SENATE HEARING SLIP

(Please Print Plainly)

DATE: 11/1/99

BILL NO. SB 158
or
SUBJECT

State Senator
ALBERTA DARLING
(NAME)

1325 West Dean Rd
(Street Address or Route Number)

Milwaukee, Wis. 53217
(City and Zip Code)

self
(Representing)

Speaking in Favor: ✓

Speaking Against: ☐

Registering in Favor: but not speaking: ☐

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

Please return this slip to a messenger PROMPTLY.
Senate Sergeant-At-Arms
State Capitol - B35 South
P.O.Box 7882
Madison, WI 53707-7882

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 11-1-99

BILL NO. 158
or
SUBJECT

BENJAMIN M. Adams
(NAME)

301 Nicolet Blvd
(Street Address or Route Number)

Neenah WI 54956
(City and Zip Code)

Elder Law Section -
(Representing) State BAR OF WIS -

Speaking in Favor: ✓

Speaking Against: ☐

Registering in Favor: but not speaking: ☐

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

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Madison, WI 53707-7882

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 11/1/99

BILL NO. SB 158
or
SUBJECT

Guardianship Petitioner's
attorney fees
Betsy Abramson
(NAME)

5900 Monona Dr.
(Street Address or Route Number)

Madison, WI 53716
(City and Zip Code)

Coalition of Wis. Aging Groups
(Representing)

Speaking in Favor: ✗

Speaking Against: ☐

Registering in Favor: but not speaking: ☐

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

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State Capitol - B35 South
P.O.Box 7882
Madison, WI 53707-7882

SENATE HEARING SLIP
(Please Print Plainly)

DATE: 11/1/99

BILL NO. 158
or
SUBJECT Payment from Wards Estate

Dave Schmidt
(NAME)

3162 Mary Brown Ln
(Street Address or Route Number)

Green Bay, WI 54313
(City and Zip Code)

St. Mary's Hosp. Med Center Green Bay
(Representing)

Speaking in Favor: [X]

Speaking Against: [ ]

Registering in Favor: but not speaking: [ ]

Registering Against: but not speaking: [ ]

Speaking for information only; Neither for nor against: [ ]

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P.O.Box 7882
Madison, WI 53707-7882

SENATE HEARING SLIP
(Please Print Plainly)

DATE: 11-1-99

BILL NO. SB-158
or
SUBJECT Requiring payment from ward's estate of reasonable atty fees in Guardianships

JANE GREENWOOD
(NAME)

4072 Redwood DR
(Street Address or Route Number)

Pulaski Wi 54162
(City and Zip Code)

BROWN Co. Human Services
(Representing)

Speaking in Favor: [X]

Speaking Against: [ ]

Registering in Favor: but not speaking: [ ]

Registering Against: but not speaking: [ ]

Speaking for information only; Neither for nor against: [ ]

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Madison, WI 53707-7882

SENATE HEARING SLIP
(Please Print Plainly)

DATE: 11-1-99

BILL NO. SB 158
or
SUBJECT Guardianship Fees

KIM MARIE WACEK, Attorney
(NAME)

414 E. Walnut St., Suite 210
(Street Address or Route Number)

Green Bay WI 54301
(City and Zip Code)

Attorney Representing Numerous petitioners - past/present
(Representing)

Speaking in Favor: [X]

Speaking Against: [ ]

Registering in Favor: but not speaking: [ ]

Registering Against: but not speaking: [ ]

Speaking for information only; Neither for nor against: [ ]

Please return this slip to a messenger PROMPTLY
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Madison, WI 53707-7882

SENATE HEARING SLIP
(Please Print Plainly)

DATE: 11-1-99

BILL NO. SB 158
or
SUBJECT

Doug Klimek
(NAME)

200 No Jefferson ST., Suite 411
(Street Address or Route Number)

Green Bay, Wi. 54301
(City and Zip Code)

Wi. Dept. of Health & Family Services
(Representing)

Speaking in Favor: ☐

Speaking Against: ☐

Registering in Favor: but not speaking: ☒

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

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Madison, WI 53707-7882

SENATE HEARING SLIP
(Please Print Plainly)

DATE: 10/1/99

BILL NO. 158
or
SUBJECT

DENNIS ANN NICHOLS PROFESSIONAL GUARDIANSHIPS, INC.
(NAME)

1345 W. MASON
(Street Address or Route Number)

GREEN BAY WI 54303
(City and Zip Code)

CORPORATE GUARDIANS
(Representing)

Speaking in Favor: ☐

Speaking Against: ☐

Registering in Favor: but not speaking: ☒

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

Please return this slip to a messenger PROMPTLY.
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State Capitol - B35 South
P.O.Box 7882
Madison, WI 53707-7882

SENATE HEARING SLIP
(Please Print Plainly)

DATE: 11-1-99

BILL NO. Senate Bill 158
or
SUBJECT

Gary Tilkens
(NAME)

200 N Jefferson St Suite 4
(Street Address or Route Number)

Green Bay WI 54311
(City and Zip Code)

Wisconsin Dept Health & Family Ser
(Representing)

Speaking in Favor: ☐

Speaking Against: ☐

Registering in Favor: but not speaking: ☑

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

Please return this slip to a messenger PROMPTLY.
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State Capitol - B35 South
P.O.Box 7882
Madison, WI 53707-7882

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 11-1-99

BILL NO. _____
or
SUBJECT SB158

Jenny Boese
(NAME)

(Street Address or Route Number)

Madison, WI
(City and Zip Code)

Real Property, Probate & Trust Law Section of State Bar of WI
(Representing)

Speaking in Favor: ☐

Speaking Against: ☐

Registering in Favor: but not speaking: ☒

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

Please return this slip to a messenger PROMPTLY.
Senate Sergeant-At-Arms
State Capitol - B35 South
P.O.Box 7882
Madison, WI 53707-7882

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 11-1-99

BILL NO. 158
or
SUBJECT _____

Karon Rusch
(NAME)

PO Box 365
(Street Address or Route Number)

Oneida Wi 54155
(City and Zip Code)

(Representing)

Speaking in Favor: ☐

Speaking Against: ☐

Registering in Favor: but not speaking: ☒

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

Please return this slip to a messenger PROMPTLY.
Senate Sergeant-At-Arms
State Capitol - B35 South
P.O.Box 7882
Madison, WI 53707-7882

Vote Record

Senate Committee on Judiciary and Consumer Affairs

Date: 11/1/99

Moved by: _____ Seconded by: _____

AB: _____ Clearinghouse Rule: _____

AB: _____ SB: 158 Appointment: _____

AJR: _____ SJR: _____ Other: _____

A: _____ SR: _____

A/S Amdt: _____

A/S Amdt: _____ to A/S Amdt: _____

A/S Sub Amdt: _____

A/S Amdt: _____ to A/S Sub Amdt: _____

A/S Amdt: _____ to A/S Amdt: _____ to A/S Sub Amdt: _____

Be recommended for:

- ☐ Passage
- ☐ Introduction
- ☐ Adoption
- ☐ Rejection
- ☐ Indefinite Postponement
- ☐ Tabling
- ☐ Concurrence
- ☐ Nonconcurrence
- ☐ Confirmation

Committee Member	Aye	No	Absent	Not Voting
Sen. Gary George, Chair	☐	☐	☐	☐
Sen. Fred Risser	☐	☐	☐	☐
Sen. Alice Clausing	☐	☐	☐	☐
Sen. Joanne Huelsman	☐	☐	☐	☐
Sen. Alberta Darling	☐	☐	☐	☐
Totals:	_____	_____	_____	_____

☐ Motion Carried ☐ Motion Failed

Senate Committee on Judiciary and Consumer Affairs

Request for Paper Ballot Executive Action on 1999 Senate Bill 158

Due to the difficulty of getting all of the members together in one place, the Senate Committee on Judiciary and Consumer Affairs is unable to hold a formal Executive Session on Senate Bill 158. We would, therefore, like to conduct a paper ballot on the bill. **Please return your ballot to Sen. George's office (Room 118 South) by 2:00 p.m. today Wednesday March 29, 2000.**

Passage of Senate Bill 158:

_____Moved (Optional -- Please check if you wish to Move Passage of the Bill)

_____Seconded (Optional -- Please check if you wish to Second Passage of the Bill)

_____ **Aye** (In Favor of Passage of the Bill)

_____ **No** (Oppose Passage of the Bill)

Signed: Gary Dryzewiecki March 29, 2000

Please return to Sen. George's Office by 2:00 p.m. Wednesday, March 29, 2000.

Senate Committee on Judiciary and Consumer Affairs

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Passage of Senate Bill 158:

_____Moved (Optional -- Please check if you wish to Move Passage of the Bill)

_____Seconded (Optional -- Please check if you wish to Second Passage of the Bill)

_____ **Aye** (In Favor of Passage of the Bill)

X **No** (Oppose Passage of the Bill)

Signed: _____ March 29, 2000

Please return to Sen. George's Office by 2:00 p.m. Wednesday, March 29, 2000.

Senate Committee on Judiciary and Consumer Affairs

Request for Paper Ballot Executive Action on 1999 Senate Bill 158

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Passage of Senate Bill 158:

_____Moved (Optional -- Please check if you wish to Move Passage of the Bill)

_____X_____Seconded (Optional -- Please check if you wish to Second Passage of the Bill)

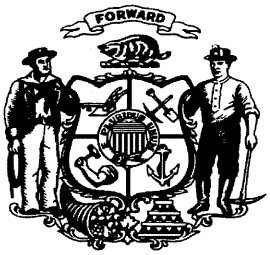
_____X_____ **Aye** (In Favor of Passage of the Bill)

_____ **No** (Oppose Passage of the Bill)

Signed: Jane B. Hulsman March 29, 2000

Please return to Sen. George's Office by 2:00 p.m. Wednesday, March 29, 2000.

State of Wisconsin



GARY R. GEORGE
SENATOR

TO: Members, Senate Committee on Judiciary and Consumer Affairs

FROM: Dan Rossmiller, Clerk
Senate Committee on Judiciary and Consumer Affairs

RE: Paper Ballot on SB 158 (Guardianship)

DATE: March 29, 2000

Attached please find a paper ballot on SB 158. This bill received a public hearing in the Senate Committee on Judiciary and Consumer Affairs last November.

There is no amendment to the bill. The earlier e-mail was in error.

Note: Please return the attached paper ballots by 2:00 p.m. today -- Wednesday, March 29, 2000.

