Approved by the Judicial Council
December 2, 2005

REPORT OF THE JUDICIAL COUNCIL GUARDIANSHIP AND CONSERVATORSHIP ADVISORY COMMITTEE ON 2005 HB 2307

BACKGROUND

In February of 2005, House Judiciary Chair Michael R. O'Neal requested that the Judicial Council study 2005 House Bill No. 2307 relating to the appointment of guardians and conservators. HB 2307 proposes to amend K.S.A. 2004 Supp. 59-3068, which currently relates to the priority of nominees and their qualifications when a guardian is appointed and K.S.A. 2004 Supp. 59-3075, which currently relates to a guardian's duties, responsibilities, powers and authority.

At the June, 2005 meeting of the Judicial Council, the Council agreed to undertake the study of HB 2307 requested by Representative O'Neal. The Council assigned the study of the proposed amendments to K.S.A. 2004 Supp. 59-3068(b) and 59-3075(a)(2), which relate to conflicts of interests between guardians and conservators and their wards, to the Judicial Council Guardianship and Conservatorship Advisory Committee. The Council formed a new advisory committee to study the proposed amendment to K.S.A. 2004 Supp. 59-3075(e)(7)(C), which relates to the guardian's authority to consent to the withholding or withdrawing of life-saving or life sustaining medical care, treatment, services or procedures from a ward.

This report is the Judicial Council Guardianship and Conservatorship Committee's response to its assignment to study 2005 HB 2307. However, it should be noted that 2005 SB 240 is identical to the bill reviewed herein and is currently in the Senate Judiciary Committee.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Guardianship and Conservatorship Advisory Committee are:

Hon. Sam K. Bruner, Chairman, retired District Court Judge, Overland Park

Tim Emert, practicing attorney and former State Senator, Independence

Hon. Thomas H. Graber, District Court Judge, Wellington

John H. House, Attorney, Kansas Department of Social & Rehabilitative Services, Topeka

Jean Krahn, Kansas Guardianship Program - Executive Director, Manhattan

Hon. Philip T. Kyle, Magistrate Judge in 24th Judicial District, Jetmore

Hon. Hal B. Malone, retired District Court Judge in 18th Judicial District, Wichita

H. Philip Martin, practicing attorney, Larned

Hon. David P. Mikesic, District Court Judge in 29th Judicial District, Kansas City

Robert I. Nicholson, Jr., practicing attorney, Paola

Dr. Jane Rhys, Kansas Council on Developmental Disabilities - Executive Director, Topeka

STATUTORY AMENDMENTS PROPOSED IN 2005 SB 2307

The issue before the Committee is whether K.S.A. 59-3068(b) and 59-3075(a)(2) should be amended, and if so, how the amendment should be phrased.

2005 HB 2307 proposes the following additions to K.S.A. 59-3068(b):

(b) (1) The court, in appointing a guardian or conservator, shall consider the workload, capabilities and potential conflicts of interest of the proposed guardian or conservator, or both, before making such appointment, and the court shall give particular attention in making such appointment to the number of other cases in which the proposed guardian or conservator, other than a corporation, is currently serving as guardian or conservator, or both, particularly if that number is more than 15 or more wards or conservatees, or both.
(2) The court shall not appoint an unrelated person, institution, association, or corporation to be the guardian of an incapacitated person if the unrelated person, institution, association, or corporation:

(A) provides, or is likely to provide during the guardianship, goods or services for a fee or anything of benefit to the incapacitated person in the professional or business capacity;
(B) is or is likely to become during the guardianship period a creditor of the incapacitated person;
(C) has or is likely to have during the guardianship period interests that may conflict with interests of the incapacitated person;
(D) is an employee of a treatment or residential facility where a ward is an inpatient in or resident of the facility; or
(E) is employed by an unrelated person, institution, association, or corporation who or which would be disqualified under paragraphs (A) through (D).

2005 HB 2307 proposes the following additions to K.S.A. 59-3075(a)(2):

(2) A guardian shall become and remain personally acquainted with the ward, the spouse of the ward and with other interested persons associated with the ward and who are knowledgeable about the ward, the ward's needs and the ward's responsibilities. A guardian shall exercise authority only as necessitated by the ward's limitations. A guardian shall encourage the ward to participate in making decisions affecting the ward. A guardian shall encourage the ward to act on the ward's own behalf to the extent the ward is able. A guardian shall encourage the ward to develop or regain the skills and abilities necessary to meet the ward's own essential needs and to otherwise manage the ward's own affairs. In making decisions on behalf of the ward, a guardian shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian shall strive to assure that the personal, civil and human rights of the ward are protected. A guardian shall at all times act in the best interests of the ward and shall exercise reasonable care, diligence and prudence. A guardian who is not a family member shall not provide direct services for a fee or for anything of

> benefit to the ward. The guardian shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the ward. Impropriety or conflict of interest occurs where the guardian has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the ward. The guardian shall be independent from all providers of services to the ward to ensure that the guardian remains free to challenge inappropriate or poorly delivered services and to advocate vigorously on behalf of the ward. The guardian shall not concurrently represent both the ward and the service provider. The guardian shall not employ such guardian's friends or family to provide services for a profit or fee unless no alternative is available and the guardian discloses this arrangement to the court. A guardian who is also an attorney shall not provide legal services to the ward for a fee. The guardian shall petition or assist the ward to petition the court for limitation or termination of the guardianship when the ward is no longer a person with a disability in need of a guardian, or when there are effective alternatives available. The guardian shall assist the ward in preparing and filing a petition for restoration upon request.

