Subject to approval by the Guardianship/Conservatorship Interim Committee

GUARDIANSHIP AND CONSERVATORSHIP INTERIM COMMITTEE MINUTES

Tuesday, August 10, 2004
9:30 a.m.
Senate Majority Caucus Room
State Capitol, Boise, Idaho

The meeting was called to order by Cochair Representative Debbie Field at 9:30 a.m. Other members present were Senator Patti Anne Lodge, Representative Leon Smith and Representative Allen Andersen. Cochair Senator Bart Davis, Senator Dick Compton, Senator Bert Marley and Representative Sharon Block were excused.

Others present were: Michael Henderson, Idaho Supreme Court; Bob Aldridge; Denise Giles, Comprehensive-Advocacy, Inc. (Co-Ad); Joe Gallegos, AARP-Idaho; Dede Shelton, Guardian Monitoring Program; Penny Fletcher, Volunteer-AARP; Linda Dripps, CCOA-Kincare Grandparents; Steve Scanlin, Scanlin Law Offices, PLLC; Judge Chris Bieter, 4th District Court; Sarah Scott and Lois Bauer, Idaho Commission on Aging; and Glady Schroeder, Senator Larry Craig's Office. Staff members present were Caralee Lambert and Toni Hobbs.

Ms. Sarah Scott, Idaho Commission on Aging, was the first speaker. She explained that her presentation would include information regarding how other states function in terms of fees charged for guardians and conservators and to explain which other states have offices of public guardians. **Ms. Scott** said that she conducted a nationwide search regarding fees charged for guardians and conservators and so far has only received five responses. She asked whether each state set limitations on fees or fee schedules or whether a "reasonableness standard" applied. **Ms. Scott** explained that overall reasonableness is the guideline for the setting of fees. In Washington it is a reasonableness standard. **Ms. Scott** said it was difficult to tell whether the Washington court, at the time the guardian/conservator order is issued, sets the fees or whether the fees are billed and the court approves the fees as they go along. Iowa's statute is silent on the fee issue but it is interpreted as being a reasonableness standard. Virginia has an established fee scale for initiating the guardianship proceeding with the ongoing rate subject to the reasonableness standard. Five percent (5%) is the general practice for the ongoing rate. Georgia has an established fee scale with allowances to petition the court for higher fees if necessary. Utah has a reasonableness standard.

From the responses so far, in **Ms. Scott's** opinion, reasonableness seems to be the guide. In response to a question from **Representative Field, Ms. Scott** said that it is the judge who determines reasonableness. She noted that without looking at each state's court rules, it is

difficult to determine if guardians/conservators are required to file annual accountings that are reviewed by the judge. Oregon requires filings and the judges do review those. **Mr. Bob Aldridge** added that in Washington, the judge handles fees just like attorney's fees in a regular case and those are subject to objection by the other parties.

Ms. Scott said that in Idaho, regarding the ongoing guardians/conservators fees, a set fee is requested in the order. **Mr. Aldridge** said that the court will either set a manner and method for the fee or an actual annual fee. **Ms. Scott** continued by stating that by practice in Idaho, someone petitions the court for the appointment of a guardian or conservator which entails petitioner fees, the Guardian ad Litem fees, the court visitor fees and often there also are physician fees. This part is preliminary to getting the order appointing the guardian or conservator. **Ms. Scott** stated that when she was active in these types of cases, court approval of the fees was not asked for specifically. Once the order was issued an amount was set for what the guardian and conservator would be paid on an annual or monthly basis. This would be approved by the court.

Mr. Aldridge explained that guardians do not manage their ward's money. In the past, guardians would report in the annual reporting if they were paying themselves anything. Now a conservator overlooks this and their report would include this amount. In most cases, this amount is set in advance. It is usually a set fee or an hourly fee, and it is rarely a percentage of assets. **Ms. Scott** commented that it is very difficult to set a specific amount because each case has different circumstances. She expressed concern regarding the actual annual expenditures. In her opinion, there is an opportunity for misuse of the estate in terms of who is being paid for doing work for the estate. This is why it is so important that the annual accountings be filed and reviewed.

Representative Field asked about families that end up paying large fees to conservators who are hiring their own representation. **Ms. Scott** said that does happen. She explained that in some cases the conservator ends up having to hire their own fiduciary because of family dynamics that cause great concerns where the conservator has to go above and beyond normal requirements. This increases fees dramatically. **Ms. Scott** said that the only time she saw a conservator hire his or her own attorney was when there was family dispute involved.