CWAG

Elder Law Center

Coalition of Wisconsin Aging Groups

TESTIMONY IN SUPPORT OF SB 158
Payment of Guardianship Petitioner's Attorney Fees
Before the Senate Judiciary and Consumer Affairs Committee
Green Bay – November 1, 1999
by Betsy Abramson, Director, CWAG Elder Law Center

The Coalition of Wisconsin Aging Groups is a statewide consumer federation of over 640 member groups and 2000 individuals advocating for issues affecting older persons. The Elder Law Center is the Coalition's legal arm, providing individual and group representation on issues of public benefits, long-term care, guardianship, advance directives and elder abuse. Under a continuing contract from the state's Wisconsin Department of Health and Family Services, the CWAG Elder Law Center has operated the Wisconsin Guardianship Support Center since 1991. Under this project, the Elder Law Center answers over 2000 calls per year on a toll-free telephone, prepares and distributes a quarterly newsletter on guardianship issues and provides technical assistance to counties, courts and guardianship programs.

In this capacity, we have carefully followed the court case and discussions on the issue of guardianship petitioner's attorney fees. We believe that the legislative proposal before you properly balances the issues at stake in guardianship, and provides courts with the appropriate amount of discretion in determining whether or not to award the payment of petitioner's attorney fees from an adjudicated ward's estate.

When an individual is no longer competent and did not previously execute a power of attorney for finances and/or health care, the individual needs a court-appointed guardian. The individual who starts the court action to have a guardian appointed is called the "petitioner." The petitioner must hire an attorney to bring the guardianship petition and pay the attorney's fees. This proposal would allow, under certain circumstances, for payment of the petitioner's attorney fees from the ward's estate, if the court in fact finds the person is appropriate for guardianship. Under this bill, the court would have to approve of the request for attorney fees from the ward's estate after considering the following factors:

- Whether the petitioner had a conflict of interest in bringing the petition (e.g., was this a disgruntled family member trying to get at "mom" for one reason or another?);
- Whether the ward had previously executed a durable power of attorney (if so, this should raise questions about why a guardianship was pursued);
- The ability of the ward's estate to pay the fees;
- The reasonableness of the fees;
- Whether the ward had contested the guardianship and if so the nature of the contest; and
- Other relevant factors.

NOTE: These listed factors were not in the original bill. These improvements were added at the request of the CWAG Elder Law Center and the Elder Law Section of the State Bar.

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Due to a 1997 court case, arising out of Milwaukee County, the law now forbids payment of petitioner's attorney's fees from the ward's estate. *Community Care of Milwaukee County v. Evelyn O., 214 Wis. 2d 433 (Ct. App. 1997). Petition for review by Supreme Court denied.* As indicated above, the proposal would essentially reverse this court case, permitting the payment of the attorney fees from wards' estates in certain circumstances.

In our experience, most guardianships are done not to "take away" rights from individuals, but to help protect them by making sure that a properly appointed guardian is available to represent them and advocate for their rights. For most family members we advise on our Guardianship Hotline, the family has put in enormous amounts of time, energy and love in trying to keep a family member at home for as long as possible. This generally has resulted in extensive time and financial costs to the family in terms of lost work time, arranging rides, meals, health care, support services and other assistance. When that is no longer possible, a guardianship is often needed so that the elder may, unfortunately, be moved from home to a nursing home, group home or other placement setting. In these situations, the family is almost always already in a crisis mode with many emotional and logistical concerns to attend to. Requiring the family themselves to pay the attorney fees for the guardianship, adds to the stress and burden.

In situations where the family's motives are clearly bad (e.g., pursuing a guardianship because they don't like the choices an elder is making, or trying to wrest away the control from a perfectly fine agent under a power of attorney "mom" had selected), the criteria listed for the judge to consider should prevent the ward from having to pay.

The few opponents to the bill have identified the following objections. First, they argue that a ward should not have to pay the attorney fees of someone who is trying to take away their rights. Second, they argue that family motives are so often bad that this should not be allowed. Third, they argue that this problem could be addressed instead by having county corporation counsels required to bring the guardianship petitions.

Our responses to these concerns are as follows. First, guardianship should not be perceived as the "taking away of rights." Rather, when done properly guardianship is actually the *transferring* of rights from individuals who are no longer capable of asserting their own rights to a court-appointed and court-monitored guardian who will assert and protect their rights for them. In this sense, it is therefore actually quite appropriate for an individual with adequate resources to pay for these protections. Second, in our experience, family members are most often generous and concerned. And where they are not, the legislative proposal's listed criteria will ensure that payment is not made. Finally, as to county corporation counsels assuming this task, the legislature would have to be prepared to greatly increase county funds for corporation counsel staff before these agencies would have the resources to assume responsibilities for this task.

This bill has been awaiting action for nearly a year. We urge this Committee to move swift approval and immediately take it to the full Senate. Thank you for this opportunity to present the unanimous position of the Governing Board of the Coalition of Wisconsin Aging Groups.

Elder Law Center

Coalition of Wisconsin Aging Groups

November 2, 1999

TO: Senate Judiciary Committee
Senators Gary George (Chairperson), FAX 266-7381
Joanne Huelsman, FAX 267-5172
Fred Risser, FAX 266-1629
Alice Clausing, FAX 267-0369
Alberta Darling, FAX 267-0588

FROM: Betsy Abramson, CWAG Elder Law Center Director

RE: SB 158 – Guardianship Petitioner's Attorney Fees

Thank you for your time yesterday in holding a hearing on the above-referenced bill. As we indicated in our testimony, this is an important bill that will help ensure that the guardianship protections are provided to individuals who are in fact adjudicated incompetent by circuit courts.

At the hearing, Senator Risser, and one practicing attorney in Green Bay, raised an issue as to whether the bill should be amended to expand situations where petitioner's attorney fees can be paid by the subject of the guardianship hearing to include situations even where the court does not ultimately order a guardianship. Senator Risser gave as an example a situation such as where an attorney had done all the work to start a guardianship petition but the subject individual dies before the hearing is held. The Green Bay attorney raised the example of where a guardianship petition is brought, but ultimately withdrawn when the subject individual and family (or providers) agree instead to pursue an advance planning alternative such as a power of attorney.

While we are sympathetic to their examples, we respectfully suggest that the bill should remain as drafted and ask you to swiftly approve this bill and move it on to the full Senate. Our reasons are as follows:

1. Under the traditional "American rule" of attorney's fees, each party pays his or her own attorney fees, unless there is a "fee-shifting" statute, directing the "loser" to pay the "winner." In both the scenarios that Senator Risser and the Green Bay attorney identified, there would be no "winner" or "loser" in the guardianship case as the guardianship was not ultimately ordered by the court. Thus, there could be no shifting of attorney fees. Indeed, there may be constitutional impediments to requiring an individual to pay the attorney fees in a case that he or she did not "lose."

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2. This proposal takes us back further than the situation prior to the 1997 *Evelyn O.* case. Prior to that case being decided, guardianship petitioner's attorneys would advise their petitioner clients (i.e., family members, health care providers, concerned neighbors, etc.) that they would file the petition for guardianship and represent them, but that they would be personally responsible for the attorney's fees if the guardianship was not ultimately granted. This provided an important, healthy check on mean-spirited, overly controlling or otherwise badly-motivated individuals from starting inappropriate guardianships. SB 158 will appropriately return us to that situation.

3. While the examples cited by Senator Risser and the Green Bay attorney are significant, and no doubt involve well-motivated family members, we believe that a statute that provided for attorney fees even where a guardianship was not ultimately ordered would give badly-motivated family members no disincentives from bringing inappropriate guardianship petitions. These individuals could simply bring guardianship petitions, knowing that their attorney fees would be paid by "mom" anyway. Thus, while there would be the few situations as they described, we believe there would be *more* situations involving bad faith petitions by family members.

4. Attorneys are quite accustomed to bringing actions where the payment of their attorney fees is not certain. Whether personal injury, employment discrimination, consumer contracts or a host of other cases, attorneys often work on a contigency. In guardianship cases prior to *Evelyn O.*, and similarly if this bill becomes law, lawyers will tell their clients (the concerned family, neighbors, health care providers, etc.) that if the guardianship is ordered, the lawyer will ask the court to approve payment of his or her attorney fees from the ward's estate, if the appropriate factors exist. The lawyer will tell their clients that if the guardianship is not ordered, or if the factors are not present (e.g., family members have bad motives, ward's estate can't afford it, etc.) the clients will ultimately be responsible. This is an important check on the system: petitioners must be confident that the individual truly meets the requirements of guardianship <u>and</u> that the factors for payment of the attorney fees exists. Otherwise, the petitioners will pay their own fees. This is as it should be as it properly balances the rights of the subject individual and the protections the guardianship system affords against petitioners with bad motives.

5. This bill is ultimately about helping to ensure access to the guardianship system's protections, for mentally incapacitated adults. It is not a bill about helping attorneys get paid. The 1997 *Evelyn O.* case has created significant impediments to concerned family members and others securing these protections for vulnerable adults. This bill can correct the situation.

In sum, we believe that the bill as carefully drafted and supported by the Coalition of Wisconsin Aging Groups and the Elder Law Section of the State Bar of Wisconsin, unanimously endorsed by the Milwaukee Bar Association and others, should be passed in its current form. We urge you to move swiftly to approve this bill so that there is time for the full Senate to consider this bill before this floor period ends.

Thank you for your consideration of this bill which will help provide the protections of the guardianship system to vulnerable adults.

LAW OFFICES OF
JURSIK & JURSIK
4711 SOUTH PACKARD AVENUE
CUDAHY, WISCONSIN 53110-1482

JOHN G. JURSIK (1906-1974)
ROBERT J. JURSIK
PATRICIA D. JURSIK

TELEPHONE (414) 744-7960
FACSIMILE (414) 744-7907

TESTIMONY IN SUPPORT OF SB 158

by Attorney Patricia D. Jursik, Co-Chair of the Milwaukee Probate Bench/Bar Committee

The probate bench/bar committee of the Milwaukee Bar Association unanimously endorsed legislation that would permit payment of attorney's fees for the successful Petitioner in a Guardianship. This endorsement was taken to the full board of the Milwaukee Bar Association. The MBA passed a resolution supporting 1999 Senate Bill 158. President Greg Herman has also sent letters to various committee members.

As the Co-Chair of the probate bench/bar committee, this matter came on the agenda at the request of the court commissioner in Milwaukee County who arguably handles more Guardianship matters than any other court in the state. Without a means to provide payment of Petitioner's attorney fees, there was a concern that there would be no other avenue to protect incompetent individuals.

As an attorney that practices in the area of probate and guardianship, I had a very focused example of difficulties that arise because of the holding in *Evelyn O.*: A single, elderly woman suffered a stroke and was totally incapacitated. She had never executed any power of attorney documents. Her closest relative was a half-sister that was never close to the woman. Her next door neighbors were her *de facto* family. These neighbors had been close to the woman for over 30 years and included the woman in holiday celebrations and their own family celebrations.

