

AGENDA ITEM VIII(d)

**Redline of NRS _____ expansion of
existing statutory guidelines regarding issuance
of temporary guardianships**

“Redline” of temp statutes per Justice Hardesty request

- Really a review of the need for temporary guardianships

1. Introduction

- a. Justice Hardesty has asked me to "redline" the temp statutes to identify problems
- b. The language itself is not necessarily the problem.
- c. The problem is the overall effect of the new legislation coupled with several proposed new rules, combined with how some judges, judicial staff and court appointed counsel are approaching guardianship given the current and past Commission's findings, recommendations and dialogue
- d. The phrase "substantial and immediate risk" should not be interpreted and applied as though it means that the only time a temporary guardianship is applied is to prevent an unreparable catastrophe.
- e. The purpose of the statute appears to be to help those in need of immediate help with financial or physical risks that really should be addressed quickly.
- f. The ten-day duration and follow-up hearings are adequate safeguards to make sure a temporary guardianship can or will end when certain immediate risks or a situation have been addressed
- g. The "best interest" and 60-day extension provisions are adequate safeguards to make sure a protected person has continued help only as needed.
- h. Appointed counsel for proposed protected persons should be an excellent safeguard to help assess the resolution of substantial and immediate risks.
- i. The best safeguard is the mandate in the statutes that "the court shall limit the powers of the temporary guardian to those necessary to respond to the substantial and immediate risk" facing the protected person.
- j. Although they do "cut in line" by requiring faster hearings on the Court docket, when used only as needed, and granted with an even-handed approach, temporary guardianships provide a means of providing help to people to address an immediate need in a minimally invasive way and for a limited amount of time, with the option of paving the way for longer term assistance when and if a judge determines that is necessary
- k. We do not advocate widespread use temporary guardianships. But neither do we advocate their non-use, which is the impression the Commission is giving is the ideal. We believe this view does not serve the best interests of many seniors in Nevada.
- l. The fact is, that in a subset of situations – in particular for homeless and isolated seniors – temporary guardianships hold an important role in delivering quality care and best results in difficult situations. These results can include protection of personal and real property and access to a pay source for long-term care, which will be necessary for many of these individuals. Without a pay source, many individuals cannot get placement in any care setting except essentially a hospital emergency room.

2. Background

- a. Hospitals are care providers of last resort
- b. They have a sworn duty to take all patients

- c. A certain portion of patients received, and that the hospital provides ongoing care for, are seniors who are mentally incapacitated with no viable family support network.
- d. This subgroup of adults are typically homeless or estranged from their family, and prior to being brought to the hospital have been living alone for some time. The number of people in this situation is surprising.
- e. They are usually brought in by emergency medical services, or sometimes family or friends, but then they are left at the hospital with no one taking responsibility for them.
- f. Even if family or friends exist, the family or friends often refuse to provide contact or financial information, or simply refuse to provide any supportive services. If they exist at all, they simply "don't want to take [the person] back".
- g. In a sizeable number of the cases, the family or friends actively interfere with the care being provided, such as by aggressively complaining to staff or threatening to report the facility, while still declining to participate or cooperate in any discharge or transition planning.
- h. In many other cases, the family or acquaintance leads hospital personnel to believe they will be petitioning for guardianship. Often despite suggesting they retain counsel and informing them of the self-help office, after weeks or months of waiting, it becomes apparent the family or acquaintances have no real intention of pursuing guardianship, though they will sometimes continue to assert they intend to apply for guardianship at some unknown future time.
- i. In a number of other cases, a patient may have no one who shows up to claim them or visit them.
- j. The patients can end up residing for long periods of time in "acute care" settings.
- k. Acute care defined:
 - 1. Acute care is a branch of secondary health care where a patient receives active but short-term treatment for a severe injury or episode of illness, an urgent medical condition, or during recovery from surgery. *In medical terms, care for acute health conditions is the opposite from chronic care, or longer term care. See https://en.wikipedia.org/wiki/Acute_care (emphasis added).*
- l. In many cases, the immediate condition for which the person was brought to the hospital - such as for dehydration or infection - is resolved within days. But a safe discharge can be impossible because it is obvious to facility personnel that the person has lacked capacity for some time, or has lost capacity due to the recent event that brought them to the hospital, such as stroke or fall.
- m. Despite the fact that the person may be medically more stable, they may not be eligible for discharge, but the hospital, due to licensing requirements for an acute care facility, must continue to provide a high level, but medically unnecessary, regimen of care.
- n. In the meantime, the patient continues to be exposed to the higher risk of infection and complications associated with a prolonged stay in an acute setting – the hospitals are they place where the sickest of people go every day
- o. Also, depending on the patient's condition, the hospital may be incurring \$500 to \$5000 per day in unreimbursed expenses. On average, the cost may be around \$2000/day.

