SB257 2 of 2

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 2-13-2002

BILL NO. SB 257
or
SUBJECT

James A. Jaeger
(NAME)
2158 Atwood Ave
(Street Address or Route Number)
Madison WI 53704
(City and Zip Code)
State Bar of Wisconsin, Elder Law section
(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.
Senate Sergeant–At–Arms
State Capitol – B35 South
P.O.Box 7882
Madison, WI 53707–7882

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 13 Feb 2002

BILL NO. SB 257
or
SUBJECT

William Donaldson
(NAME)
214 N Hamilton St
(Street Address or Route Number)
Madison 53703
(City and Zip Code)
Board on Aging & Long Term Care
(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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State Capitol – B35 South
P.O.Box 7882
Madison, WI 53707–7882

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 2/13/02

BILL NO. SB257
or
SUBJECT SB257

Helen Marks Dicks
(NAME)
250 Davey Drive
(Street Address or Route Number)
Madison Wi 53718
(City and Zip Code)
Coalition of Wisconsin 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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Madison, WI 53707–7882

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 2-13-02

BILL NO. SB 257
or
SUBJECT

Patricia Cavey
(NAME)

405 E. Lincoln
(Street Address or Route Number)

Milwaukee WI 53207
(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: ☐

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Madison, WI 53707-7882

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 2/13/2002

BILL NO. S 257
or
SUBJECT ATTORNEYS FEES IN prosecuting guardianship

JEFFERY R. MYER
(NAME)

230 W. Wells
(Street Address or Route Number)

Milwaukee WI 53203
(City and Zip Code)

LEGAL ACTION OF WISCONSIN
(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: 2/13/02

BILL NO. SB 257
or
SUBJECT

Dianne Greenley
(NAME)

16 N. Carroll
(Street Address or Route Number)

Madison WI 53711
(City and Zip Code)

WI Coal. for Advocacy
(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: FEB 23, 2002

BILL NO. SB 257 +

or

SUBJECT ATTORNEY FEES' ESTATES

JEFF WISWELL

(NAME)

TENNEY PLAZA, #802

(Street Address or Route Number)

MADISON, WISC.

(City and Zip Code)

WIS. SHERIFFS & DEPUTY

(Representing) SHERIFFS ASSOC.

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: 2-13-02

BILL NO.

or

SUBJECT SB257

JENNY BOESE

(NAME)

PO BOX 7158

(Street Address or Route Number)

MADISON, WI 537

(City and Zip Code)

ELDER LAW SECTION OF

(Representing) ~~THE~~ STATE BAR

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: 2-13-02

BILL NO.

or

SUBJECT SB257

JENNY BOESE

(NAME)

PO BOX 7158

(Street Address or Route Number)

MADISON, WI

(City and Zip Code)

REAL PROPERTY, PROBATE & TRUST

(Representing) LAW SECTION OF THE STATE BAR

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

Rossmiller, Dan

From: Pat Cavey [pcavey@execpc.com]

Sent: Wednesday, February 13, 2002 12:23 AM AM

To: dan.rossmiller@legis.state.wi.us

Cc: pcavey@execpc.com

Subject: OPPOSE SB 257

I would like to register my opposition to SB 257 as a public interest lawyer. In that capacity I have been involved in thousands of guardianship court proceedings. I have filed petitions for guardianships. I have served as guardian ad litem and defense counsel. I am appalled that SB 257 is pitched as a way of "protecting" vulnerable adults. The proponents of the original amendment to 880.24 (private attorneys looking for an easy source of attorney fees) agreed, at that time, that they would respect life planning or power of attorney documents and "only" sought fees when they determined that a guardianship should be filed. Greed is such a motivating factor that these private attorneys cannot limit their "practice" to representing clients as other lawyers must. They seek a self-appointed role of private attorney general so that anyone may call them, express concern about a vulnerable person and this private lawyer should be insulated from the financial risk of having a client pay for their lawyer's services, an alleged vulnerable person should be denied a referral to a qualified protective service worker and be subject to loss of their estate to fund litigation which, if they have created an effective power of attorney document, should insulate them from guardianship litigation. The argument seems to be that: woe is me-- these vulnerable people need the private attorney (to represent someone else) and that the vulnerable person's estate is best used by the private attorney for fees rather than being used for the vulnerable person's care. Every dollar taken from the vulnerable person by the private attorney (who is not their lawyer) is one less dollar available for needed care and one more Medicaid dollar which must be spent on care.