After the stoke, these neighbors cared for the woman's home, cutting her grass and watching over her vacant house. They cared for the woman's dog, kept her car running, and visited the woman almost daily at the hospital. The social worker at the hospital was able to understand from the woman that she wanted the neighbors appointed her guardians, and she asked the neighbors to see an attorney to begin the process of guardianship. The neighbors indicated that they were willing to act in this capacity and to help in any way they could. In advising these neighbors, they were told that because of the holding of *Evelyn O.*, they would be responsible for paying the attorney fees to bring a guardianship Petition. This in spite of the fact that the woman had a sizable estate and would have been more than able to pay attorney fees necessary to protect her assets. While the neighbors were willing to do almost anything for their friend, they were not willing to expend dollars from their already limited income as they were retired and had limited assets.

There is no good mechanism in place today to protect this woman. In some cases, the hospital itself must hire attorneys to do the guardianship petition. In other cases, the county dept. of aging is called on to prepare the guardianship petition. Milwaukee County is not equipped to handle a high-volume of guardianship petitions. It should not become the responsibility of the county to provide legal services to individuals that can actually afford to pay for services that are obtained.

Traditionally, guardianship proceedings were considered special proceedings handled through courts of equity. Because the guardianship provided protection for an incompetent and protected the assets of an incompetent, the court permitted the payment of the costs in securing a guardian for an incompetent. Many attorneys feel that the holding of *Evelyn O.* was incorrect because the court did not distinguish special proceedings in a court of equity from other common law cases where attorney fees are traditionally not awarded. This will all become moot however if the Committee approves SB 158. The new legislation also provides factors that will protect individuals from abuse of the process. In my years of practice, I believe that abuse is rare in guardianship. Most Petitions are in fact filed when it is clear that an individual is under a disability and in need of protection. However, the factors do provide relevant concerns and would permit the court to deny fees in those cases.

The Evelyn O. case was decided in 1997. It is already proving burdensome, and I would ask the committee to approve the bill and take it to the Senate for prompt action. Thank you for your time and considerations.

TAMMI, COHN & CAVEY

ATTORNEYS AT LAW

not a partnership

Bruce A. Tammi
David P. Cohn
Patricia M. Cavey
William J. Schneider, retired

405 East Lincoln Avenue
Milwaukee, Wisconsin 53207
(414) 744-8120 / 744-4581
FAX: 414-744-2424

FACSIMILE COVER SHEET

Number of Pages Including Cover Page: 5
If all pages are not received or if they are illegible, please call: 414-744-4581

DATE: November 3, 1998

TO: Senator Gary George
ATTENTION: JEFF ROBB

RECIPIENT FAX NUMBER: 608-266-7381

FROM: Attorney Patricia Cavey

MESSAGE:

OPPOSITION TO SB 158

Enclosed position statement
Enclosed position State Bar of Wisconsin Public Interest Section

****

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November 3, 1999

BY FAX
608-266-7381

Senator Gary George
118 State Capitol
Madison, Wisconsin

Re: Oppose SB 158

State Bar of Wisconsin - Public Interest Section Opposes SB 158

Dear Senator George:

Enclosed please find a position statement regarding SB 158.

As Legislative Committee Chair for the State Bar of Wisconsin Public Interest Section, I wanted to communicate that the Public Interest Section Board has taken the position of opposing SB 158. Unlike the Elder Law Section, the Public Interest Section is comprised of attorneys who work on law reform issues, work with people in poverty and see the many problems with SB 158. SB 158 would be an economic boon to the private attorneys who can file a check off the box petition. The economic benefit comes at great cost to those people who don't have money, desperately need to use their money to access services or are required to spend their limited funds on guardian ad litem and defense attorneys. For the reasons stated in the enclosed position paper we ask you to oppose SB 158. A group of advocates who actually represent the defendants in these actions would be happy to meet with you. Please contact me if you would like us to arrange such a meeting or if you would like any additional information. We can provide many, many examples of great harm done to vulnerable people by private attorneys attempting to act as a public service system.

Thank you for your continued support.

Sincerely,

PATRICIA M. CAVEY, Director
Mental Disability Law Center
and
Legislative Committee Chair
State Bar of Wisconsin Public Interest Section

MENTAL DISABILITY LAW CENTER
P.O. Box 7722, Milwaukee Wisconsin 53207
Telephone: (414) 744-4581 FAX: (414) 744-2424

TAMMI, COHN & CAVEY
ATTORNEYS AT LAW
not a partnership

Bruce A. Tammi
David P. Cohn
Patricia M. Cavey
William J. Schneider, retired

405 East Lincoln Avenue
Milwaukee, Wisconsin 53207
(414) 744-8120 / 744-4581
FAX: 414-744-2424

Oppose SB 158: Proposed Guardianship Statute

A proposed change to guardianship law has been drafted as a negative response to recent court cases. The court cases support and uphold the rights of elderly and disabled persons. The court cases are: Guardianship of Evelyn O. and the companion case, Guardianship of Thyra K., and Guardianship of Verma B., 214 Wis. 2d 434 (Ct. App. 1997) and Yamat v. Verma L.B., 214 Wis. 2d 707 (Ct. App. 1997). The cases upheld that the elderly and others who may have guardianship petitions filed against them in court have the same legal rights as others who finds themselves in litigation. That is, they are responsible for their attorney fees (and the guardian ad litem fee) but not the attorney fees of their opponents.(We would be happy to fax copies of the cases to you; they are also available on-line.)

Unfortunately, though not unexpected, there has been a proposed statutory change which creates a statute making payment of the elder's opponent mandatory and ignores the role of the court appointed neutral attorney, the guardian ad litem (whose attorney fees the guardianship defendant is already obligated to pay for by statute). Ironically, the payment of the elder's own attorney is optional.

The current statute reads:

> **880.24 Compensation allowed from estate. (1)** FEES AND EXPENSES OF GUARDIAN. Every guardian shall be allowed the amount of the guardian's reasonable expenses incurred in the execution of the guardian's trust including necessary compensation paid to attorneys, accountants, brokers and other agents and servants. The guardian shall also have such compensation for the guardian's services as the court, in which the guardian's accounts are settled, deems to be just and reasonable.
>
> **(2)** WARD'S EXPENSES IN PROCEEDINGS. When a guardian is appointed the court may allow reasonable expenses incurred by the ward in contesting the appointment.

Proposed Language:

AN ACT to create 880.24(3) of the statutes; relating to: requiring payment from a ward's estate of reasonable attorney fees and costs for successful petitioners in incompetency and guardianship proceedings.

> **(3)** FEES AND COSTS OF PETITIONER. (a) When a guardian is appointed, the court shall award from the ward's estate payment of the

petitioner's reasonable attorney fees and costs, including those fees and costs, if any, related to protective placement of the ward, unless the court finds after considering all of the following except as provided in par. (b), that it would be inequitable to do so:

1. The petitioner's interest in the matter, including any conflict of interest that the petitioner may have had in pursuing the guardianship.

2. Whether the ward had executed a durable power of attorney under s. 243.07 or a power of attorney for health care under s. 155.05 or had engaged in other advance planning to avoid guardianship.

3. The ability of the ward's estate to pay the petitioner's reasonable attorney fees and costs.

4. Whether the guardianship was contested and, if so, the nature of the contest.

5. Any other factors that the court considers to be relevant.

(b) Existence of the factor specified in par. (1)2., without the presence of another relevant factor under par. (a) 1.,3.,4. or 5., may not preclude the awarding of attorney fees under par. (a).

Section 2. Initial applicability.

(1) This act first applies to petitions filed under section 880.07(1) of the statutes that are pending on the effective date of this subsection.

(END)

The proponents of a law change appear to be State Senator Alberta Darling at the request of the Resnick law firm and others who have a financial interest in this area. The Resnick law firm is the firm which represented the petitioners in the above cases. The case of Yamat v. Verma L.B., 214 Wis. 2d 707 (Ct. App. 1997)(Yamat is one of the attorneys in the Resnick firm who used the money from an elderly woman's bank account during the course of guardianship litigation to pay himself and his employer who represented an opposing party in the case) outlines the various conflicts of interest engaged in by that firm. Unfortunately this area has become a "cash cow" for many lawyers, and there will be a strong effort to restore the lawyers' source of income at the expense of vulnerable adults.

Advocates for the elderly and disabled are strongly opposed to a law change which will continue to undermine the protective service system for the elderly and disabled. The protective service system was designed to protect frail elderly and disabled persons who are not able to care for themselves or make decisions for themselves. Through the use of power of attorney documents and other planning techniques people are often able to plan, while mentally competent, for potential incompetency by selecting who they wish to take over decisionmaking in the event of incapacity or mental incompetence. Unfortunately, when guardianship work became lucrative

for lawyers, these documents were ignored and guardianship petitions were filed despite the planning efforts by the elderly person. Both elderly women in Evelyn O. and Thyra K. had power of attorney documents, yet they were subjected to guardianship petitions and many thousands of dollars in legal fees which could have been better used to provide services to them.

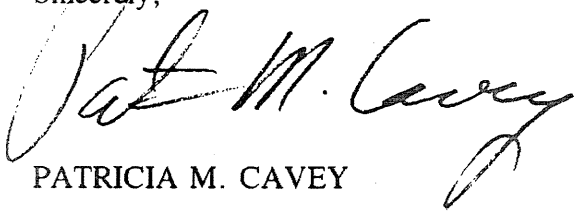
For a number of years before I became an attorney, I worked as a social worker in the protective service system. For more than eleven years my law practice has focused on the protection of vulnerable adults. I have done thousands of guardianships: defense, prosecution and guardian ad litem work. As a practicing lawyer and an advocate for the elderly, I am appalled at the effects of a system which was designed to protect is now becoming focused on protecting the profit for lawyers rather than protecting seniors and the disabled. A system driven by attorney fees with the promised "protection" that the lawyers and judges will be the watchdogs is not protective of people's rights, it is protective of the lawyers' source of income.

Where families decide on their own to hire attorneys to obtain a needed guardian for mom or dad, the family, as the lawyer's client, directs the litigation and controls the expense of litigation. The check-off-the-box form system for guardianships permits any non-lawyer to file a petition with a nominal filing fee of $10.00. After the petition is filed, a guardian ad litem (neutral attorney) is appointed to 1) act in the best interests of the defendant, and 2) protect legal rights. The defendant already pays for the guardian ad litem and defense counsel if they choose to have an attorney. The guardian ad litem can, and has a responsibility to, prosecute the guardianship if that is in the best interest of the defendant. SB 158 adds an additional private, non-neutral lawyer who has no responsibility to the vulnerable adult.

