

^{Legal Advisor}
Bob Anderson is concerned about this bill. Haven't heard back from the State Bar yet.

2 LEGISLATURE

LRB-2451/1

DAK:jld:jf

STATE BILL 257

September 26, 2001 - Introduced by Senators CHVALA and BURKE, cosponsored by Representatives HUBER, LA FAVE, TURNER and RYBA. Referred to Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform.

1 AN ACT *to repeal* 880.24 (3) (b); *to amend* 880.24 (3) (a) (intro.); and *to create*
2 880.24 (3) (a) 1m. of the statutes; **relating to:** payment from a ward's estate of
3 reasonable attorney fees and costs for successful petitioners in incompetence
4 and guardianship proceedings.

Analysis by the Legislative Reference Bureau

Under current law, an individual's relative, a public official, or any other person may petition for a finding of incompetence and appointment of a guardian for the individual. If a court finds, after a hearing that is brought to review the petition, that the individual is incompetent, the court orders appointment of a guardian for the person and estate of the individual (the ward). The court also must award payment, from the ward's estate, of reasonable attorney fees and costs incurred by the person who successfully petitioned for the finding of incompetence, unless, after considering specified factors, the court finds that it would be inequitable to do so. However, if the court finds that the ward had executed a financial power of attorney or power of attorney for health care or had engaged in other advance planning to avoid guardianship, the court may not award this payment from the ward's estate.

* [This bill eliminates the provision prohibiting a court from awarding, from a ward's estate, attorney fees and costs to the person who successfully petitioned for a finding of the ward's incompetence, if the ward had executed a financial power of attorney or power of attorney for health care or had engaged in other advance planning to avoid guardianship. Instead, the bill provides that this action on the part of the ward must be considered as a factor in determining whether it would be



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Nelson, Irvings & Waeffler S.C.

Patricia J. Nelson
Ruth J. Irvings
Alexandra L. Waeffler
Attorneys at Law

FACSIMILE

TO: Senator Gary R. George

FAX No.: 608-266-7381
PHONE No.:

FROM: Alexandra L. Waeffler
Nelson, Irvings & Waeffler, S.C.

RE: Senate Bill 257

DATE: January 14, 2002

SENT BY: Julie D. Miller

NUMBER OF PAGES 3 **(INCLUDING THIS COVER PAGE)**

MESSAGE:

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the address above via the U.S. Postal Service.

THANK YOU.

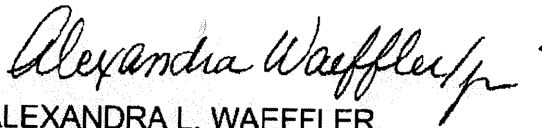
Senator Gary R. George
January 14, 2002
Page 2

action. In that event, all of his father's assets would have been unavailable for his nursing home care, and Title XIX would have been billed for this cost. Surely that was not the legislature's intent in passing this statute?)

2. An elderly woman in a nursing home had powers of attorney for health care and finances. She was not competent. Her son, the agent on both powers, then became incompetent himself, and entered a nursing home. A guardian needed to be appointed to make medical decisions for this woman. None of her children could afford to bring a petition for guardianship.
3. An incompetent woman in Milwaukee had an out-of-state sister as an agent on her financial and healthcare powers of attorney. Local (shirttail) relatives were attempting to persuade this vulnerable woman to change her agent, so that they could have access to her money. I suggested that the out-of-state sister establish a guardianship, and have an in-state guardian appointed to insulate this woman from her predatory relatives. The out-of-state sister could not afford to fund these proceedings.

I believe that there are probably many other circumstances which illustrate the difficulty with this statute. I hope that you will consider the proposed amendment at your earliest opportunity.

Very truly yours,



ALEXANDRA L. WAEFFLER

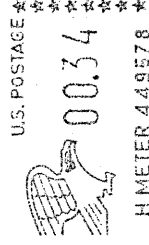
ALW/jdm

cc: Helen Marks Dicks
Wisconsin Coalition on Aging Groups

WILLIAM N. LEEGE, S.C.

Attorneys and Counselors at Law

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OCONTO, WISCONSIN 54153-0104



Senator Gary R. George
Room 118 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

537077882 51



Rossmiller, Dan

From: Ellen Henningsen [ellenh@cwag.org]
Sent: Saturday, January 19, 2002 11:09 AM
To: Dan.Rossmiller@legis.state.wi.us
Subject: SM 257

You had thought SB 257 might be scheduled for hearing before Judiciary the week of Jan 21, but I've been checking the calendar but don't see it yet. Any idea when it might be?