- p. Routinely, the cost of caring for these individuals prior to guardianship reaches into the many 10's of thousands of dollars, and very often into the 100's of thousands of dollars
 - q. Normally, a person is responsible for the cost of his or her medical care, whether it be an ambulance ride, or weeks in an expensive acute care setting.
 - r. Also, data shows that long term stays in an acute setting does pose greater risk of infection and complications to patients.
 - s. But if the person is incapacitated, without POA or guardianship, the hospital has no way of commencing or signing a Medicaid application, or authorizing a transition out of the acute care setting.
 - t. Without Medicaid benefits, or access to the patient's funds, if any, the hospital cannot be compensated, and no care home or long term care facility will accept the patient because there is no pay source.
 - u. In many cases, the hospital is aware of a person's apartment or home
 - v. However without a POA or guardianship, the hospital is not authorized to access their mail to aid in finding relatives, or assess or check assets to determine Medicaid eligibility. In fact, even with a POA, most banks and financial institutions will not provide financial data; typically they require a guardianship
3. Legal process leading to temp
- a. At some point, the facility realizes no one has authority, and contrary to assertions from family or acquaintances, no one is genuinely pursuing guardianship.
 - b. It should be noted that in many cases, another cause for delay is that hospital personnel may have had good reason initially to believe that a person's capacity might improve to a point where he or she would be able to make decisions for themselves.
 - c. In any event, the facility realizes guardianship is the only way forward.
 - d. In some cases, it is known that the patient has an apartment or home and there is concern for, among other things, the need to secure the patient's only remaining property, which can include medication bottles indicating past medical history, family history including pictures and other personal property, as well as mail containing financial data, and potentially pets that need care – again, among many other things.
 - e. Generally, it will take at least a week to prepare the petition and supporting documentation.
 - f. The facility usually will have asked counsel to initiate a search for family of the patient.
 - g. In many cases there is some indication of potential family including children, spouse, parents or siblings, but their whereabouts are unknown.
 - h. If that is the case, the citation to commence a guardianship must be published for a period of 4 weeks.
 - i. Only then, following the accomplishment of publication, does the 20 day citation period run.
 - j. Then the facility must wait for a hearing date. Perhaps the hearing will occur within a week of the conclusion of the citation period.
 - k. If there are objections to the guardianship, those objections can take weeks or months to resolve.