A system which dumps all of the fees in litigation on the defendant is a system with no disincentive to unnecessary and costly litigation and does not insure the needed benefit of professionals who are involved because they have knowledge as to services which may be available to preserve the dignity and autonomy of our frail citizens. SB 158 provides a financial incentive to litigants at the expense of vulnerable adults.

Thank you for your continuing efforts to maintain dignity and respect for seniors and disabled people in Wisconsin.

Sincerely,



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June 18, 1999

Honorable Gary R. George
State Senator
P.O. Box 7882
Madison, WI 53707

Re: Proposed SB 158 (Guardianship Petitioners' Attorney Fee Bill)

Dear Senator George:

Legal Action of Wisconsin, Inc. is the grantee under Title III of the federal Older Americans Act to provide legal assistance to persons over 60 years of age in seven counties in southeastern Wisconsin. One of the practice areas identified in the Older Americans Act is guardianship. Legal Action of Wisconsin, through its SeniorLAW project, has provided representation in guardianship and protective placement proceedings both as defense counsel and as petitioners' attorney.

Regarding the specific issue of forcing guardianship defendants to pay petitioner's attorney's fees, attorneys with Legal Action's SeniorLAW project were defense counsel in the two court of appeals decisions that proposed SB 158 would overturn: Community Care Organization of Milwaukee County, Inc. v. Evelyn O./Community Care Organization of Milwaukee County, Inc. v. Thyra K., 214 Wis. 2d 434, 441, 571 N.W.2d 700 (Ct. App. 1997) and Yamat v. Verma L.B., 214 Wis. 2d 207, 216, 571 N.W.2d 860 (Ct. App. 1995).

Based on this experience, it is our view that proposed SB 158 is both unnecessary and counterproductive to helping frail and vulnerable seniors.

BACKGROUND ON THE CURRENT LAW

The Legislative Reference Bureau analysis describes the current law with respect to guardianship petitioner's inability to shift the costs of the **petitioner's** attorney to the guardianship defendant, but several other aspects of current law are important as well.

1. Literally, any person may start a guardianship action. §880.07(1). This broad authority permits good friends, close relatives, caring church members, etc. to invoke the judicial system to "protect" the guardianship defendant; it also permits

those with venal motives, such as estranged spouses, greedy relatives, creditors, and officious meddlers, to use judicial power against the guardianship defendants, control their money and make the most fundamental life decisions.

2. A guardianship action is simple and cheap to commence. The petition to start a guardianship action under Chapter 880, or a protective placement action under Chapter 55, is a simple, standardized, "check the box" form. The form is available from the Register in Probate. The filing fee is only $15.00.[1]

3. The filing of a guardianship petition triggers the automatic appointment of a guardian ad litem, who must be an attorney. §880.331.

4. The county of venue, or the defendant if ordered by the court, must pay for the court-appointed guardian ad litem -- even if the defendant is competent and successfully proves competency during the litigation. §880.331(8).

5. The guardian ad litem's duty is to advocate for the "best interests" of the guardianship defendant. §880.331(3). If the "best interests" require the guardianship proceeding to be prosecuted, then the guardian ad litem must prosecute the action if the petitioner does not. Guardianship of Agnes T., 189 Wis. 2d 520, 530, 525 N.W.2d 268 (1995).

6. Guardianship defendants must also pay for their own attorney. Guardianship of Claus, 45 Wis. 2d 179, 172 N.W.2d 643, (1969). The defendant has the right to counsel. §880.33(2) The defendant's attorney does not have the same role as the guardian ad litem. In fact, there is an inherent, unwaivable conflict of interest between the role of defense counsel and guardian ad litem. Guardianship of Tamara L.P., 177 Wis. 2d 770, 503 N.W.2d 333 (Ct. App. 1993).

I. A CHANGE IN CURRENT LAW IS NOT NECESSARY TO MAKE IT EASY FOR PETITIONERS TO PROTECT PERSONS WHO REALLY ARE INCOMPETENT.

Under current law and practice, guardianship actions are probably the easiest type of litigation to commence. The petitioner does not have to be a relative, a friend, an agency, or

[1]There is a separate fee (§814.66), based on the value of the estate, that is paid after a guardianship is ordered; the ward's money is already used for that fee.

a service provider. Literally, "any person" can start the process. See §880.07(1)[2]

The guardianship process is easy to commence. There is a simple, "check the box" form. A copy of the standard form is attached to this letter. The form is available from the Register in Probate. As one can tell from the attached form, it does not require an attorney to start guardianship litigation. The specific allegations required by §880.07(1) are preprinted on the standard form. A guardianship petitioner can, of course, choose to hire an attorney to represent the petitioner, but the form is so simple that anyone of a modest education can complete the form sufficient to start the litigation.

As discussed in the next section, the filing of this simple petition triggers a series of protections. Those protections insure both that there will be a lawyer whose duty it is to prosecute the guardianship litigation if the guardianship is in the best interest of the defendant, and that the defendant has a right to counsel if the defendants opposes the taking away of their rights. Thus, for petitioners who are motivated by a genuine desire to help the guardianship defendant, current law and practice set the process in motion with a minimal amount of time and expense. The cost is within everyone's means. Attorneys are not necessary.

The petitioner may, of course, **choose** to hire an attorney to represent the petitioner. That attorney, however, represents **only** the petitioner. Whether the petitioner's objectives are purely charitable or less than honorable, the petitioner's attorney, if the petitioner chooses to have one, represents the petitioner's interests -- whatever they are.

II. A CHANGE IN CURRENT LAW IS NOT NECESSARY TO PROTECT PERSONS WHO REALLY ARE INCOMPETENT BECAUSE CURRENT LAW PROVIDES THAT PROTECTION THROUGH THE GUARDIAN AD LITEM.

Upon the filing of this standardized "check the box" petition, the circuit court is required to order a hearing. See §880.08(1).[3] The petitioner does not have to prove anything before this hearing is ordered. The guardianship petitioner does not need medical experts or evidence. If the guardianship petition is filled out, then a hearing must be ordered.

The ordering of a hearing triggers the appointment of a guardian ad litem. See

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[2]Section 880.07(1) reads, in part: "Any relative, public official or other person, may petition for the appointment of a guardian of a person subject to guardianship."

[3]Section 880.08 reads, in part: "Upon the filing of a petition for guardianship, and the court being satisfied as to compliance with s. 880.07, the court shall order notice of the time and place of hearing as follows:"

§880.331(1).[4] The guardian ad litem must be an attorney. See §880.331(2). The guardian ad litem's duty is to "be an advocate for the best interest of the proposed ward or alleged incompetent as to guardianship, protective placement and protective services." The guardian ad litem is independent and can **not** be one who is "an interested party in a proceeding, appears as counsel in a proceeding on behalf of any party or is a relative or representative of an interested pary." §880.331(2). The guardian ad litem is not the defendant's attorney or the petitioner's attorney or the county's attorney.

The guardian ad litem's role is very specific: it is to advocate for the "best interests" of the defendant.

Case law has established that the independence of the guardian ad litem is so important that the same lawyer can never be the defendant's lawyer in one proceeding and the guardian ad litem in a related proceeding. Guardianship of Tamara L.P., 177 Wis. 2d 770, 503 N.W.2d 333 (Ct. App. 1993). It does not require an **actual** conflict of interest.[5] The roles of the guardian ad litem and the other lawyers are inherently different from each other. The petitioner's lawyer (if any) represents the petitioner. The guardian ad litem, who must always be appointed and always be a lawyer, advocates for the "best interest." The defense lawyer advocates for the defendant's interest, whether or not the defendant's objectives are consistent or inconsistent with the petitioner's interests or the petitioner's view of the defendant's "best interest" or the guardian ad litem's view of the "best interest."

As an independent advocate for the "best interest," it is the guardian ad litem's duty, if a guardianship is in the best interest of the defendant, to see that the litigation is prosecuted. If the petitioner is unwilling or unable (because pro se or for any other reason) to prosecute the litigation, then the guardian ad litem becomes the lawyer whose duty it is to complete the litigation. That is one of the holdings of Guardianship of Agnes T., 189 Wis. 2d 520, 530, 525 N.W.2d 268 (1995). If, for whatever reason, the petitioner does not pursue a guardianship that really is in the best interest of the alleged incompetent, then that task is the guardian ad litem's professional responsibility.

Thus, current law guarantees that there will always be a lawyer who, if a guardianship

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[4]Section 880.331(1) reads: "The court shall appoint a guardian ad litem whenever it is proposed that the court appoint a guardian on the ground of incompentency under §880.33, protectively place a person or order protective services under s. 55.06, review any protective placement or protective service order under under s. 55.06 or terminate a protective placement under s. 55.06."

[5]In Tamara L.P. there was no actual conflict of interest. The role of the guardian ad litem is so inherently different from the role of defense counsel or petitioner's counsel, that the conflict of interest automatically taints the guardian ad litem's independence.

is in the best interest of the defendant, has the duty to prosecute the litigation. Under current law, the petitioner is, of course, free to hire a lawyer at the petitioner's own expense. The petitioner's lawyer, however, represents the petitioner, not the defendant or the defendant's "best interests."

III. PROPOSED SB 158 MAKES THE DEFENDANT PAY FOR A THIRD LAWYER THAT THE DEFENDANT CANNOT CONTROL AND WHO OWES NO DUTY TO THE DEFENDANT OR TO THE DEFENDANT'S BEST INTEREST.

Under current law, the guardianship defendant already can be forced to pay for two lawyers -- the defense lawyer who represents the defendant's wishes, and the guardian ad litem who represents the defendant's "best interest." If the defendant is indigent, the county of venue must pay for these two lawyers. §§880.33(2)(a), 880.331(8).

Proposed SB 158 makes the defendant pay for a third lawyer, but this third lawyer owes no duty to the defendant. By definition, the petitioner's lawyer represents the petitioner. The petitioner's lawyer must seek the **petitioner's** objectives. That is the petitioner's lawyer's ethical duty: to represent the petitioner's interests.

This problem, making the defendant pay for the lawyer of an adversary in litigation, was described by the Court of Appeals in Community Care Organization of Milwaukee County, Inc. v. Evelyn O., 214 Wis. 2d 434, 441, 571 N.W.2d 700 (Ct. App. 1997), as having "to supply bullets to their adversaries." There are myriad ways in which, under proposed SB 158, guardianship defendants would be forced to "supply bullets to their adversaries," **even where the defendant acknowledges the need for a surrogate decision-maker**.

