LEGISLATIVE COMMITTEE ON SENIOR CITIZENS, VETERANS AND ADULTS WITH SPECIAL NEEDS

March 10, 2010
RE: Outline of two areas.
Ernest Nielsen, Washoe County Senior Law Project; - 775 328-2592;
enielsen@washoecounty.us; 1155 E 9th St., Reno NV 89512

A. REPRESENTATION OF PROPOSED WARDS AND WARDS

Attorney representation.

- Courts must advise the proposed ward that he/she has the right to an attorney.
- Courts must appoint counsel to represent the proposed ward if the proposed ward requests representation
- The statute does not place any limits on the representation. In other words, regardless of the person's capacity to engage in an attorney/client relationship the statute requires appointment if the proposed ward asks.
- There is debate whether there should be a further inquiry prior to that attorney appointment-to assure that the person understands and has the capacity to engage in an attorney/client relationship. Some systems do make an effort to make that decision.
- Though not defined in statute, the ward's attorney,
    - Assures that all process to which the proposed ward is entitled is provided
    - Represents what the proposed ward wants
- .No statutory limits or mandates describe the extent of the representation. However there is debate (fostered by an environment of limited resources) that distinguish between
    - enforcement of mandatory due process protections leading up to and including the appointment (or not)of a permanent limited or full guardianship and
    - Representation post guardianship order that deals with issues such as placement.
- The statute does allow for an existing ward to request and be appointed an attorney but no defined mechanism on how that would occur.

Guardian Ad Litem (GAL) representation

- The difference between GAL representation and representation by an attorney is that while the attorney acts on behalf of the proposed ward following, to the extent feasible, the ward's instruction, the GAL acts on the proposed ward's best interest (often time that will be different than what the proposed ward is verbalizing). That may be different than the application of what is referred to as "substituted judgment"
- Technically the proposed guardian and the proposed guardian's attorney have a fiduciary duty to act in the **best interest** of the proposed ward.

EXHIBIT F
Senior Citizens, Veterans and Adults
With Special Needs (A.B. 9)
Document consists of 5 pages.
Entire exhibit provided.
Meeting Date: 3-10-2010

- Most stakeholders believe that if the proposed ward does not ask for an attorney to represent him that the court should appoint someone to "represent" that proposed ward.
- There is general consensus that "representation in such a case could either be an attorney or a GAL
- There is likely to be consensus on some criteria to guide the court in making that decision, but it is unlikely that everyone would agree on all criteria.
- Though A GAL would "represent" the best interest of the ward, a GAL would assure that the process rights that the proposed ward is due would occur
- Though the courts are authorized to appoint GALs, GALs are not statutorily well defined and there is little guidance to inform when a GAL should be appointed. .

Funding for ward's Attorney or for GAL.

- There is no money to pay attorneys or GALs if the ward is poor.
- The only source defined by statute to pay an attorney is the proposed ward's assets.
- In Washoe County the Aging and Disability Services Division (ADSD) provides limited funding (Independent Living Grants -ILG) to pay for ward representation.
- In other parts of the state this function may be provided by pro bono attorneys
- There is no funding source (including proposed ward's assets) defined by statute to pay for a GAL (Limited exception for GAL as investigator-NRS 159.046)
- In Washoe County the GAL function is frequently provided by the appointment of a SAFE volunteer. Such are volunteers with limited training but strong dedication to the proposed wards. Limited resource.
- In Clark County the ADSD provides limited funding(again ILG) to pay for GALs (very limited resource)

Long Term Goals-statutory

- Courts must appoint an attorney if ward asks (already exists). Should that change?
- Current policy requires appointment regardless of capacity of the ward to participate in the attorney client relationship. A current discussion point is whether, for those who ask for an attorney, appointment should be denied for those that have no capacity to engage in the attorney client relationship. If the answer is yes, then there should be a structured "assessment" prior to appointment to make that determination. That decision and process require the stakeholders to define what capacity it is that is being measured.
- Determine role of an attorney- Current consensus is that minimum role is to assure that proposed ward is provided all due process to which proposed ward is entitled. Is the minimum role broader than that?
- Courts must appoint an attorney or a GAL in cases where the ward does not request an attorney.
- In the latter case, some degree of statutory guidance should be given the courts to make the choice between GAL and Attorney appointment. This relates to the above policy question concerning the capacity of the proposed ward to engage in an attorney client relationship.

