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Estates, Trusts and Probate Law Section
Transmittal of Comments to the D.C. Council Committee on Human Services Regarding Bill 17-432 (Health-care Decisions for Persons with Developmental Disabilities Amendment Act of 2007)

One Page Summary

The ET&P Steering Committee plans to submit testimony regarding Bill 17-432 (Health-care Decisions for Persons with Developmental Disabilities Amendment Act of 2007) to the D.C. Council Committee on Human Services. The Council has enacted variations of this bill in emergency and temporary form for several years, and Bill 17-432 is an effort to make these changes permanent. The Committee held hearings on this legislation on March 17, 2008. At the hearing Committee Chair Tommy Wells invited comments from the probate section of the Bar. These comments are mainly technical in nature and pertain to proposed changes in the administration of attorneys' fees from the Superior Court "guardianship fund", proposed changes in the definition of "emergency guardianship" and of the term "emergency", and proposed changes in the rules regarding frequency of contact by guardians, conflicts of interest, and the appointment of emergency or health care guardians.

The Steering Committee Members are Anne Meister and Morris Klein, co-chairs, Kimberly Kyle Edley, Kate M.H. Kilberg, Paul D. Pearlstein, Catherine Mary Rafferty, Andrea J. Sloan, Kimberly Martin Turner, and Edward G. Varrone. Anne Meister has recused herself from consideration of this matter.

Disclaimer: The views expressed herein represent only those of the Steering Committee of the Estates, Trust and Probate Section and are not those of the D.C. Bar or its Board of Governors. In addition, Anne Meister, a member of the Steering Committee, recused herself from participating in this matter.

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April 17, 2008

Hon. Tommy Wells
Chairman, Committee on Human Services
Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004

Re: Bill 17-432 - Health Care Decisions for Persons with Developmental Disabilities Amendment Act of 2007

Dear Chairman Wells:

On behalf of the Steering Committee of the Estates, Trusts and Probate Law Section of the District of Columbia Bar,* I am providing you with the Section's comments on the above legislation. The Section thanks you for your invitation to offer our comments.

The Estates, Trusts and Probate Law Section is made up of more than 1,000 attorneys who actively practice estate planning, administration of decedents' estates, and matters involving the protection of the property and health of minors and disabled adults through intervention proceedings such as guardianships and conservatorships.

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This legislation has existed in emergency or temporary form for several years; the most recent incarnation is Law 17-100 (Act 17-219), a temporary law set to expire on September 14, 2008. This circumstance has allowed us to see how the law operates in the "real world" and provides an opportunity to improve the legislation based on the experience of attorneys practicing in this area of law.

We offer the following concerns and suggestions (all references are to sections of the D.C. Code):

*The Steering Committee members are: Anne Meister and Morris Klein, co-chairs, Kimberly Kyle Edley, Kate M.H. Kilberg, Paul D. Pearlstein, Catherine Mary Rafferty. Andrea J. Sloan, Kimberly Martin Turner, and Edward G. Varrone. Anne Meister has recused herself from participating in this matter.

1. Proposed changes to Section 21- 2060 (attorneys ' fees)

Section 21-2060 requires careful attention because this section applies to conservatorships as well as guardianships. It is also a new addition to the series of emergency and temporary laws previously enacted. The bill will require judges to pay from a "guardianship fund" the fees of attorneys involved in guardianships and conservatorships where the ward is receiving various governmental benefits such as Medicaid or Supplemental Security Income (SSI). As we understand it, the purpose of this language is to ensure that payment of compensation in conservatorships and guardianships does not leave a ward virtually penniless. This is an important concern, but it requires more careful consideration.

As background, a number of different persons could be entitled to compensation in a proceeding under Chapter 21 of the D.C. Code. In an intervention proceeding, the petitioner, counsel for the petitioner, appointed counsel for the subject, and a court-appointed guardian ad litem, examiner or visitor all are potential persons who could be entitled to compensation. After a conservator or guardian is appointed, the conservator and guardian, and his or her attorney, could be entitled to compensation. Lawyers are appointed by the court to serve in many of those roles, and those appointed must complete a 6-hour course offered by the Probate Division and also comply with continuing legal education requirements as approved by the court.

A person is compensated for his or her services by filing a fee petition with the court with notice to interested persons. The court reviews the petition for reasonableness and considers any objections filed by interested persons, and then approves, reduces, or disproves the requested fee. If the ward has the financial resources to pay for the services, the court may order that the fee be paid from the ward's estate. If the ward does not have the resources, then, as a last resort, the court can order payment from a "guardianship fund," funded by public money. Compensation paid from the guardianship fund is currently set at a rate of $80.00 per hour.