For example, the defendant may be willing to have a voluntary conservatorship under §880.31. A voluntary conservatorship is just that: voluntary. The defendant can choose the surrogate decision maker. The basic purpose of the conservatorship statute is "to eliminate the stigma of incompetency for persons who are forgetful because of age, and yet afford them the protection of the court if they desired it." Estate of Evans, 28 Wis. 2d 97, 100, 135 N.W.2d 832 (1965). The conservator has exactly the same powers as a guardian, but the conservatorship is voluntary. §880.31(3).

Under proposed SB 158, however, the petitioner has a powerful economic incentive to force upon the defendant the stigma of a guardianship, and to force upon the defendant a litigated surrogate decision maker not of the defendant's choosing. Only if a guardian is appointed does the petitioner, under proposed SB 158, get his or her lawyer's fee paid.

In addition to the question of whether the proceeding should be a voluntary

conservatorship or an involuntary guardianship, proposed SB 150 would require defendants to "supply bullets to their adversaries" if the dispute is over who should be the guardian. Disputes of who should be the guardian are common. The defendant and the guardian ad litem may prefer, for example, one adult child who is not the petitioner to be the guardian. If the petitioner can force the defendant to pay the petitioner's attorney's fees, the petitioner can litigate cost-free that issue. Amazingly, under proposed SB 158 the defendant cannot even avoid this litigation expense by designating a surrogate decision maker in a power of attorney for health care. Proposed SB 158 specifically provides that the existence of a power of attorney for health care is **not** sufficient to protect the defendant from having to pay the petitioner's attorney's fees. [See, proposed §880.24(3)(b).]

A third scenario of forcing the guardianship defendants to "supply bullets to their adversaries" is where the petitioner wants to place the defendant in a nursing home, but the defendant or the guardian ad litem support a less restrictive in-home placement, an assisted living apartment, or a community based residential facility.[6] Again, the petitioner has every incentive to litigate. The defendant will be stuck, under proposed SB 158, with the entire bill for the litigation.

IV. THE "CRITERIA" OF PROPOSED §880.24(3)(a) DO NOT SOLVE THE PROBLEM OF DEFENDANTS HAVING TO SUPPLY BULLETS TO THEIR ADVERSARIES, BUT INSTEAD INVITE EXPENSIVE LITIGATION AT THE FULL COST TO FRAIL, VULNERABLE, CITIZENS.

Proposed SB 158 lists five criteria which the circuit court can, in theory, consider to overcome a presumption of petitioner's entitlement to payment of the petitioner's attorney's fees by the defendant. Unfortunately, each of these criteria are "fool's gold": shiny and attractive, but worthless in the real world.

The first criterion is the "petitioner's interest" and whether the petitioner has a conflict of interest in pursuing the guardianship. The proposed statute, however, does not indicate whether a petitioner seeking to have the petitioner named guardian has a "conflict of interest."

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[6]This is exactly the scenario of the Community Care Organization of Milwaukee County, Inc. v. Evelyn O., 214 Wis. 2d 434, 571 N.W.2d 700 (Ct. App. 1997). The defendant's attorney and the guardian ad litem stipulated that the defendants were "fit subjects for a guardianship," but the petitioner sought nursing home placements rather than less restrictive community placements. It is also, in a far more venal setting, the scenario in Yamat v. Verma L.B., 214 Wis. 2d 207, 216, 571 N.W.2d 860 (Ct. App. 1995) where the defendant's son was living with defendant in her home and petitioned for temporary guardianship against his mother to place her in a nursing home; under the temporary guardianship, the temporary guardian, an attorney employed by the son's attorney, paid out $7,000 to himself as temporary guardian and to his employer, the son's attorney.

Certainly an evil child seeking to gain control of a parent's money in order to avoid "wasting" the "inheritance" on services for the vulnerable parent has a conflict of interest. But no evil child -- especially one represented by a lawyer at the parent's expense -- will admit that this is the motive.

A good argument could be made that a petitioner seeking to have the petitioner named guardian **always** has a conflict of interest. A guardian's fiduciary duty is to preserve the ward's estate. This fiduciary duty prevails even if the guardian genuinely believes that the ward would want to divest the ward's estate for tax reasons. Michael S.B. v. Berns, 196 Wis. 2d 920, 540 N.W.2d 11 (Ct. App. 1995). The guardian's fiduciary duty is thus to resist payment of the petitioner's attorney's fees; but under proposed SB 158 the petitioner's (i.e. the guardian's) interest is in having the petitioner's legal fees paid. The court of appeals has already held that an attorney temporary guardian employed by the petitioner's attorney has an "inherent, non-waivable conflict of interest." See, Yamat v. Verma L.B., 214 Wis. 2d 207, 216, 571 N.W.2d 860 (Ct. App. 1995). One of the conflicts in that case was exactly the conflict created by proposed SB 158 -- the payment of the petitioner's attorney's fees.

Another criterion in proposed SB 158 is whether "the guardianship was contested, and, if so, the nature of the contest." Unfortunately, this criterion gives absolutely no guidence on whether the existence of a "contest" weighs for or **against** forcing the defendants to "supply bullets to their adversaries."

If the absence of a dispute weighs in favor of forcing the defendant to pay the petitioner's attorney's fees, then that is exactly the kind of case where fee shifting is **never** necessary under current law. In the **undisputed** case -- where it is clear that a guardian is in the best interest of the ward, and it is clear who the guardian should be and it is clear where the defendant should be protectively placed -- current law **already** provides for a lawyer -- the guardian ad litem -- to ensure that this result is accomplished. In this **undisputed case**, the petitioner's role is finished with the filing of the "check the box" petition and paying the nominal filing fee. The guardian ad litem has the duty **under current law** to ensure that, in this undisputed case, the legal paperwork is done.

This fact suggests that proposed SB 158 intends that the existance of a "contest" on some issue is a criterion that weighs **in favor** of forcing the defendant to pay petitioner's attorney's fees. That, however, gives the petitioner a powerful economic incentive to "contest" on some issue. A petitioner, or more precisely, the petitioner's lawyer, can always create a "contest." The "contest" might be over whether the final order should be a voluntary conservatorship or a forced guardianship, or over who should be the guardian, or over whether the placement should be a locked nursing home or some less restrictive placement. Proposed SB 158 creates a powerful economic incentive for petitioners and their lawyers to create "contests." It similarly creates a powerful "chill" on the exercise of the defendants' rights. To litigate any of these

"contests," guardianship defendants must pay for three lawyers; the petitioners pay for none.

The third problematic criterion in proposed SB 158 is the "ability of the ward's estate to pay the petitioner's" attorney's fees. Every single dollar that is paid out of the ward's estate for petitioner's attorney's fees is one less dollar available to provide for the ward's continuing needs. Is a ward's $100,000 estate sizable enough to finance contentious litigation of at least three attorneys -- defense counsel, the guardian ad litem, and petitioner's attorney? Three legal meters running at the same time will deplete the accummulated wealth of even very affluent citizens.

Unfortunately, all of the litigation over these issues will, under proposed SB 158, be financed by the defendant. For example, if a circuit court awards petitioner's attorney's fees even though the petitioner sought ("successfully") to have the petitioner named guardian, defense counsel and the guardian ad litem have a duty to appeal to clarify the intent of proposed SB 158 over whether this is a conflict of interest under proposed §880.24(3)(a). But who pays for this appeal -- three times over? The wards: the very persons who need their accumulated funds to pay for their care. The very people who have been stripped of the power to manage their own money.

Guardianship litigation is different from probate litigation over a dead person's money. If the beneficiaries of a decedant's estate want to fight in court over who gets how much of the decedant's money, they are eating their own seed corn. The decedant does not need the money. The decedant is dead.

In guardianship litigation, however, the money siphoned off to pay the petitioner's attorney's fees is no longer available to pay for the ward's needs. By definition, the ward has care needs; the ward is, by definition, incompetant, but still living. Proposed SB 158 invites expensive litigation which will drain the ward's estate, leaving the public to pay for the continuing care needs of the ward.

V. PROPOSED SB 158 CREATES A BIZARRE SYSTEM WHEREIN THE GUARDIAN AD LITEM'S COMPENSATION IS CAPPED, BUT THE PETITIONER'S ATTORNEY IS PAID AT FULL MARKET RATES.

The legislature has seen fit to cap the guardian ad litem's compensation at $45 per hour for in court time and $35 per hour for out of court time. See §§880.331, 977.08(4m)(b). These are seriously submarket rates. But it is the guardian ad litem whose statutory and ethical duty it is to advocate for the best interest of the defendants.

Ironically, proposed SB 158 permits full market rates -- "reasonable attorney fees" -- for

the attorney who owes no duty to the defendant or to the defendant's best interests. It is not just a question of "supplying the bullets" to one's adversary. Proposed SB 158 requires supplying a lot more bullets to the adversary's lawyer than to a lawyer whose duty it is to advocate for the best interests of the defendant.

It demeans the service provided by attorneys who fulfill the important function of guardian ad litem at submarket statutory rates to force the guardianship defendant to pay three or four times more for the petitioner's lawyer -- whose duty is to the petitioner and not to the defendant -- than is paid to the attorney whose statutory and ethical duty is to be an advocate for the best interests of the ward.

VI. IF FEE-SHIFTING IS A PERCEIVED "BENEFIT" TO THE WEALTHY GUARDIANSHIP DEFENDANT, THEN THAT "BENEFIT" SHOULD, AS A MATTER OF PUBLIC POLICY, BE AVAILABLE TO THE LOW-INCOME GUARDIANSHIP DEFENDANT.

The proponents of SB 158 will probably claim that the petitioner in a guardianship case provides a "benefit" by "protecting" the guardianship defendants from their incompetency. As discussed above, this "benefit" is accomplished with the filing of the "check the box" form petition and paying the nominal fee to start the guardianship action. That triggers the ordering of a hearing and the appointment of the guardian ad litem.

On a broader, public policy, level, however, if one accepts, even for the sake of argument, that prosecuting a guardianship case is such an important function that the petitioner should be able to do so cost-free, then why is it only the rich and middle-income would "receive" this "benefit?"

Guardianship proceedings serve a very important and legitimate function. They are one way we determine which of our citizens are in need of protection from their own vulnerability. Current law guarantees that there will be a guardian ad litem whose duty it is to see that guardianships in the best interest of the defendant will be accomplished.

