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TALKING POINTS
SB 1053

1. General Subject of Bill

A Guardian ad Litem is an attorney appointed by the Court in a conservatorship and/or guardianship proceeding to represent the person for whom the conservatorship and/or guardianship is being sought. That Guardian ad Litem has a series of duties, set forth in the Idaho Code in Sections 15-5-315 (guardianship) and 15-5-434 (conservatorship). In general, the Guardian ad Litem is to ensure that the legal rights of the person are being protected. The person is called a “ward” in a guardianship and a “protected person” in a conservatorship. The Guardian ad Litem does a written report to the Court with the findings and recommendations of the Guardian ad Litem about the proceeding. This is not binding on the Court, but can be very helpful to the Court. However, the Guardian ad Litem is not the guardian or the conservator and does not exercise any of their powers. If problems come up in the proceedings after the appointment of the guardian and/or conservator, the Guardian ad Litem can file motions or take other steps to protect the ward/protected person.

2. Existing Problem

The Guardian ad Litem, to carry out the duties under the Code, also has rights and powers, set forth in Sections 15-5-316 (guardianship) and 15-5-435 (conservatorship). It has always been the understanding that those rights and powers are to carry out the duties, for the protection of the person under guardianship and/or conservatorship. However, paragraph (2) of Section 15-5-316 and paragraph (2) of Section 15-5-435 states:

(2) The guardian ad litem shall have the right and power to file pleadings, motions, memoranda and briefs on behalf of the [ward][protected person], and to have all of the rights of the [ward][protected person], whether conferred by statute, rule of court, or otherwise.

A limited number of attorneys acting as Guardians ad Litem have taken the position that the second half of the above sentence is not limited to carrying out the duties of the Guardian ad Litem, but instead makes the Guardian ad Litem a sort of “super guardian”

and “super conservator” who can take any action that the person could have taken, including making medical or living decisions, changing investments, and so forth. Those are properly the rights and powers of the guardian or conservator, not of the Guardian ad Litem, and are limited by other sections of the Code when exercised by the guardian or conservator. In fact, in later versions of the Uniform Probate Code, not yet adopted in Idaho, there is no Guardian ad Litem, only the appointment of an attorney for the person, emphasizing the limited and specific role of the Guardian ad Litem.

This assumption of super rights by the Guardian ad Litem has created major problems for properly handling the case, both before and after appointment of a guardian and/or conservator. Often the actions taken will be in direct opposition to the actions of the guardian or conservator. Additionally, these types of actions often require knowledge and training that attorneys do not automatically have, but that guardians or conservators are trained to have. To be appointed as a guardian or conservator, there is a mandatory training class, online, that must be taken prior to appointment. Guardians ad Litem do not have any such requirement.

3. Solution in Bill

This bill clarifies and carries out the original intent of the code sections by providing that the rights and powers of the Guardian ad Litem are to fulfill their duties under the Code. This will keep the Guardian ad Litem in the proper role.

4. Possible Questions

Does this bill reduce any of the protections for the person under guardianship or conservatorship? No. In fact, it increases them, since the actions of the guardian and conservator have clear and protective restrictions in the Code. It will remove arbitrary actions by the Guardian ad Litem. It will also reduce expenses of the proceedings in cases where the Guardian ad Litem and the guardian or conservator are taking incompatible actions, requiring court intervention.

5. Fiscal Impact

There will be no fiscal impact. The bill should if anything reduce the costs of proceedings and free up court time.