- There may be consensus that there should be statutory standards for training, certification and performance for GALs. At this point, there is no consensus on what those are.
- An additional mechanism must be provided for wards to access their rights to an attorney (or GAL) for issues that arise after a permanent guardianship exists including termination of a guardianship or a change in guardian.
- A source of funds must exist to pay for all such representation if the ward's income and assets are below a threshold
    - Define the threshold
        - Threshold could be at the court's discretion based on a court assessment similar to that now required of courts defined at Subsection 3 of NRS 159.183
        - Could be statutorily defined (weakness is that a two proposed wards with the same income and assets may be impacted very differently-based on the services they require and other available funding sources etc.
    - Potential sources of funds to pay for representation include
        - Additional filing fees
            - On all district court cases
            - On only family division cases
        - Statute requiring General Fund appropriations-to be managed by the courts
        - Attorney due process function Add to Public Defender's set of responsibilities-similar to Public Defender's role in the involuntary civil commitments (mental health)

B. COURT MONITORING

Current system

- A summary guardianship case is that in which the ward's assets are less than $5,000
- For non summary cases, the statute requires an annual hearing on issues of the estate (Annual accounting NRS 159.176 et seq.)
- For both non summary and summary cases, the statute requires a report to be given to the court on the status of the guardianship of the person (NRS 159.081).
- There is no statutorily required review of the guardian of the estate for summary guardianships.
- There is no statutorily defined mechanism defining how the annual review of the guardianship of the person is performed.
    - NRS 159.081 subsection 3 indicates that a hearing is not required
    - In fact the language at NRS159.081 subsection 1 "for the court's review" imposes no mandate that the court review the report of the person at all
    - However NRS 159.176 though grouped under the heading "Accountings" states that "Every guardianship established pursuant to this chapter must be reviewed by the court annually"

- Practices differ throughout the state regarding the manner in which the guardianship of the person is annually reviewed in non summary cases (where there is a required annual review (hearing) to approve the accounting in the guardianship of the estate.
- Practices differ across the state on review of the guardianship of the persons in summary cases. .Some courts have the resources to hire compliance staff while other courts do not. E.g. To identify summary cases that have not filed a required report on the guardianship of the person. There are stories, but little documentation, that there are open guardianship cases on a court's docket in which the ward has been deceased for years.
- Most of the Guardianship Statute deals specifically with the guardianship of the estate. There is very little describing what is expected for court management of the guardianship of the person.

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Long term goal statutory or court rule

- NRS 159.081 should be amended
  - Though it would not dictate a hearing, deleting subsection 3 would change the orientation of policy
  - Provide authority to the court to dictate the form and content of the report
- Describe the minimum requirements for an annual review of each guardianship of the person. For Example (Absolutely no consensus around this item)

  : "Though a hearing is not required the court may satisfy the NRS 159.176 requirement that it review every guardianship of the person annually by incorporating such review into the hearing associated with the annual accounting.

  An annual review of the guardianship of the person must include
  a) Verification that a report is actually filed
  b) Verification of placement and health status.

  Though a hearing is not required, the court must make specific inquiries when
  a) The ward has been moved to a more restricted placement
  b) Any action was taken described in NRS 159.078 or NRS 159.113 without permission of the court and
  c) No report of the guardianship of the person is filed within 120 days of the anniversary date"
- Assure that the courts have sufficient resources to perform minimum required monitoring functions for the guardianship of the person.

A good resource: American Bar Association Commission on Law and Aging (see http://new.abanet.org/aging/Pages/GuardianshipLawand Practice.aspx)