But if the justification for proposed SB 158 is that the current law, with the already established duties of the guardian ad litem, is not sufficient protection of the vulnerable, the "cure" of proposed SB 158 -- fee-shifting for the rich -- is repugnant to the fundamental principle of equality. We do not as a society accept that we will provide protection from fire only to those whose estates are large enough to privately pay for the fire department. We do not as a society provide protection from crime only to those whose estates are large enough to privately pay for the police department. The protection provided by guardianship to those vulnerable because of infirmities of aging is no less important than protection from fire and

crime. If some perceive that the current law is not protective enough, and that the cure for this deficiency is that guardianship petitioners should be able to litigate cost-free, then that cure, as a matter of equal justice, should be provided to all citizens. Although, as discussed above, a change in the law is not necessary, if the law is to be changed, then it should be changed to provide an equal protection to those of modest means.

VII. THERE IS NO LIMIT IN PROPOSED SB 158 ON HOW MANY LAWYERS THE DEFENDANT MUST FINANCE.

Proposed SB 158 naively assumes that there is only one possible petitioner in a guardianship proceeding. This is a false assumption. A County Department on Aging might start the litigation by filing a petition and nominating a corporate guardian. One child might file a second petition for guardianship nominating himself or herself to be guardian, arguing that the family was better suited than a corporate guardian. A second child might file a third petition seeking a different guardian.

Under proposed SB 158, do all these petitioners get their fees paid by the defendant? They are all "petitioners." They all have equally legitimate claims to having provided some "benefit" to the defendant. Nothing in proposed SB 158 bars the defendant being force to pay for all three petitioners' three lawyers.

Or, under proposed SB 158 does only the "winning" petitioner force the defendant to pay? This result, of course, creates the economic incentive to "win" in litigation where the only legitimate concern should be the needs of the defendant.

Or, under proposed SB 158 does only the "first in line" force the defendant to pay that petitioner's attorney's fee?

These are not idle questions. Those of us who actually do guardianship litigation -- especially those of us who represent frail and vulnerable elders, rather than hospitals or nursing homes -- know that guardianship litigation can bring out the worst: the cost-cutting of hospitals and nursing homes seeking to dump patients, the pent-up sibling rivalries of the defendant's children, and the greed of prospective heirs.

CONCLUSION

SB 158 is riddled with weaknesses. It is not needed to encourage the filing of guardianship petitions. It is not needed to ensure that a lawyer, the guardian ad litem, will the appointed whose statutory and ethical duty it is to advocate the "best interests" of the defendant.

It will invite litigation by various petitioners for no other reason than to justify the payment of the petitioners' attorneys' fees. Worst of all, it forces the frail, vulnerable elder, the very person who needs her life savings to pay for her care, to pick up the tab for a bunch of lawyers.

The "American Rule" on attorneys fees -- clients are responsibile to pay for the lawyer who represents their interest -- is a good rule for guardianship cases. It is not a barrier to well-intentioned petitioner because they can begin guardianship cases easily with the "check the box" form. The "American Rule" on attorneys fees is, however, a protection for the frail and vulnerable elderly from the money grabbers. Clients pay their own lawyers. Lawyers owe their duties to their client, and no one else. We should not ever lose sight of the fact that the petitioner's lawyer is the **petitioner's** lawyer. Petitioners choose their own lawyers. They should have to pay for their own lawyers.

Sincerely,

Jeffery R. Myer
Litigation Director

Enclosure: Form Petition for Guardianship

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

IN THE MATTER OF THE GUARDIANSHIP OF

_____

_____
Date of Birth

PETITION FOR
☐ GUARDIANSHIP
☐ Temporary ☐ Successor
☐ Permanent ☐ Standby
☐ PROTECTIVE PLACEMENT

File No. _____

Under oath, I petition the court for:
☐ the appointment of the guardian of the ☐ person ☐ estate
☐ protective placement
of the above person, and state that:

1. The interest of the petitioner is _____

2. The proposed ward's
   post office address is _____
   residence is _____
   telephone number is _____

3. The proposed ward is in need of a guardian, of the type checked above, for the following reasons:
   _____
   _____
   _____

☐ 4. This is a family placement in a nursing home or CBRF under §50.06, Wisconsin Statutes, requiring a hearing within 60 days of filing.

5. The proposed ward has or is entitled to:
   ☐ personal property, value: ..... $ _____
   ☐ real estate, value: ..... $ _____
   ☐ social security: ..... $ _____ per month
   ☐ Veterans Administration benefits: ..... $ _____ per month
   ☐ other claims, income, compensation, rent, pension, insurance or allowances, value: .. $ _____
   ☐ medical assistance

6. Of the present assets, $ _____ were derived from the Veterans Administration. The additional information required by the Uniform Veterans Act, if applicable, is _____

7. The present guardian is (if none, so state):
   name: _____ telephone number: _____
   post office address: _____

8. The person nominated as guardian of:
   ☐ person is: _____ telephone number: _____
   post office address: _____
   ☐ estate is: _____ telephone number: _____
   post office address: _____

☐ 9. The person nominated as a standby guardian is:
   name: _____ telephone number: _____
   post office address: _____

PETITION FOR GUARDIANSHIP/PROTECTIVE PLACEMENT

10. The person or institution having the care and custody of the proposed ward is:
name: _____
post office address: _____

11. The names and post office addresses of the spouse, presumptive or apparent adult heirs of proposed ward, and all other interested persons are:

NAME	RELATIONSHIP	POST OFFICE ADDRESS

12. The petitioner believes that the proposed ward should retain the following power(s), if any:
☐ vote ☐ marry ☐ contract ☐ hold or convey property
☐ obtain a motor vehicle operator's license or other state license
☐ other: _____
☐ none

13. If petitioner is requesting protective placement (§ 55.06, Wis. Stats.), complete the following:

a. The proposed ward suffers from the following disability(s):
☐ developmental disability ☐ infirmities of aging ☐ chronic mental illness ☐ other like incapacities
and this disability is permanent or likely to be permanent.
Explain: _____

b. The proposed ward has a primary need for residential care and custody because: _____

c. The proposed ward is totally incapable of providing his or her own care or custody as to create a substantial risk of serious harm to oneself or others. Explain: _____

d. The least restrictive placement for the proposed ward is _____ or like facility and that ☐ a locked ☐ an unlocked unit is appropriate.

Subscribed and sworn to before me
on _____

_____
Notary Public, Wisconsin
My commission expires: _____

_____
Signature of Petitioner

_____
Typed Name of Petitioner

_____
Date

Name of Attorney	
Address	
Telephone Number	Bar Number

BECKER & HICKEY, S.C.

Attorneys at Law

Suite 306
312 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4305

Barbara J. Becker
(Fellow, American Academy of Matrimonial Lawyers)
Margaret W. Hickey

Telephone: (414) 273-1414
Fax: (414) 273-3223

November 5, 1999

The Honorable Gary George
State Senator
P.O. Box 7882
Madison, Wisconsin 53702

The Honorable Fred Risser
State Senator
P.O. Box 7882
Madison, Wisconsin 53702

The Honorable Alice Clausing
State Senator
P.O. Box 7882
Madison, Wisconsin 53702

The Honorable Joanne Huelsman
State Senator
P.O. Box 7882
Madison, Wisconsin, 53072

The Honorable Alberta Darling
State Senator
P.O. Box 7882
Madison, Wisconsin 53702

Dear Senators:

I am writing to you in support of SB 158. I am a constituent of Senator Alberta Darling and the immediate past chair of the Elder Law Section of the State Bar of Wisconsin. My law practice is approximately one-half in the area of elder law which includes guardianship actions.

As you know, the Elder Law Section of the State Bar, and the Milwaukee Bar Association (on which I serve as a Board member) support SB 158. I support this important legislation because it will help individuals who are the most vulnerable in our society. Incompetent individuals are protected by means of guardianship actions. The purpose of a guardianship action is to provide court oversight in the affairs, both personal and financial, of individuals who can no longer manage their own affairs due to disabilities, infirmities of aging, and other causes of incompetence. When a petitioner brings an action for guardianship, the very nature of that petition is to protect the alleged ward and his or her finances. When a guardianship is ordered, the court will routinely order that the guardian of an estate be bonded, provide the court with an inventory of all assets, and provide an accounting to the penny of the ward's assets each year. Again, the purpose of this is to protect the incompetent individual.

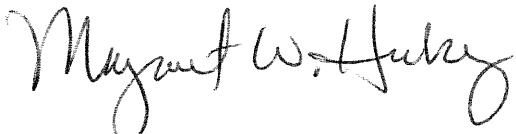
The language of SB 158 will permit individuals who petition for guardianship in Wisconsin to have the attorney's fees for bringing such an action paid out of the estate of the incompetent

individual in some circumstances. The Elder Law Section requested certain changes to this legislation that would allow courts greater discretion to make sure that attorney's fees are not ordered in inappropriate cases. Those changes were made and the legislation as modified will give courts discretion to order fees where appropriate or deny fees where appropriate. SB 158 would reinstate the law as it existed for many years prior to the case called In re the Guardianship and Protective Placement of Evelyn O., 214 Wis. 2d 433 (Ct. App. 1997). Prior to the Evelyn O. case, courts routinely ordered that the fees for the petitioner's attorney be paid out of the ward's estate. I believe that the Evelyn O. case is an aberration given the conflicts of interest that existed in that case. Under SB 158, the court would have discretion to refuse to order fees in a case such as Evelyn O. where the attorneys in the case proceeded despite conflicts of interest.

If SB 158 is not successful, we will continue to see individuals decide not to proceed with a guardianship actions for a family members or friends because they cannot afford to pay a lawyer to assist them in the action. Guardianship actions are complicated and cannot be easily done pro se. Although the County is supposed to handle such guardianship actions for individuals who cannot afford them, this does not occur in Milwaukee County given budget restrictions.

For the reasons stated above, I strongly urge you to approve SB 158 as drafted and move it along for approval in the legislature. Please do not hesitate to call me if you have any questions. Thank you.

Very truly yours,



Margaret W. Hickey

MWH/cao/eld
cc: Mr. Benjamin Adams

Alberta Darling

Wisconsin State Senator

Committee on Judiciary and Consumer Affairs
Senator Gary George, Chairman
November 1, 1999

Testimony submitted by State Senator Alberta Darling
Senate Bill 158

I have introduced Senate Bill 158 to permit payment of petitioner's attorney fees in guardians from the ward's estate in certain cases. This bill is in response to the 1997 case, Community Care of Milwaukee County v. Evelyn O., 214 Wis. 2d 433 (Ct. App. 1997).

In the Evelyn O. case, the Court of Appeals held that an adjudicated ward may not be charged for the petitioner's attorney fees. The court held that attorney fees followed the American rule, that each party paid for its own attorney fees, absent a statute specifically shifting the attorney fees of the "losing" party to the successful party. The petitioners in the case had argued that the attorney fees were payable as a ward's "just debts," under sec. 880.19, Wis. Stats. The court rejected the argument, explaining that the wards in the case clearly had not sought out the petitioners' attorneys' services (indeed the wards had opposed the guardianship) and further, the attorney fees were incurred before the court had declared them incompetent anyway.