I notice that Dave Begel is on the staff - assuming he's the Dave Begal from WFB, say hi to him from me (Paul Henningsen's sister).

Thanks.

Attorney Ellen J. Henningsen
Guardianship Support Center
Elder Law Center of the Coalition of Wisconsin Aging Groups
2850 Dairy Drive, Suite 100
Madison WI 53718-6751
608-224-0660
fax 608-224-0607
ellenh@cwag.org

HUMAN SERVICES DEPARTMENT

Brown County

MARK A. QUAM
Human Services Director

DATE: January 16, 2002

PLEASE DELIVER THE FOLLOWING TRANSMITTAL TO:

NAME/TITLE: Senator Gary R. George

DEPT./OFFICE/LOCATION: _____

FAX NUMBER: 508-266-7381 NO. OF PAGES SENT: 2

FROM:

NAME/TITLE: Phil Chaudoir, Supervisor

DEPT./OFFICE/LOCATION: Adult Protective Services

SUBJECT/COMMENTS: _____

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BROWN COUNTY DEPARTMENT OF HUMAN SERVICES**ADULT PROTECTIVE SERVICES**

111 N. Jefferson Street, Green Bay, Wisconsin 54301

Phone: (920) 448-4528

January 17, 2002

7th Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform

Attn: Senator Gary George, Chairman

Senator Fred Risser

Senator Robert Wirsch

Senator Joanne Huelsman

Senator Scott Fitzgerald

Dear Senators:

We are writing to express our support of SB257. As part of the statewide Adult Protective Service (APS) system it is not unusual to encounter situations in which a guardianship is needed to stop Power of Attorney agents from mismanaging the affairs of the principle vulnerable adult.

We recognize that, for the most part, Power of Attorneys are a positive and effective vehicle to carry out the wishes and advance directives of a vulnerable adult. When this arrangement with a POA "goes bad" and there is malfeasance the case is brought to the attention of our local APS system. These cases frequently involve a POA who is uncooperative and intent on abusing the principle's assets. The principle, ("vulnerable adult"), now becomes the "victim" of the gross mismanagement by the POA. We have seen cases where POAs have not paid medical and health care providers, facilities, and other service providers for the principle. Further, the POA has not applied for Medical Assistance, and is using the principle's money and/or property for their own benefit or gain. We have seen cases where there is a longstanding history of an adult child having financial dependence on an aging parent. When that individual is acting in the role of Power of Attorney, and their dependence upon the parent's money continues. The option to intervene with a guardianship proceeding in order to stop mismanagement is a last recourse. Usually another family member is the person first aware of the mismanagement on the part of a POA. It is extremely rare that this concerned and responsible family member can afford the cost of attorney fees associated with establishing guardianship in order to stop the actions of an inappropriate Power of Attorney.

The SB257 revisions to Chapter 880 afford the presiding judge the option of approving attorney fees (related to a guardianship proceeding) be paid from the ward's estate. The vulnerable adult ends up paying for the proceeding. However, the vulnerable adult's money may be used for their protection and attorney fees to establish guardianship in order to assure appropriate management of their finances and personal affairs.

Thank you for your consideration.

Sincerely,



Phil Chaudoir
Adult Protective Service Supervisor



Jane Greenwood
Adult Protective Service Specialist

JG/sf



Fond du Lac County

OFFICE OF REGISTER IN PROBATE
(920) 929-3083

City/County Government Center
160 South Macy Street, P.O. Box 1355
Fond du Lac, WI 54936-1355
barbara.fitch@courts.state.wi.us

January 15, 2002

Sen. Gary R. George
Room 118 South
P.O. Box 7882
Madison, WI 53707-7882

RE: Senate Bill 257
Petitioner's Fees for Guardianships

Dear Senator:

I am writing to urge your support for SB 257, which would permit the court to allow payment of attorney fees from a ward's assets even though there is a power of attorney in effect. This legislation is needed for a number of reasons. First of all, some of the petitions for guardianship filed with my office are a result of the agent under the power of attorney using the ward's assets for their own (the agent's) benefit. The petitioner should not have to pay attorney fees when he or she is trying to protect the ward.

