the petitioner, typically a family member, cannot afford to do so. **The result of the *Evelyn O.* decision has been that incompetent individuals who need guardianship are forced to go without its protections.**

AB 742 was introduced to provide the necessary equilibrium between the need for guardianship and the protection of the ward's estate. AB 742 provides this balance by creating several layers of safeguards. First, fees are to be paid out of the ward's estate ONLY if the court orders that guardianship is necessary - a safeguard against bad-faith petitioners. Second, the court awards fees only if it determines, by considering all of the following conditions, whether it is equitable to do so:

1. The petitioner's interest in the matter, including any conflict of interest that the petitioner may have had in pursuing the guardianship.

2. Whether the ward had executed a durable power of attorney under s. 243.07, Stats., or had engaged in other advance planning to avoid guardianship.

3. The ability of the ward's estate to pay the petitioner's reasonable attorney fees and costs.

4. Whether the guardianship was contested and, if so, the nature of the contest.

5. **Any other factors that the court considers to be relevant.**

AB 742 is the necessary correction to the practical result of the *Evelyn O.* decision. AB 742 provides appropriate safeguards for the ward's estate, maintains court discretion and, at the same time, provides for the protections under guardianship for those individuals who need it most.

The Elder Law Section and the Real Property, Probate and Trust Law Sections urge your support for this needed legislation.

For more information contact Jenny Boese at the State Bar at 608-250-6045 or 'jboese@wisbar.org'.


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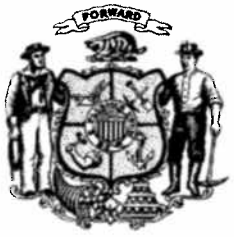
FORWARD

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OF COUNSEL
HARRY V HILL

Date ?

STATEMENT

My name is Jim Jaeger. I am an attorney in private practice in Madison Wisconsin and speaking here as a representative of the Elder Law Section of the State Bar of Wisconsin. Our section represents approximately 700-800 attorneys in the State of Wisconsin who represent elderly individuals and their families. Many of us are extensively involved in guardianship practice. I am here to express my support for AB 742, a bill to allow to judges the discretion to award attorneys fees to successful Petitioners in guardianship cases.

Please note that this bill does not automatically award fees in all cases. The original proposed Senate Bill on this topic would have allowed fees in all cases. The Board of the Elder Law Section disagreed with this approach because of a belief that there are circumstances where fees should not be awarded. At the same time, our Board felt that the position of the Court of Appeals in the Evelyn O. and Thyra K. cases, which disallowed fees in all cases, was simply too restrictive. We believe that the language in A.B. 742 provides a basis for local probate courts to examine individual cases and decide whether or not, on the facts of those cases attorneys fees are appropriate. Rather than a "one size fits all" approach AB 742 allows for consideration of the facts of each case to determine whether, in that case, fees should be permitted.

Last Saturday night, I was privileged to attend the Annual South Central Wisconsin Alzheimer's Association Mardi Gras fundraising event. In the room that evening were hundreds of family members and caregivers of persons afflicted with Alzheimer's disease. The victims of this disease, along with victims of other forms and dementia and strokes, are voiceless. Only family members can speak for them. We know that in all to many situations, whether because of lack of

knowledge or foresight, persons do not execute health care or financial powers of attorney so that someone can manage their affairs and speak for them when they are unable to do so. I am sure many of the persons in that room had sought guardianship for a loved one, not to deprive that person of his or her rights or to control finances for selfish reasons, but rather to ensure that their loved one could receive the kind of care they needed. Many of the persons who seek guardianship have fewer financial resources than the proposed ward. Many of the persons who seek guardianship are in the sandwich generation, caring both for children and for elderly and ill parents or other relatives. Many of these are persons who step in to care for family members even though they have no obligation, either legal or moral, to do so. It is unreasonable and unfair to ask those persons to also have to carry the financial burden of obtaining the guardianship.

Most guardianship cases are uncontested, meaning no one objects. A brief, unscientific and informal poll I conducted indicates that the range of contested cases is 4-6% in most of the state and 13% in Milwaukee. The vast majority, 85-95% are uncontested. The family is simply doing what the incapacitated individual would have probably done if he/she had been given the opportunity. Thus, the kinds of potential problems alluded to by other speakers only apply to a small fraction of cases. Furthermore, even in contested cases there are situations where it would be reasonable to pay the petitioner's fees from the assets of the ward, such as situations where an agent under a power of attorney is abusing his or her trust or where the elderly individual is being financially exploited and needs the protection of the guardianship system.

AB 742 does not mandate that fees be allowed in all situations. It simply gives local judges and courts, who are accountable to the public, the discretion, subject to specific criteria, to make the determination as to whether the fees should be allowed. I urge you to give them that discretion.