As a result of this court case, elder law attorneys, county social service, adult protective service agencies and advocates reported to me that the court decision has made it very difficult for some functionally incompetent individuals to receive the protections of the guardianship system. This is a result of the financial burden on concerned family members about paying the petitioner's attorney fees.

A few individuals have indicated that they believe it would be fundamentally unfair to make an adjudicated ward pay for the proceedings that imposed the guardianship on him or her, and have suggested that individuals can file pro se petitions (costing petitioners no attorney fees) or request that corporation counsel file petitions. Proponents of the bill, however, have pointed out that the filing of pro se petitions can be difficult under the best of circumstances, much less situations where there is great family stress taking place. They have also pointed out that corporation counsel in most counties do not have the resources to assume responsibility for filing all of these petitions. Furthermore, they point out that guardianship should not be perceived as stripping individuals of their rights but rather as providing a conscientious substitute decision-maker to indeed make sure that a competent individual's rights are honored.

After consulting with advocates and attorneys active in guardianship matters, I agreed to author this legislation that I believe will carefully balance the interests of the adjudicated ward.

Capitol Office:

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Madison, Wisconsin, 53707-7882
Phone: 608-266-5830
Fax: 608-267-0588
Toll-free: 1-800-863-1113

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6373 North Jean Nicolet Road
Glendale, WI 53217
Phone: 414-352-7877
Fax: 414-352-7898

Printed on Recycled Paper

The relevant part of the proposal, SB 158, would create sec. 880.24(3), Stats., as follows:

FEES AND COSTS OF PETITIONER. (a) When a guardian is appointed, the court shall award from the ward's estate payment of the petitioner's reasonable attorney fees and costs unless the court finds after considering all of the following…that it would be inequitable to do so:

1. The petitioner's interest in the matter, including any conflict of interest that the petitioner may have had in pursuing the guardianship.

2. Whether the ward had executed a durable power of attorney under s. 243.07, Stats.,* or had engaged in other advance planning to avoid guardianship.

3. The ability of the ward's estate to pay the petitioner's reasonable attorney fees and costs.

4. Whether the guardianship was contested and, if so, the nature of the contest.

5. Any other factors that the court considers to be relevant.

*It is probable that an amendment will be suggested that will also include reference to the ward having previously executed a power of attorney for health care under ch. 155, Stats.

Additional language in the legislative proposal makes clear that the existence of the power of attorney, without at least one of the other factors may not preclude the awarding of attorney fees since, for example, an individual may have a power of attorney that is not comprehensive enough (e.g., only addresses some of their financial interests), so that a guardianship is later necessary. The proposal also identifies that it would first apply to petitions that were pending on the effective date of the law, if and when it passes.

The Elder Law Section of the State Bar of Wisconsin and the Coalition of Wisconsin Aging Groups' Elder Law Center worked very closely with me in drafting the bill's language and are supporting the bill. I am very grateful for their counsel and support.

I urge my colleagues to forward Senate Bill 158 to the full Senate for debate and passage.

Thank you for your consideration. I would be happy to speak to any of you further if you have questions.

STATE BAR of WISCONSIN

Jennifer Boese
Government Relations
Coordinator

RE: SB158

Here's some information on SB158.
A co-sponsorship memo from WI Aging Groups in support and a draft copy of an article that's going to run in next month's Wisconsin Lawyer by Darling.

Supporters of SB158 include both the Elder Law and Real Property, Probate & Trust Law Sections of the State Bar as well as Coalition of WI Aging Groups and Milwaukee Bar Association's Board of Directors.

(608) 250-6045
(800) 444-9404, ext. 6045
jboese@wisbar.org

Jenny

CWAG

Elder Law Center

Coalition of Wisconsin Aging Groups

April 1, 1999

TO: All Legislators

FROM: Tom Frazier and Betsy Abramson

RE: Request for Co-Sponsors of LRB-0036/2
Permitting payment of reasonable Attorney fees and costs
for successful petitioners in Guardianship cases.

Senator Alberta Darling is proposing legislation to correct a serious problem in our guardianship statute. Two recent court cases have held that petitioners in guardianship cases (generally concerned family members) must pay all the attorney fees and other costs in bringing a guardianship petition, even where the court ultimately finds that the individual needs the protections of guardianship. These rulings have resulted in many frail, mentally incompetent individuals not getting the protections of guardianship that they need, despite their estate being able to pay for it, because family members cannot afford the costs.

The bill proposed by Senator Darling balances important concerns in this issue. First, the bill requires that these fees be paid by the ward's estate *only* in cases where a court actually finds an individual incompetent and orders a guardianship. Second, it requires the court to consider an important list of factors before ordering the fees paid, including the reasonableness of the costs, whether the petitioner had a conflict of interest in bringing it, whether the ward had previously executed a power of attorney (so as to avoid guardianship, but the petitioner brought the guardianship only to try to end-run the ward), and, of course, the ward's estate's ability to pay.

In sum, this bill balances the interests in guardianship cases, recognizing that while these cases are generally brought to protect an incompetent individual who is unable to assert his or her own rights, in which case payment of the fees from the ward's estate is generally appropriate. In other cases, however, where a guardianship petition is not brought in good faith, either because of a conflict of interest on the part of the petitioner, to try to un-do the ward's previously-made plans, or other bad motives, the court will not approve the fees.

This bill is supported by the Coalition of Wisconsin Aging Groups and our Legislative Caucus, consisting of representatives from the County Aging Unit Directors, Wisconsin Nutrition Directors, the Wisconsin Association of Area Agencies on Aging, AARP, the Wisconsin Benefit Specialist Association and others.

On the back of this memo is the LRB analysis. We hope you will seriously consider adding your name to the list of co-sponsors. Please call Jim Villa, 266-5830 in Senator Darling's office to let him know if you will co-sponsor this bill.

5900 Monona Drive • Suite 400 • Madison, WI 53716-3554 • 608/224-0660 • FAX 608/224-0607

DRAFT COPY

State Senator Alberta Darling
Senate Bill 158

In May I introduced legislation that would permit in certain guardianship cases, payment of petitioner's attorney fees in guardians from the ward's estate. This bill is in response to the 1997 case, Community Care of Milwaukee County v. Evelyn O., 214 Wis. 2d 433 (Ct. App. 1997).

In the Evelyn O. case, the Court of Appeals held that an adjudicated ward may not be charged for the petitioner's attorney fees. The court held that attorney fees followed the American rule, that each party paid for its own attorney fees, absent a statute specifically shifting the attorney fees of the "losing" party to the successful party. The petitioners in the case had argued that the attorney fees were payable as a ward's "just debts," under sec. 880.19, Wis. Stats. The court rejected the argument, explaining that the wards in the case clearly had not sought out the petitioners' attorneys' services (indeed the wards had opposed the guardianship) and further, the attorney fees were incurred before the court had declared them incompetent anyway.

As a result of this court case, elder law attorneys, county social service, adult protective service agencies and advocates reported to me that the court decision has made it very difficult for some functionally incompetent individuals to receive the protections of the guardianship system. This is a result of the financial burden on concerned family members about paying the petitioner's attorney fees.

A few individuals have indicated that they believe it would be fundamentally unfair to make an adjudicated ward pay for the proceedings that imposed the guardianship on him or her, and have suggested that individuals can file pro se petitions (costing petitioners no attorney fees) or request that corporation counsel file petitions. Proponents of the bill, however, have pointed out that the filing of pro se petitions can be difficult under the best of circumstances, much less situations where there is great family stress taking place. They have also pointed out that corporation counsel in most counties do not have the resources to assume responsibility for filing all of these petitions. Furthermore, they point out that guardianship should not be perceived as stripping individuals of their rights but rather as providing a conscientious substitute decision-maker to indeed make sure that a competent individual's rights are honored.

After consulting with advocates and attorneys active in guardianship matters, I agreed to author this legislation that I believe will carefully balance the interests of the adjudicated ward.

The relevant part of the proposal, SB 158, would create sec. 880.24(3), Stats., as follows:

FEES AND COSTS OF PETITIONER. (a) When a guardian is appointed, the court shall award from the ward's estate payment of the petitioner's reasonable attorney fees and costs unless the court finds after considering all of the following...that it would be inequitable to do so:

1. The petitioner's interest in the matter, including any conflict of interest that the petitioner may have had in pursuing the guardianship.

2. Whether the ward had executed a durable power of attorney under s. 243.07, Stats.,* or had engaged in other advance planning to avoid guardianship.

3. The ability of the ward's estate to pay the petitioner's reasonable attorney fees and costs.

4. Whether the guardianship was contested and, if so, the nature of the contest.

5. Any other factors that the court considers to be relevant.

*It is probable that an amendment will be suggested that will also include reference to the ward having previously executed a power of attorney for health care under ch. 155, Stats.

Additional language in the legislative proposal makes clear that the existence of the power of attorney, without at least one of the other factors may not preclude the awarding of attorney fees since, for example, an individual may have a power of attorney that is not comprehensive enough (e.g., only addresses some of their financial interests), so that a guardianship is later necessary. The proposal also identifies that it would first apply to petitions that were pending on the effective date of the law, if and when it passes.

The Elder Law Section of the State Bar of Wisconsin and the Coalition of Wisconsin Aging Groups' Elder Law Center worked very closely with me in drafting the bill's language and are supporting the bill. I am very grateful for their counsel and support.

There are also 15 legislative co-sponsors on the bill which has been referred to the Senate Judiciary and Consumer Affairs Committee.

Senator Darling represents the 8th Senate District, comprised of portions of Milwaukee, Ozaukee, Washington and Waukesha Counties. Senator Darling is the author of Wisconsin's Sexual Predator and Community Notification laws.