- l. Even without objections, it may take a few days to get the order and letters filed and certified copies obtained.
- m. By this time, assuming the guardianship was not objected to, at least 2 ½ months have elapsed since the guardianship process was initiated. All the while, the patient has been flat on their back in an acute hospital bed.
- n. Next, now that the order and letter are filed, the guardian searches for a placement for the patient at a long-term care facility. Many patients have specific needs and so only certain care facilities are licensed or authorized for a particular patient.
- o. Within days or a week or two, placement may be found.
- p. Depending on the facility, and statutory ambiguity, many feel the guardian must provide a 10-day notice of intent to move the protected person.
- q. Often, and I do mean often, by the time the 10-day notice has elapsed, the long-term care facility will have given the bed to another person, and the guardian must begin the placement process all over.
- r. Now the process is at least 3 months from the commencement of the guardianship, and the guardianship itself may have only begun, due to the hope that the patient would recover, or due to the misrepresentations of family and acquaintances, after the patient had already been in the hospital for some weeks or months.
- s. This arcane and dysfunctional process leads hospitals to look positively at the relief afforded by a temporary guardianship.
- t. Even then, most hospitals petition for temporary guardianship only when corresponding facts support it – i.e., an apartment or house belonging to the patient may be lost, the patient may be the subject of potential abuse, either physical or financial exploitation.
- u. Also, in my experience, hospitals are NOT using temporary guardianships to do drastic things – such as
 - 1. Move the patient out of state
 - 2. Removing life sustaining treatment or
 - 3. Selling a home
- v. Rather, temporary guardianship petitions are surgically asking for two simple things:
 - 1. For authority to commence a Medicaid application (so the hospital can be paid, and critically, so ANY long-term care facility can be paid. Without a pay source NO FACILITY will accept the patient).
 - 2. For authority to transition the patient out of a potentially harmful, hugely expensive and unnecessary acute setting and into a much more affordable, and much safer long-term care setting that is appropriate to the patient's needs
- w. Opposition to the temporary guardianship primarily focuses on
 - 1. Due process or
 - 2. Whether the facility's petition articulates an "immediate and substantial risk of harm" as outlined by the temp statutes
- x. We believe due process is satisfied. A judge has to review and approve of the petition. The proposed protected person has a right to counsel and my office provides a copy of every temp petition to the office of Legal Aid Society BEFORE IT IS FILED. The temporary guardianship is limited to 10 days, after which a

hearing must be held to justify any continuance of the guardianship, as well as to approve what has been done. When one reviews the temp statutes, it is apparent due process has to be viewed in context. Less process is authorized to meet certain contingencies, and safeguards are built in in the form of a very short duration, and very limited, surgical authority given to the guardian. Within days, the petitioner must return to court to justify what actions they've taken and why the guardianship should continue. The temporary guardianship is there to help the protected person.

- y. One problem with the current regime is that based on the attitude of this Commission. The phrase "substantial and immediate risk of harm" is being assigned a meaning that is out of step with the plain language of the statute and reality.
- z. The statute itself gives examples which include a foreclosure and turning off of utilities. That's it.
- aa. A plain reading of immediate is "now" or "very shortly".
- bb. A plain reading of substantial is "not ephemeral" or "real".
- cc. A plain reading of risk of harm is "some reasonable likelihood that something undesirable will happen to the proposed protected person that could be avoided by the appointment of a guardian"
- dd. Risks often cited in temp petitions in the past 2 years include:
 - 1. Risk of infection
 - 2. Risk of huge medical bills
 - 3. Risk of dying without family knowing about it
 - 4. Risk of loss of access to a rehab facility
 - 5. Risk of losing a home
 - 6. Risk of losing property in an apartment that is not being paid for
 - 7. Risk of property being stolen or damaged
 - 8. Risk of muscle atrophy or loss of ability to walk
 - 9. Risk of being unsafely discharged because the patient or their family or friends are aggressively demanding it but where the patient is felt to lack capacity
 - 10. Risk of alleged financial or physical abuse
- ee. To me, languishing in a hospital bed with no one visiting you for months on end while incurring large medical bills, not to mention some of these other risks, like losing an apartment and all your belongings, are easily as important as the risk of foreclosure or utilities being shut off – risks expressly cited by the temp statutes.
- ff. But some argue the person is not subject to any risk because they are in a hospital - that the financial ramifications of that, or the risk of infection, exploitation or atrophy should be dealt with in a full guardianship petition that would take months to hear.
- gg. Still other times, the arguments almost sound like to be substantial, a risk would have to involve a catastrophe. It almost makes one wonder, what would qualify as "substantial" under that view? An Ebola outbreak? Someone holding a revolver to the patient's head?