COMMITTEE FINDINGS

The Committee is unanimously opposed to the 2005 HB 2307's proposed amendments to K.S.A. 2004 Supp. 59-3068(b) and 59-3075(a)(2). The following findings set forth the basis for the Committee's position and recommendation.

1. **The prohibitions set forth in proposed K.S.A. 59-3068(b)(2) are limited to "unrelated" guardians.**

2005 HB 2307 proposes a new subsection (b)(2) be added to K.S.A. 59-3068 which prohibits appointment of "unrelated" guardians in certain situations. The presupposition that potential conflicts of interest are not a concern for guardians who are related to the ward cannot be reconciled with reality. Family members who are guardians can have a myriad of conflicts. Financial conflicts of interest are particularly common in familial guardian/ward relationships.

2. **The proposed additions to K.S.A. 59-3068 are not artfully drafted and would be difficult to apply.**

As summarized below, there are several serious flaws in the language of the proposed additions to K.S.A. 59-3068:

a) "Incapacitated person" is a term of art that is no longer in use in Kansas.

b) The language "likely to provide," "likely to become," and "likely to have" requires courts to be able to foretell the future in order to apply the statute.

c) The provision is directed at guardians who are "unrelated," a term that is not defined.

3. The proposed amendment to K.S.A. 59-3068 would absolutely prohibit the selection of potential appointees who could be otherwise appointed with proper disclosures.

The provision that would be added to K.S.A. 59-3068 would prohibit many qualified, competent people from serving as guardians. An employee of the provider of any services to the ward could not serve as the guardian, even if the employee worked in a different location or had nothing at all to do with the actual delivery of services to the ward. In reality, this category of people is a valuable resource in the community as potential guardians. This provision, if enacted, would needlessly disqualify countless guardians currently serving in a competent and professional fashion.

4. The proposed amendment to K.S.A. 59-3075 employs a "laundry list" approach to attempt to define conflict of interest.

K.S.A. 59-3075(a)(2) currently contains broad directives regarding a guardian's duties and responsibilities. The language that is proposed in 2005 HB 2307 as an addition to that subsection contains a list of very specific things a guardian "shall" or "shall not" do. It appears to attempt to define situations that would constitute a conflict of interest. Laundry list approaches should be used with caution, especially in statutes. Such lists inevitably lead to questions regarding a situation that is not listed. Was it intentionally omitted, or was it forgotten or not considered? Despite the

apparent attempt to be specific about what constitutes a conflict of interest, the proposed language includes terms that are not defined. For example, there is no definition of "friends or family" to accompany the provision that "The guardian shall not employ such guardian's friends or family to provide services . . ."

5. **The amendments proposed in 2005 HB 2307 are unnecessary because the act already contains provisions that adequately deal with existing and potential conflicts of interest.**

There is no need for these amendments. The act for obtaining a guardian or conservator, or both, K.S.A. 59-3050 *et seq.*, thoroughly addresses the potential for conflicts of interest in guardianships and conservatorships. The court is directed to consider potential conflicts at the time of appointment. K.S.A. 59-3068(b) states:

> "The court, in appointing a guardian or conservator, shall consider the workload, capabilities and potential conflicts of interest of the proposed guardian or conservator, or both, before making such appointment . . ." (Emphasis added).

The act also provides guidance for guardians. The last sentence of existing K.S.A. 59-3075(a)(2), immediately preceding the proposed laundry list addition, clearly states that "A guardian shall at all times act in the best interests of the ward and shall exercise reasonable care, diligence and prudence." It is not necessary to then list situations in which a guardian would not be acting in the ward's best interests.

The act also has built-in opportunities to bring a conflict of interest to the attention of the court. Anyone can file a verified petition pursuant to K.S.A. 59-3088 requesting the removal of a guardian or conservator, or both. The court can even raise the issue in the absence of a petition and set the matter for hearing "at any time when the court has reason to believe that removal of a

guardian or conservator, or both, may be necessary." K.S.A. 60-3088(c). In addition, K.S.A. 60-3089(a) states as follows:

> "At any time the court has reason to believe that the guardian or conservator, or both, has failed to faithfully or diligently carry out such person's duties or responsibilities or to properly exercise such person's powers or authorities in a manner consistent with the provisions of K.S.A. Supp. 59-3075 or 59-3078, and amendments thereto, or with any prior order of the court, the court may issue to the guardian or conservator, or both, an order to appear before the court at a specified date, time and place to show just cause why the court should not find that such person has failed to faithfully or diligently carry out such person's duties or responsibilities or to properly exercise such person's powers or authorities."