Ms. Scott then discussed Offices of the Public Guardians in other states. On this issue, **Ms. Scott** said that she only searched the western states because they are more similar to Idaho. California was not included. All of the people she talked to in the different states agreed that there is a huge gap for adult protection clients or people who need a guardian and do not have family or resources to get one. The success of the particular system in each state varies greatly, but finances are a huge factor in every program. **Ms. Scott** said that in some states, adult protection and human services are countywide entities rather than statewide like in Idaho.

Ms. Scott said that Montana does not have an Office of the Public Guardian. They have done a statewide study of guardianship issues and will share that information with Idaho. Adult protection is trying to establish such an office. In her opinion, Montana would probably be

interested in collaborating with Idaho on that issue. **Ms. Scott** continued by stating that Colorado does not have an Office of the Public Guardian but that the adult protection units are part of each county. When an indigent needs a guardian, the county department can petition for guardianship of that person. Arizona is similar to Colorado, with a countywide system where each county is responsible for petitioning for guardianship. This petitioning is always limited by how much money is available.

Ms. Scott explained that Wyoming does not currently have an Office of the Public Guardian but they have had one in the past and the person with whom she spoke was not certain why it no longer exists. New Mexico goes to corporate guardians and ask for indigent assistance. This is not an efficient system and they are struggling with it. This is similar to Idaho with the Boards of Public Guardians. Utah has created an Office of the Public Guardian as part of their Department of Human Services. It is new enough that they are still struggling with certain obstacles, but it is working well. **Ms. Scott** said that Utah seems to have done a lot of work and that they are willing to share information with Idaho on other issues.

In response to a question from **Dede Shelton, Ms. Scott** explained that in the states where the county can petition for guardianship, the county department acts as a guardian. In her opinion, this means that the county just finds someone who is willing to do it. It seems pretty informal and is used only as a last resort. **Ms. Scott** said it reminded her of Idaho's Boards of Community Guardians. **Caralee Lambert** clarified that in Colorado the county departments are not mandated to provide guardianship services. About two-thirds of the Colorado counties accept these guardianship appointments. The counties petition for the appointment of a guardian or assist a family member in doing so. If no other viable guardian option exists, the county department may petition to be appointed guardian itself.

Ms. Shelton said that Alaska does have an Office of Public Guardian that is state funded and works very well. She said that she would get that information for the committee. **Ms. Scott** said that she would follow up with Montana and Utah also.

Mr. Bob Aldridge discussed a GAO report on guardianships that was given to the Chairman of the Special Committee on Aging of the U.S. Senate. This report includes both guardianships and conservatorships. He distributed a handout that contains comments and testimony about the report. **Mr. Aldridge** said that the GAO report surveyed three states: New York, California and Florida. In all of those states there was a tremendous amount of problems and lack of oversight. Individual local courts were also looked at in places like New Hampshire. The bottom line of the GAO report, in **Mr. Aldridge's** opinion, is that there needs to be more collaboration and it needs to go outside of government to include private entities.

Mr. Aldridge stated that another part of the discussion included the problem in working with guardianships and conservatorships in that the Social Security Administration (SSA) does not recognize the appointment of a conservator or guardian. This means that once the conservator or guardian is added as the representative payee, the next day a family member can walk in and get it changed to their name. **Mr. Aldridge** said that he has had cases in the past with continual

back and forth battling of payees even though the family member had been financially abusing the elder. He added that, unfortunately, the SSA did not join in the GAO's final report.

Idaho, in keeping with the GAO report, is doing the following:

- A meeting is being held with the Idaho Community Foundation to begin talks of getting funding through innovative programs or grants.
- Private meetings will be held with people involved with guardianships/conservatorships on a professional level to discuss the issues **Ms. Scott** explained earlier regarding fees and costs.
- Meetings will be held with Judge Bieter to discuss how Guardians ad Litem work and to develop a plan where these Guardians ad Litem are appointed by the judge off of a rotating list.

Within that, the problems that exist with the Boards of Community Guardians will also be looked at. **Mr. Aldridge** said that in Ada County there was a set limit on how many cases the civil arm of the Prosecuting Attorney's office would handle. That has been removed as a formal limit, but there is a budget limit as to how many cases they can take. As a result, anyone on the Guardian ad Litem or court visitor list will be required to take one pro bono case from the Board of Community Guardians.