Ensuring Access to Guardianship System

SOME FAMILIES CANNOT AFFORD TO SEEK GUARDIANSHIP OF INCOMPETENT INDIVIDUALS. SENATE BILL 158 ATTEMPTS TO REMEDY THIS SITUATION BY PERMITTING, IN CERTAIN CASES, PAYMENT OF PETITIONER'S ATTORNEY FEES FROM THE ADJUDICATED WARD'S ESTATE.

by Alberta Darling

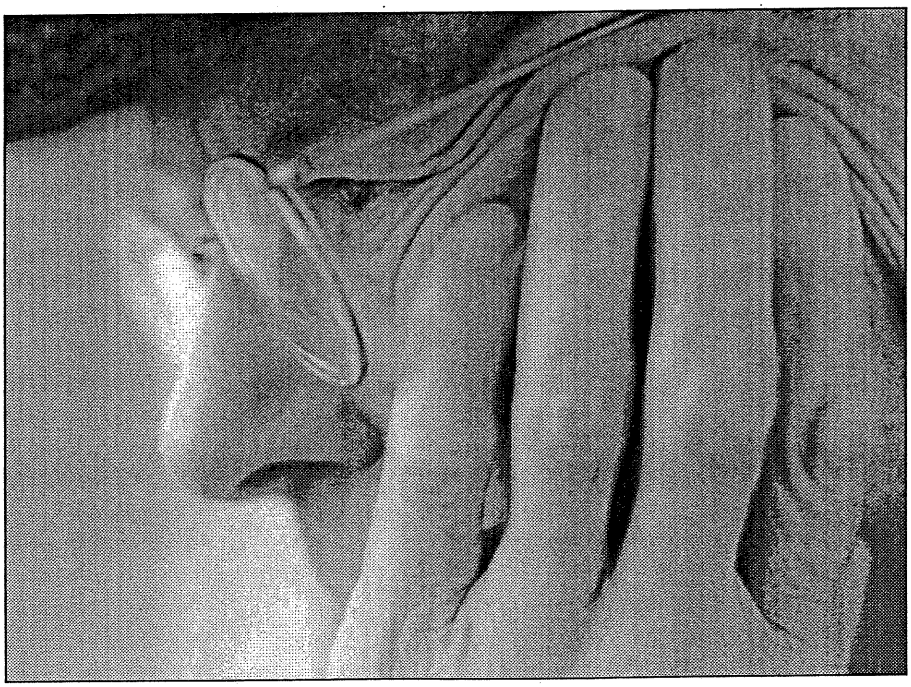
SEN. DARLING REPRESENTS THE 8TH SENATE DISTRICT, COMPRISED OF PORTIONS OF MILWAUKEE, OZAUKEE, WASHINGTON, AND WAUKESHA COUNTIES. SHE IS THE AUTHOR OF WISCONSIN'S SEXUAL PREDATOR AND COMMUNITY NOTIFICATION LAWS.

LAST MAY I INTRODUCED LEGISlation – Senate Bill 158 – that would permit in certain guardianship cases, payment of petitioner's attorney fees from the ward's estate. This bill is in response to the 1997 case, *Community Care of Milwaukee County v. Evelyn O.*[1]

In *Evelyn O.*, the Wisconsin Court of Appeals held that an adjudicated ward may not be charged for the petitioners' attorney fees. The court held that attorney fees followed the American rule – that each party pay for its own attorney fees – absent a statute specifically shifting the attorney fees of the "losing" party to the successful party. The petitioners in the case had argued that the attorney fees were payable as a ward's "just debts" under section 880.19 of the Wisconsin Statutes. The court rejected the argument, explaining that the wards in the case clearly had not sought out the petitioners' attorneys' services (indeed the wards had opposed the guardianship) and further, the attorney fees were incurred before the court had declared the wards incompetent.

As a result of this court case, elder law attorneys, county social services, adult protective service agencies, and advocates reported to me that the court decision has made it very difficult for some functionally incompetent individuals to receive the protections of the guardianship system. This is a result of the financial burden on concerned family members about paying the petitioner's attorney fees.

A few individuals have indicated that they believe it would be fundamentally unfair to make an adjudicated ward pay for the proceedings that imposed the guardianship on him or her. They have suggested that individuals can file pro se petitions (costing petitioners no attorney fees) or request that corporation counsel file petitions. Proponents of SB 158, however, have pointed out that the filing of pro se petitions can be difficult under the best of circumstances, much less in situations in which there is great family stress. They also have pointed out that corporation counsel in most counties do not have the resources to assume responsibility for filing all of these petitions. Furthermore, they point out that guardianship should not be perceived as stripping individuals of their rights but rather as providing a conscientious substitute decisionmaker to ensure



that an incompetent individual's rights are honored.

After consulting with advocates and attorneys active in guardianship matters, I agreed to author this legislation that I believe will carefully balance the interests of the adjudicated ward.

The relevant part of the proposal, SB 158, would create section 880.24(3) of the Wisconsin Statutes, as follows.

Proposed Section 880.24(3)

FEES AND COSTS OF PETITIONER. (a) When a guardian is appointed, the court shall award from the ward's estate payment of the petitioner's reasonable attorney fees and costs unless the court finds after considering all of the following ... that it would be inequitable to do so:

1. The petitioner's interest in the matter, including any conflict of interest that the petitioner may have had in pursuing the guardianship.

2. Whether the ward had executed a durable power of attorney under s. 243.07, Stats.,[2] or had engaged in other advance planning to avoid guardianship.

3. The ability of the ward's estate to pay the petitioner's reasonable attorney fees and costs.

4. Whether the guardianship was contested and, if so, the nature of the contest.

5. Any other factors that the court considers to be relevant.

Additional language in the legislative proposal makes clear that the existence of the power of attorney, without at least one of the other factors, may not preclude the awarding of attorney fees since, for example, an individual may have a power of attorney that is not comprehensive enough (for example, only addresses some of the individual's financial interests), so that a guardianship is later necessary. The proposal also identifies that it would first apply to petitions that were pending on the effective date of the law, if and when it passes.

The State Bar of Wisconsin Elder Law Section and the Coalition of Wisconsin Aging Groups' Elder Law Center worked very closely with me in drafting the bill's language and are supporting the bill. I am very grateful for their counsel and support. The State Bar Real Property, Probate and Trust Law Section supports the bill; the Milwaukee Bar Association's Board of Directors also has voted to support SB 158.

The bill, which has 15 legislative cosponsors, has been referred to the Senate Judiciary and Consumer Affairs Committee.

[1]*Community Care of Milwaukee County v. Evelyn O.*, 214 Wis. 2d 433 (Ct. App. 1997).

[2]It is probable that an amendment will be suggested that also will include reference to the ward having previously executed a power of attorney for health care under chapter 155 of the Wisconsin Statutes.

PROF INSURANCe, 1/2, 2/c

STATE BAR of WISCONSIN

5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

MEMORANDUM

To: **Senate Committee on Judiciary and Consumer Affairs**

From: Elder Law Section
Real Property, Probate and Trust Law Section

Date: November 1, 1999

Re: Support for Senate Bill 158 - Guardianship Proceedings

Both the Elder Law Section and the Real Property, Probate and Trust Law Sections of the State Bar of Wisconsin join the Coalition of Wisconsin Aging Groups and the Milwaukee Bar Association's Board of Directors in strong support of Senate Bill 158, authored by Sen. Darling.

SB 158 was introduced in response to the 1997 case of *Community Care of Milwaukee County v. Evelyn O.*, 214 Wis. 2d 433 (Ct. App. 1997), which held that petitioner's attorney fees in guardianship proceedings were not to be paid for out of the ward's estate, even if the court deems that the guardianship is necessary.

On its face, the implications of *Evelyn O.* appear to be financial in nature (ie: costs of petitioner's attorney fees). Unfortunately, in practice the ramification of *Evelyn O.* has been that needed guardianship proceedings are not being filed because the petitioner, typically a family member, cannot afford to do so. **The result of the *Evelyn O.* decision has been that incompetent individuals who need guardianship are forced to go without its protections.**

SB 158 was introduced to provide the necessary equilibrium between the need for guardianship and the protection of the ward's estate. SB 158 provides this balance by creating several layers of safeguards. First, fees are to be paid out of the ward's estate ONLY if the court orders that guardianship is necessary - a safeguard against bad-faith petitioners. Second, the court awards fees only if it determines, by considering all of the following conditions, whether it is equitable to do so:

1. The petitioner's interest in the matter, including any conflict of interest that the petitioner may have had in pursuing the guardianship.

2. Whether the ward had executed a durable power of attorney under s. 243.07, Stats., or had engaged in other advance planning to avoid guardianship.

3. The ability of the ward's estate to pay the petitioner's reasonable attorney fees and costs.

4. Whether the guardianship was contested and, if so, the nature of the contest.

5. Any other factors that the court considers to be relevant.

SB 158 is the necessary correction to the practical result of the *Evelyn O.* decision. SB 158 provides appropriate safeguards for the ward's estate, maintains court discretion and, at the same time, provides for the protections under guardianship for those individuals who need it most.

The Elder Law Section and the Real Property, Probate and Trust Law Sections urge you to support SB 158.

For more information contact Jenny Boese at the State Bar at 608-250-6045 or 'jboese@wisbar.org'.

STATE BAR of WISCONSIN

5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

October 19, 1999

State Senator Gary George
State Capitol, Room 118 South
Madison, Wisconsin

Dear Senator George:

There are three bills in the Senate Judiciary and Consumer Affairs Committee that we would like to bring to your attention.

Senate Bill 202 is supported by the State Bar Family Law Section. In Mendez v Hernandez Mendez 213 Wis. 2d 217 (Wis. App 1997), the court decided that a married person coming or returning to Wisconsin can no longer end the marriage in Wisconsin courts unless the other spouse also spent some time in the state during the marriage. The bill corrects this jurisdictional problem and will allow our courts to provide a divorce to people who have come or returned to Wisconsin to pursue opportunities or seek safety.

Senate Bill 158 is supported by both the Elder Law and Real Property, Probate and Trust Law Sections of the State Bar. In addition, the Milwaukee Bar Association's Board of Directors also voted to support SB 158. SB 158 is in response to a 1997 case, Community Care of Milwaukee County v. Evelyn O., 214 Wis. 2d 433 (Ct. App. 1997), which did not allow for petitioner's attorney fees to be paid for by the ward's estate. As a result of this case it has been difficult for elder law attorneys, county social services, adult protective services and others to be able to provide for the protection of incompetent individuals within the current guardianship system. SB 158 balances the interests of the ward by establishing guidelines for awarding these fees under the court's discretion.

Senate Bill 117 is supported by the Business Law Section of the State Bar. SB 117 repeals the antiquated bulk transfer provision under Article 6 of the Uniform Commercial Code. UCC Article 6 relates to the transfer of bulk goods and the notice which is required when there is a bulk sale of inventory. The repeal of Article 6 has been recommended by the National Conference of Commissioners on Uniform State Laws and the American Law Institute since 1989 and has already been adopted by 36 other states.

(608) 257-3838 in Madison ❖ (800) 362-8096 in Wisconsin ❖ (800) 728-7788 Nationwide
FAX (608) 257-5502 ❖ Internet: www.wisbar.org ❖ Email: service@wisbar.org

We would appreciate a public hearing on these bills before your committee and we would be happy to further discuss their merits with you.

Thank you for your time and attention.

Sincerely,

Linda

Linda Barth
Public Affairs Director