This statute also gives the court broad latitude to shape an appropriate remedy, depending on the court's findings at the conclusion of the hearing. These range from dismissal of the proceedings to removal of the guardian or conservator and revocation of the letters of guardianship or conservatorship, or both. K.S.A. 59-3088(c) and (d).

6. 2005 HB 2307 does not solve the perceived problem it attempts to address and instead creates new problems.

The Committee believes that 2005 HB 2307 was at least in part a reaction to the Newton case in which the owner of a group home served as guardian and provided therapy to a ward residing in the home. It is the Committee's position that the Newton case is an example of human failures and not of inadequate statutory protections. Moreover, 2005 HB 2307 is not well drafted or tailored to address the perceived issue. The bill is overly broad and contains undefined terms and vague language that are incapable of uniform application. Further, enactment of the bill would result in the outright disqualification of capable and competent persons who could otherwise be appointed as guardians.

7. The concern that influenced the introduction of 2005 HB 2307 can be addressed with less restrictive provisions.

As stated above, it is the Committee's position that current statutory provisions afford adequate protection against the appointment or retention of guardians whose interests conflict with those of the proposed ward. The Committee firmly believes that Kansas judges are capable and are in fact in the best position to evaluate individual situations and make the best decision for each proposed ward. 2005 HB 2307 takes that discretion away from judges by enacting blanket prohibitions against situations that "might" result in a conflict of interest. Although the Committee did not find that it is necessary to amend the act, it was also agreed that it would not be harmful to add a more detailed conflict analysis to K.S.A. 59-3068 that is narrowly tailored to address the concerns of the drafters of 2005 HB 2307 without undue intrusion on judicial discretion. The Committee's proposed amendment is set forth below.

COMMITTEE'S RECOMMENDATION

After careful consideration, the Committee recommends that the proposed amendments to K.S.A. 2004 Supp. 59-3068(b) and 59-3075(a)(2) contained in 2005 HB 2307 not be enacted. Although the Committee's position is that no amendments to the act are necessary, if the legislature determines that more detailed guidance on situations in which a potential guardian is a service provider or an employee of a service provider, an addition to K.S.A. 59-3068(b) should be worded as set forth below. The Committee is opposed to any amendment to K.S.A. 59-3075.

ACCEPTABLE AMENDMENT TO 59-3068(b)

59-3068. Appointment of guardian or conservator; priority of nominee; qualifications. (a) The court in appointing a guardian or conservator shall give priority in the following order to:

(1) The nominee of the proposed ward or proposed conservatee, if such nomination is made within any durable power of attorney;

(2) the nominee of a natural guardian;

(3) the nominee of a minor who is the proposed ward or proposed conservatee, if the minor is over 14 years of age;

(4) the nominee of the spouse, adult child or other close family member of the proposed ward or proposed conservatee; or

(5) the nominee of the petitioner.

(b)(1) The court, in appointing a guardian or conservator, shall consider the workload, capabilities and potential conflicts of interest of the proposed guardian or conservator, or both, before making such appointment, and the court shall give particular attention in making such appointment to the number of other cases in which the proposed guardian or conservator, other than a corporation, is currently serving as guardian or conservator, or both, particularly if that number is more than 15 or more wards or conservatees, or both.

(2) If the proposed guardian or proposed conservator is a person who provides care or other services, or is an employee of an agency, partnership or corporation which provides care or other services, to persons with a disability similar in nature to the condition or conditions which contribute to the impairment of the ward or conservatee, then that person or employee may be appointed as the guardian or conservator only when:

(A) the person or employee is the spouse, parent, grandparent, child, grandchild, sibling, niece, nephew, aunt or uncle of the ward or conservatee, and the court is satisfied that the person or employee is aware of issues of conflict of interest and has or will receive training from an appropriate person or agency concerning the proper exercise of the duties, responsibilities, powers and authorities of a guardian or conservator in K.S.A. 59-3075 and 59-3078, and amendments thereto;

(B) the person or employee does not personally provide nor supervise the providing of care or other services to the ward or conservatee, and the person or employee is not in a position to be called upon to advocate for the agency, partnership or corporation in opposition to the interests of the ward or conservatee; or,

(C) the person or employee is the only person readily available to be appointed and the court is satisfied that the person or employee is aware of issues of conflict of interest and has or will receive training from an appropriate person or agency concerning the proper exercise of the duties, responsibilities, powers and authorities of a guardian or conservator in K.S.A. 59-3075 and 59-3078, and amendments thereto.

For purposes of this section, "employee" shall include any volunteer, student, trainee or other classification of persons providing services to any agency, partnership or corporation, whether compensated or not.

(3) Nothing in this section shall prohibit a guardian or conservator from collecting a reasonable fee, as approved by the court, for carrying out their duties and responsibilities as a guardian or conservator. Nothing in this section shall prohibit a guardian or conservator associated with the Kansas guardianship program from receiving a stipend from that program for carrying out his or her duties and responsibilities as a guardian or conservator.

(c) In appointing a guardian for a person who is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing, the court shall consider, but shall not be limited to, the appointment of an individual as guardian who is sympathetic to and willing to support this system of healing.