The other situation I have run into is that the Veteran's Administration will not accept a power of attorney for incompetent individuals receiving VA benefits. We have had guardianships filed for individuals with valid POA's because the VA refuses to acknowledge the POA. We appointed the same person guardian who was the agent under the POA, so it was not a case where the POA was acting negligently.

In both of these instances, the person petitioning for guardianship is not trying to circumvent the advance planning done by the ward, but is acting in the ward's best interest and should not be penalized by having to bear the cost of attorney fees.

Thank you for your anticipated consideration.

Sincerely,

Barbara Fitch
Register in Probate

Rossmiller, Dan

From: Jenny Boese [jboese@wisbar.org]
Sent: Friday, January 18, 2002 6:22 PM
To: Dan.Rossmiller@legis.state.wi.us
Subject: SB 257

Dan,

The State Bar of Wisconsin supports Senator Chvala's legislation, SB 257, which is currently in Sen. George's committee. If I can do anything to help on this issue please let me know.

Hope you have a nice weekend!

Jenny

Jenny Boese
Senior Government Relations Coordinator
State Bar of Wisconsin
Direct Dial: 608-250-6045
Fax: 608-257-4343
jboese@wisbar.org

ALLIS CARE CENTER

9047 W. GREENFIELD AVENUE • WEST ALLIS, WISCONSIN 53214 • 414-453-9290 • FAX 414-777-7356

January 24, 2002

Senator Gary George
Chair, Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance
Fax # 608-266-7381

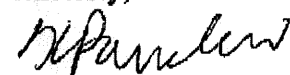
Dear Senator George:

I am writing to ask for your and your Committee's support of Senate Bill 257. Although I am sure the original language in 880.24 was well intentioned, it has proven very problematic for individuals, families, and professionals. As a nursing home social worker for the past seven years, I have encountered many instances in which it was necessary to pursue guardianship, even when there was an existing power of attorney.

Some situations I have encountered include: an individual has only a durable power of attorney, is now incapacitated, and needs nursing home placement and guardianship must be pursued to facilitate nursing home placement; an individual, now incapacitated, may have previously indicated on their power of attorney for health care document that they do not authorize an agent to consent to nursing home placement, thus necessitating a guardianship proceeding to secure nursing home placement; an individual with Alzheimer's dementia has two physicians certifying he/she is incapacitated, but repeatedly attempts to leave the facility to "go home," requiring a protective placement and, consequently, a guardianship proceeding to prevent them from leaving the facility; the sole health care agent moves out of state, provides notice that they no longer want to be an individual's agent, and the individual is in a nursing home, clearly incapacitated, without a legally recognized decision maker, again requiring a guardianship proceeding.

These are just of the few scenarios that I have witnessed in my experience in long term care. The law, as it is now written, puts the financial burden on families, hospitals, and nursing homes, even when in the best interests of the individual or to provide statutory compliance for placement. I believe judges and court commissioners should be granted statutory authority to assess all relevant factors when making a decision about awarding reimbursement of the fees associated with guardianship proceedings. Please feel free to contact me if you have any questions or need any other information. I appreciate your consideration in this matter.

Sincerely,



Katie Panebianco
M.S.W., C.A.P.S.W.

CC: Senator Risser Senator Wirsch Senator Huelsman Senator Fitzgerald



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Sincerely,

Barbara Fitch
Register in Probate

WILLIAM N. LEEGE, S.C.

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WILLIAM N. LEEGE

January 16, 2002

✓ Senator Gary R. George
Room 118 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Senator Fred Risser
Room 220 South
State Capitol
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Senator Robert W. Wirch
Room 316 South
State Capitol
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Senator Joanne Huelsman
Room 5 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Senator Scott L. Fitzgerald
Room 106 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senators:

Re: Senate Bill 257

It is my understanding that the Senate Committee on Judiciary, Consumer Affairs and Campaign Finance Reform may be holding a hearing in the near future in regard to the above Bill introduced by Senator Chvala.

The basic thrust of this Bill would be to allow the Court in a guardianship/protective placement action to award attorney fees/costs to the petitioner despite the fact that the ward had executed advance directives such as a Financial and/or Health Care Power of Attorney.

I do a significant amount of elder law work in Northeastern Wisconsin. I support Senate Bill 257.