4. Sample case

- a. The following case illustrates how the belief that temporary guardianships are bad influenced a number of individuals with the result that guardianship was

- n. After investigation and upon information and belief, the proposed protected person had no friends other than one person, a checker he had met at Smith's who kindly began to stop by and care for him despite the fact that she has no medical training and she has a family of her own to care for. She advised counsel for proposed protected person repeatedly of need for guardianship and her unwillingness to any longer provide care to proposed protected person. All of this was corroborated by the brother of the proposed protected person who was demanding that guardianship be implemented
- o. 3/28/18 hearing to appoint general guardianship denied and Court finds despite physician's certification that the patient had capacity to be discharged against medical advice.
- p. 3/30/18 order filed denying general guardianship and a status check was set for 5/30/18
- q. In response to the demands of the proposed protected person, the proposed protected person's court appointed counsel, the proposed protected person is discharged from the hospital. Since no one would pick him up and under threat of litigation, the hospital pays for third party to deliver proposed protected person to his home and place him on his bed. Upon information and belief, he could not even get himself a drink of water.
- r. Days later, as predicted, on 4/6/18 proposed protected person readmitted to the hospital (after metro well checks were called in by hospital and proposed protected person's Smith's acquaintance)
- s. 4/9/18 proposed protected person discharged from the hospital and again provided transportation to his home;
- t. 4/15/18 proposed protected person readmitted to hospital
- u. Pictures taken by the Smith's friend show the proposed protected person on the floor, filthy, covered in his own feces.
- v. 5/3/18 Petition For Re-Hearing to appoint a temporary guardianship filed with the court; pictures of squalor provided to court and parties
- w. 5/17/18 hearing to appoint the temporary guardianship on OST granted;
- x. Eventually general guardianship was granted
- y. 7/11/18 protected person discharged from the hospital under guardianship. He is currently living in a long-term care situation
- z. In the end, guardianship was essentially denied three times and then granted on the fourth try in a very difficult situation. The whole matter was extremely expensive for the hospital. We believe the delays were based on various individual's beliefs that the Commission does not want temporary guardianships being appointed and that court appointed counsel should zealously represent the client even if the client's wishes are against his or her own best interests. some of the representations in the objection about the ability of this person to care for himself and the existence of friends who could care for him were not based in fact.
- aa. The total number of days in acute care at hospital: 188 days.
- bb. For the duration, the man's home was left in the care of the Smith's friend, who was not supervised or authorized by the Court. According to her, the proposed protected person cannot pay his own bills, and doesn't really know what is going on. The only reason the home was not foreclosed was by her intervention. The temp statutes expressly authorize a guardianship under exactly these

circumstances, yet it was denied repeatedly as not constituting an “emergency” though that term is not used in the statute. Some of the dialogue from the Commission about temp guardianships can make it seem to some judges, staff and practitioners that temp guardianships should essentially never be granted regardless of the circumstances, indeed, even when the circumstances exactly match the statute regarding risk of foreclosure or loss of utilities.

- cc. These types of denials have happened in other cases involving incapacitated individuals who own homes or have property in apartments and have no known authorized individuals to help them. Again, this is because there is a perception among some that temps should simply not be allowed.