The language in the bill will require payment of compensation from the guardianship fund in any case in which the subject or ward is receiving public assistance. However, while many intervention proceeding subjects or wards have very little savings, not all wards who receive public assistance are completely out of money. For example, some wards may have a supplemental needs trust, which is established under federal law to allow a ward to set aside money to pay for expenses that public benefits will not pay for, including compensation for professional or legal services. Assets in such a trust may be substantial.

Therefore, we urge your Committee to amend the bill to allow the judges to retain discretion in determining the source of payment of fees in intervention proceedings, based on the assets available to the ward. This can be accomplished without adversely affecting the material purpose of the legislation by making it a presumption, and not a requirement, that compensation be paid from the guardianship fund when a ward receives public benefits. We suggest amending page 13, line 10 by deleting the words "The estate of a person or ward shall

be deemed depleted. . . " on and replacing these words with "There is a rebuttable presumption that the estate of a person or ward shall be depleted. . . "

2. Proposed changes to Section 21-2046 (emergency guardianship) and Section 21-2011 (definition of "emergency")

a. Definition of emergency care

The provisions of an emergency guardianship are invoked when a ward is in desperate condition. The ward may be in a hospital in need of immediate medical attention, and without a health care agent or family, and a guardian is required to make immediate health care decisions. The law prior to the emergency and temporary legislation defined the emergency provisions too narrowly, and the bill's change to the definition of an emergency is an improvement. However, the words "unanticipated medical care" should be removed from the definition because they could cause unnecessary confusion. Some medical procedures are needed to forestall a more serious problem that may be anticipated if immediate intervention does not occur. For example, a feeding tube through the nose is only useful for the short-term and must eventually be replaced with a more permanent device to lessen the threat of aspiration or infection. Similarly, it is possible to "anticipate" that without immediate medical intervention, an infection may set in or an amputation become necessary if the patient is untreated. It does not make sense to bar the emergency invervention in such an instance until the more serious condition occurs.

We therefore propose that the defmition of "emergency care" on page 3, lines 6 through 8 be amended to say: "'Emergency care' means immediate treatment, including diagnostic treatment, provided in response to a sudden and acute medical crisis in order to avoid injury, extreme pain, impairment, or death. "

b. Length of emergency guardianship

Under current law, an emergency guardianship may last only 15 days and is not renewable. It is not unusual for a petition for an emergency guardianship and a petition for a permanent guardianship to be filed contemporaneously. However, a hearing on the permanent guardianship is very unlikely to be scheduled within the 15 days that the emergency guardianship will exist, in large part because strict service and notice requirements must be met. Consequently, there may be a gap in time between the expiration of the emergency guardianship and the court's consideration of the appointment of a permanent guardian. Therefore, it would be useful to extend the time for an emergency guardian for a longer period of time, to 21 days. We propose that the number 15 be replaced with the number 21 on page 7, line 7.

In addition, the reference to "temporary guardian" on page 7, line 19 needs to be replaced with the words "emergency guardian," because this paragraph deals only with emergency guardianships.

3. Proposed Section 2043(e)(2)

This provision requires a guardian "To make a minimum of one visit per month with each ward." A guardian should see and maintain contact with his or her ward regularly, but a specific time period is, in some cases, impractical or unworkable. For example, a ward may temporarily be out of the jurisdiction for medical or other purposes. On the other hand, there may be circumstances where visits more frequently than once a month may be necessary, such as when the ward is in the hospital and health care needs are changing rapidly. We again believe there should be some discretion in the statute. We therefore suggest that the language on page 6, line 14 be deleted and replaced with the following: "(2) To maintain regular and reasonable contact with each ward, based on the ward's care needs"

4. Proposed Section 21-2043(a-l)

This section identifies circumstances in which a guardian may not serve due to a conflict of interest. We believe that the court should maintain some discretion in this area. For example, a non-profit volunteer is as subject to this section as a for-profit professional. A guardian who was awarded a fee is arguably a creditor, which under the terms of this provision would disqualify the guardian from continuing to serve. We suggest that the language on page 5, lines 13 and 14 stating "may not be appointed" be replaced with "may be disqualified from appointment," to emphasize the court should have discretion in determining the person's eligibility to serve.

5. Proposed changes to Section 21-2046

These sections describe the circumstances under which an emergency or health care guardian may be appointed. We believe that such a guardian may need to be appointed where someone has the authority to act but is unwilling to do so. Therefore, we suggest that Proposed Sections 21-2046(b)(I)(C) (page 7, line 11) and 21-2046(c)(I)(C) (page 8, line 6) should be changed by striking the "and" after subsection "B", adding "and" at the end of subsection "C", and adding a new subsection "D" stating: "a person may have authority to act under the statue but is unwilling or unable to do so." This is to clarify that there may be circumstances in which a person has authority is unwilling or unable to do so, such as where the subject has an adult child but the child cannot be located.

Thank you for your consideration of these comments.

Sincerely yours,

Morris Klein, co-chair
on behalf of the Steering
Committee