Judge Bieter commented that Judge Dutcher had the idea for the Guardian ad Litem/court visitor list. This was due to concerns that even though there was not collusion between people working in this area, it may appear that there was. In the past, typically in a guardianship case the attorney would suggest to the court or even name their own preference for the court visitor and Guardian ad Litem. Even though no one suspected a problem with this, there was a perception that the parties were not entirely independent. Judge Dutcher thought it should be completely independent process and asked anyone who wanted to be a court visitor or Guardian ad Litem to submit their name to the court to be on a rotating list. **Judge Bieter,** in a meeting regarding the Board of Community Guardian cases, suggested that the members on this regular list be required to take one case in turn on a pro bono basis. So far everyone on the list has agreed to this.

Judge Bieter commented that cases that involve family fighting are heartbreaking and he does not know what can be done legally to make people responsible, fiscally and otherwise, for their loved ones. He suggested possibly offering another arena, such as mediation, for these families to air their grievances other than formal court proceedings.

In response to a question from **Representative Smith, Judge Bieter** explained that two lists exist. One list is for Guardians ad Litem and one for court visitors. A person on either list must take one pro bono case for the Board of Community Guardians if their name comes up. There are not requirements or restrictions to being on the lists unless abuse of the system or professional issues are known to exist. He said that this might be an area that could be addressed statutorily.

Mr. Aldridge clarified that Idaho law requires the Guardian ad Litem to be an attorney, but it gives no additional qualification requirements. It states that the court visitor is a person who is skilled in law, social services, psychology, etc. He added that trying to create additional qualifications or review situations is difficult. What works for Ada county probably will not work for a small county such as Franklin.

Representative Andersen asked who pays the fees charged by the court visitor and the Guardian ad Litem and how are they set. **Judge Bieter** stated that the ward pays those fees and in three months on the job, he has not reviewed any fees. He explained that the fees seem to be charged within a certain range but there is no set limit or recommended rate. **Representative Field** said that she had heard of a case that charged $600,000 in fees in a period of eighteen months. She noted that it seems that if the ward has money, there is more likelihood of such abuse. This is a large concern of the committee.

Judge Bieter said that he would keep his eyes open for such abuses. **Ms. Shelton** said that she has seen court visitor fees range from $400 to $1,000 depending on how many people they have to meet with to develop their report. Sometimes these fees are higher for a large estate. This is due to the fact that more research is required in such an instance. She noted that in cases where private firms go to an attorney for everything, huge attorney fees are listed on the annual account reports. About 10% of the cases she sees involve these large attorney fees.

Mr. Steve Scanlin, an attorney and professional guardian, spoke to the committee. He is on the list to be a Guardian ad Litem and court visitor. He commented that in guardianship cases where families are fighting, the abuse is by the families, not the Guardian ad Litem or the court visitor or even the guardian. He noted one case in which Judge Dutcher required the family to get permission to file any more pleadings or notices of hearings due to such infighting.

Mr. Scanlin said that in his experience, most of the fees charged are reasonable. He said that large estates do require more investigation, and larger fees are reasonable in these cases. It is very difficult to set a standard fee because each case is so different. In response to a question from **Representative Andersen, Mr. Scanlin** said he charges an hourly rate and he personally would not be in favor of charging a certain percentage of assets. In some cases families could be charged on both ends if both attorneys are actually involved in the case with one representing the Guardian ad Litem and one representing the guardian. **Mr. Scanlin** commented that some court visitors have had to hire attorneys in cases where the court visitor has been threatened with suit by the family.

Ms. Penny Fletcher, an AARP Volunteer with the Guardianship Monitoring Program, said that her job is to help research the backlog of guardianships that have not filed the required annual report. She discovered that trying to find these people after five years is very difficult. The majority of cases she has worked on were insurance settlements for minors where someone has been appointed to take care of that money for the minor.

Ms. Fletcher commented that very little personal information is required for someone to be

appointed a guardian and suggested that some type of information sheet be developed that guardians be required to fill out in order to qualify. This information should include the prospective guardian's full name, employer, address, source of income, relationship to the ward, whether they rent or own their home and date of birth. Social security numbers would also be a good option but that might raise privacy issues. This information would be very helpful when the necessity to find these guardians arises. It could also be helpful to the judge in deciding if this person is qualified to be a guardian. Verification of this information would probably require a background check with the public information that is available.