5. Conclusion

- a. I have handled cases in the North, and from my conversations and experiences, I believe there is a measurable difference between what is experienced in the South in terms of the level of homelessness and the number of senior individuals living estranged from any family connections. Such things are far more widespread in Clark County than in other areas of the state.
- b. The statutes do not necessarily need to be changed.
- c. I urge the Commission to not promote the idea that “substantial and immediate risk of harm” is limited only to extremely severe, catastrophic and irreversible harm. Statutes are supposed to be construed in a way that they have meaning. If the foregoing definition were to be universally applied to temporary guardianship petitions, one could argue that almost all of those situations should be handled instead by simply calling the police and transporting the individual to the hospital where they will supposedly be safe and sound indefinitely without any further consideration from legal professionals.
- d. The temporary statutes themselves give us express examples of what is a substantial and immediate risk of harm. Those are a foreclosure or the cessation of utilities. To me, those examples connote legitimate and reasonable concerns, but certainly not a requirement of an irreversible cataclysmic catastrophe.
- e. Unfortunately, we are finding temporary guardianships being denied with some frequency even where the proposed protected person has an apartment, or a home that could be the subject of a foreclosure proceeding, utilities could be in danger of being cut off and personal property is at serious risk of being lost.
- f. We believe the reason for this outcome is a monolithic approach that sometimes seems to come from the Guardianship Commission that essentially all or nearly all petitions for temporary guardianship are unfounded and harmful.
- g. Many guardianship petitions are extremely helpful to the persons they protect.
- h. Not only that, but due to recent legislation, in particular the right to counsel, the risk that temporary guardianships would be misused to steal a person’s property is very small and we believe such a result is highly unlikely.
- i. In addition, temporary guardianships filed in the last couple of years are typically extremely limited in scope – almost surgical – they typically seek only authority to obtain Medicaid or other benefits and to transition the individual out of acute care – both matters that are objectively necessary to the long-term health and well-being of the proposed protected person, and both matters that should be addressed if possible without months of unnecessary delay, as happens with petitions for general guardianship.

- j. I hope courts will continue to compassionately consider the best interests of the proposed protected person and whether the temp guardianship actually serves those purposes.
- k. We do not advocate widespread use of temporary guardianships. But neither do we advocate their virtual non-use, which is the impression the Commission is giving is the ideal. We believe this view does not adequately address the needs of many seniors.
- l. The fact is, that in a subset of situations – in particular for homeless and isolated seniors – temporary guardianships hold an important role in delivering quality care and best results in difficult situations. These results can include protection of personal and real property and access to a pay source for long-term care, which will be necessary for many of these individuals. Without a pay source, many individuals cannot get placement in any care setting except essentially a hospital emergency room.

By John Michaelson

AGENDA ITEM IV
Report from Kate McCloskey,
Guardianship Compliance Manager

Recording Fee Survey Results as of 9/13/2018

County	Legal Services Indigent	Dispersed To	Legal Services Abused/Neglected Children	Dispersed To	Court Appt. Investigators	Dispersed To
Carson ¹	0.00		0.00		0.00	
Churchill						
Clark ²	1,830,393.00	Legal Aid	<i>Estimate 3,050,655.00</i>	District Court	610,130.00	District Court
Douglas ³	32,040.00		0.00	N/A	10,680.00	
Elko	37,014.00	Legal Aid	0.00	N/A	12,338.00	District Court
Esmeralda						
Eureka ⁴	4,552.00	Not Disbursed	0.00	N/A	4,542.00	Not Disbursed
Humboldt						
Lander						
Lincoln						
Lyon	40,132.00	Legal Aid	40,132.00	District Court	13,489.00	District Court
Mineral	7,161.00	Not Distributed	0.00	N/A	2,387.00	Not Disbursed
Nye ⁵	59,286.00	District Court	0.00	N/A	59,286.00	District Court
Pershing	7,113.00	DA's Office	0.00	N/A	2,371.00	District Court
Storey	5,001.00	Legal Aid	0.00	N/A	2,138.00	Legal Aid
Washoe ⁶	235,577.00	Legal Aid	<i>Estimate 235,577.00</i>	Legal Aid	78,519.00	District Court
White Pine	8,871.00	Legal Aid	0.00	N/A	8,871.00	Legal Aid

A follow up survey has been sent out to county treasurers. Results are pending.

¹ Carson City Recorder Indicated In survey they are not collecting for any of these funds.

² Clark County assesses 5.00 fee for abused and neglected children – estimated fee total is 610,130.00*3.00 – will follow up with recorder's office.

³ Douglas County recommended follow up with Treasurer to confirm where disbursed to.

⁴ Eureka County Indicated "no" on survey when asked where/how funds were disbursed.

⁵ Nye County Treasurer Indicated the District Court has a budget to pay for Investigators and attorneys.

⁶ Washoe County assessed 3.00 fee for legal services for abused and neglected children until April 2017, when it increased to the 6.00 maximum – estimated fee total is 78,519.00*3.00 –will follow up with recorder's office for accurate total.