WILLIAM N. LEEGE, S.C.
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PHONE (920) 834-2889
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January 16, 2002
Page Two

I encourage many clients to execute advance directives such as financial/medical Durable Powers of Attorney. One of the main reasons that I encourage them to do this is to avoid the cost and complications of a guardianship. None the less, there are a number of occasions where a nursing home or similar facility insists on a protective placement order by the court. This is often due to the fact that the proposed ward has a condition where he or she may become violent or walk away from the premises. In those cases a protective placement order of the court is necessary. However, one cannot get a protective placement order from the court unless it is also accompanied by a guardianship. Perhaps a solution to the problem might be to not require an accompanying guardianship for a protective placement action? You may wish to have your staff investigate that potential. In the meanwhile, I feel that it is important to proceed with Senator Chvala's Senate Bill 257.

Thank you.

Yours very truly,

WILLIAM N. LEEGE, S.C.



By

William N. Leege

WNL/jn

pc; Coalition of Wisconsin Aging Groups
- Attorney Helen Marks Dicks

NIW

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Ruth J. Irvings
Alexandra L. Waeffler
Attorneys at Law

Anne L. DeLeo
Of Counsel
Jean Trimble
Legal Assistant

January 14, 2002

VIA FACSIMILE
608-266-7381

Senator Gary R. George
Madison, Wisconsin

Re: Senate Bill 257

Dear Senator George:

I am writing to you in support of this bill. Section 880.24(3) Wis. Stats. currently prohibits a court from awarding attorney fees to a petitioner from the guardianship ward's estate if there has been a prior advance directive for either health care or finances. Three of my cases since 880.24(3) became law illustrate why this statute needs revision:

1. An elderly man (widower, with one child) hospitalized with a stroke was unable to communicate in any way. A few years ago, he had executed a health care power of attorney, but he never executed a durable power of attorney for finances. After a period of hospitalization, his son placed him in a nursing home, using the authority of the health care power of attorney. However, there was no legal way to access any of his funds for purposes of nursing home payment, as nobody had the authority to do so. In addition to the nursing home bill, the father had other bills, including mortgage payments, that needed to be paid immediately. In order to handle these financial matters, his son, with my assistance, established a guardianship of the estate for his father. The court commissioner refused to authorize attorney fees, even though we sought only a guardianship of the estate and even though the only prior advance directive was for health care. The reason for this is that the unfortunate wording of this statute has a blanket prohibition against awarding a fee where any prior advance directive has been executed, regardless of whether the nature of the authority given by the advance directive is totally irrelevant to the authority sought in the guardianship petition. The son was financially unable to pay the attorney fee himself. There is no logical reason to prevent the award of attorney fees from the ward's estate under these circumstances. (I suppose I could have suggested to the son that he take no

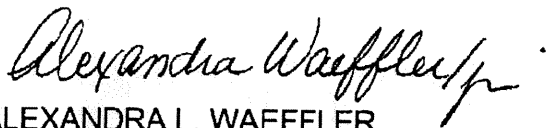
Senator Gary R. George
January 14, 2002
Page 2

action. In that event, all of his father's assets would have been unavailable for his nursing home care, and Title XIX would have been billed for this cost. Surely that was not the legislature's intent in passing this statute?)

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I believe that there are probably many other circumstances which illustrate the difficulty with this statute. I hope that you will consider the proposed amendment at your earliest opportunity.

Very truly yours,



ALEXANDRA L. WAEFFLER

ALW/jdm

cc: Helen Marks Dicks
Wisconsin Coalition on Aging Groups

HUMAN SERVICES DEPARTMENT

Brown County

MARK A. QUAM
Human Services Director

DATE: January 16, 2002

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NAME/TITLE: Senator Gary R. George

DEPT./OFFICE/LOCATION: _____

FAX NUMBER: 608-266-7381 **NO. OF PAGES SENT:** 2

FROM:

NAME/TITLE: Phil Chaudoir, Supervisor

DEPT./OFFICE/LOCATION: Adult Protective Services

SUBJECT/COMMENTS: _____

Re: SB 257

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BROWN COUNTY DEPARTMENT OF HUMAN SERVICES**ADULT PROTECTIVE SERVICES**

111 N. Jefferson Street, Green Bay, Wisconsin 54301

Phone: (920) 448-4528

January 17, 2002

7th Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform

Attn: Senator Gary George, Chairman

Senator Fred Risser

Senator Robert Wirch

Senator Joanne Huelsman

Senator Scott Fitzgerald

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Thank you for your consideration.

Sincerely,

Phil Chaudoir
Adult Protective Service SupervisorJane Greenwood
Adult Protective Service Specialist

JG/sf