Ms. Fletcher added that an actual review of the annual reports is very important. Requiring and reviewing a report only thirty days after the guardian has been appointed would also help identify problems. **Ms. Fletcher** stated that the AARP volunteer program is a great idea but, due to the nature of what they have to work with in researching these guardians, it is unlikely to succeed. In doing the searches, the volunteers only have access to public information.

Denise Giles, Co-Ad, said that she has also been doing research regarding states that have Offices of the Public Guardian and she has found only five states so far that have such an office listed in their statutes. She noted that, in regard to fees, many other states that use the reasonableness standard do have a system set up so those fees are reviewed and approved by the court before they are paid.

Georgia Mackley, Chairman of Ada County Grandparents as Parents, said that 90% of the grandparents her group works with do not have the money to formally apply for guardianship. This is a problem because when the grandparents are not official guardians, the parents can come and take the children back at any time and the grandparents have no legal recourse. **Ms. Mackley** said that when she applied for guardianship of her grandchildren, it cost about $1,200 for the attorney and $1,200 for the Guardian ad Litem. This was an uncontested case.

Senator Lodge asked about grants available to help grandparents raising grandchildren. **Ms. Mackley** said that there are about 18,000 grandparents raising their grandchildren in Idaho and only about 1,200 get these grants. Many do not apply for the grants because the parents are asked to pay child support. Once the parents are asked to pay child support, they decide to take their children back whether or not they should be raising them. There is a lot of confusion regarding whether or not the child support requirement can be waived. **Mr. Aldridge** said that it would require a federal waiver of the child support requirement.

Representative Smith said that in the occasional guardianship cases that he has done, most are family related and none have involved fighting over who becomes guardian of the ward. In small areas of the state, this is not usually a problem. He suggested structuring something that would allow magistrate judges to implement rules to fit their specific communities. **Judge Bieter** said that he has not been on the job long enough to get a feel for the differences that exist throughout the state. He agreed that flexibility is important because each case is so different. **Senator Lodge** suggested getting additional information from Judge Dutcher.

Ms. Scott suggested that statutory changes that would allow judges to bring parties into court for show cause hearings would be helpful. When the adult protection office gets a call on a guardianship or conservatorship where abuse is allegedly occurring, adult protection can review the case and prepare a report but there is nowhere else to go.

Judge Bieter said that, in his opinion, a Guardian ad Litem as a lawyer representing the ward was in the case until there is a substitution or until they are released by the court. He assumes that in cases that have been going on for some time with suggestions of abuse or other problems, the Guardian ad Litem has the obligation to bring this forward. **Ms. Scott** suggested that a statutory change clarifying this would be helpful and **Judge Bieter** agreed. **Mr. Aldridge** said that this has been an area of discussion for many years and is a huge problem. The number of attorneys in Idaho who think they are in the case until the end as Guardians ad Litem is very small. Almost all Guardians ad Litem believe they are out of the case as soon as the guardian or conservator is appointed. In **Mr. Aldridge's** opinion, there is nothing in the statute that allows this. In some cases keeping the Guardian ad Litem is not necessary but in others the Guardian ad Litem is the outside source of monitoring, review and protection for the ward. **Ms. Shelton** said that in eight of ten cases she sees no Guardian ad Litem available when abuse is reported.

Michael Henderson, Idaho Supreme Court, said that requiring review of the annual reports is important but added that in many small rural areas finding available resources will be a challenge.

Mr. Aldridge noted that the reasonable standard in Idaho statute is very vague. In his opinion, the question of submitting the expenses to the court up-front for approval before payout should be addressed.

Representative Field asked how the issue of requiring more personal information from potential guardians could be addressed. **Mr. Aldridge** suggested creating a partially sealed portion of the information form that would only be available to the court for investigation. He also suggested a more thorough listing of what needs to be included in the annual reports be developed. When **Ms. Shelton** gets these reports, these are very minimal. He suggested putting detail in the statute regarding what has to be submitted. **Mr. Aldridge** also said that uniform forms should be required. There is nothing mandated as to the use of certain forms, yet uniformity makes it much easier for those responsible for reviewing the reports.

The next meeting was scheduled for September 21, 2004, at 9:30 in the House Majority Caucus Room. The meeting was adjourned at 11:45 a.m.