EXAMPLES: 1) Milwaukee County: a hospital does not agree with the family/power of attorney agent and principal's decision to return home rather than accept a transfer to a nursing home. The hospital (with their private attorney) initiates a guardianship so that a nursing home transfer can be accomplished without the knowledge or consent of the patient or agent. The hospital refuses to tell the agent where the family member was discharged to. The patient/nursing home resident calls the family member and advised him of her location. Upon coming to the nursing home, the nursing home social worker asks the family member how he was able to find the relative and is advised that she called him. The nursing home social worker states that he didn't think she was incompetent but also states the behavior of the hospital is not uncomman. The nursing home social worker was unaware of the fact of the power of attorney documents. Threatened with a lawsuit, the hospital and their private attorney agree to dismiss the guardianship without payment of costs. Because of the hospital's behavior, the nursing home resident incurred costs for her attorney and was discharged to her home saving the State of Wisconsin thousdands of dollars in potential Medicaid payments to the nursing home.

EXAMPLE 2: Waukesha County: an elderly woman with valid power of attorney documents residing in an assisted living facility is advised by the facility that her family must pursue a guardianship because the state requires a guardianship for her because of some change in licensing. The first attorney the family approached advised them to just get a guardianship--no big deal. The family is incensed that their mother's wishes are not respected via her power of attorney documents; that they should be able to handle their family business without lawyers and without court involvement. The supposed authority for the order that all those with POA's must get guardianships is baffled by the misunderstanding of the assisted living facility but admits that they have received numerous calls. There is apparently some understanding that guardianships are good things to have or better than POAs so everyone should have them AND if you don't have a lawyer the facility can refer you to a private lawyer for no cost-no worries--the attorney fees come from the vulnerable person. The private elder law/divestment attorneys have done enough marketing to convince institutions that they must get guardianships.

EXAMPLE 3: DANE/SHEBOYGAN COUNTY: An attorney employed by the State of Wisconsin is informed that her relative's POA is not as good as a guardianship and that the family must pursue a guardianship (same "policy" as Example 2). The state employee/attorney/family member contacts Coalition for Wisconsin Aging Groups and is informed by this organization that she should just get a guardianship--it's such an easy thing to do. She is also informed that this organization does not represent guardianship defendants or people seeking to enforce their power of attorney documents. The state attorney/family member/agent decides to hire an attorney to enforce her relative's advance directives and is hopeful to correct the misunderstanding that guardianships must be sought even when there is a pre-existing POA document. This nursing home resident is on Medicaid so the costs of the court proceeding and advocate attorney and guardian ad litem will be funded by State Medicaid dollars which could otherwise be used for patient care.

EXAMPLE 4: MILWAUKEE COUNTY: A private attorney drafts valid power of attorney documents for his elderly

client. Months later another elderly person contacts this same lawyer complaining that the first client should not be spending her money to live in her own home but should be in a nursing home. This private attorney agrees to file a guardianship against his first client and represent the second client in a guardianship and informs his new client that the first client will pay for the fees. The agent under the POA is incredulous that baseless allegations and personal opinion of how someone is living causes the triggering of the court system and violation of attorney/client privilege. The guardianship is eventually dismissed but not without incurring thousands of dollars in guardian ad litem fees and defense fees. The elderly client continues to live in her home and she is happily paying for 24 hour care out of her own pocket with the oversight and assistance of her power of attorney agent. Without defense counsel, this woman would have paid thousands of dollars to her former attorney who ignored a clear conflict and filed a guardianship against her. Without a defense attorney, she would have been placed in a nursing home, used up her resources and been placed on Medicaid. An easy "divestment" plan for the first lawyer--first pay the lawyers, use what's left for the nursing home --no worries-- Medicaid will pick up the tab.

EXAMPLE 5: OUTAGAMIE COUNTY: A valid guardianship is ordered for a disabled person upon her reaching majority with her father appointed as her guardian. Father and daughter are satisfied with the guardianship but the mentally deranged ex-wife/mother wants to use guardianship court as a forum to act out her mental illness. The father spends thousands of his own dollars to defend his daughter's guardianship. The daughter is indigent. No one proposes that the county should pick up the tab for this litigation. If the daughter had money, should she have to fund her mother's litigation?

Necessary protections are lost when private attorneys have an incentive to file guardianship cases against people especially when their source of payment is from someone other than their client. Likewise, leaving the decision as to when a guardianship is filed to the institution social worker who has a vested financial interest in the patient being admitted to the facility or continued stay at the facility does not provide the neutral protective service to which vulnerable people are entitled. Especially when they have planned, in advance, to avoid guardianship. Once the court papers have been filed, the individual has already been transferred to an institution. The damage is done and is often irrevocable. Last week the Wisconsin Court of Appeals, District I recognized the abuse of the guardianship system by private attorneys. Despite this decision and clear caselaw to protect vulnerable adults from fee shifting, it is not surprising that the Wisconsin State Bar would support a system whereby private attorneys can make a fee off of vulnerable people. The State Bar has not, however, presented to the Legislature the fact that the Public Interest Section of the State Bar took a position to strongly oppose SB 257. The State Bar took the unprecedented position to support one Section's goal to make money over another Section's interest in the public and the integrity of the law.

For the above reasons, I ask that the Judiciary Committee show the vulnerable people of the State of Wisconsin that they are more important than lining the pockets of private attorneys. OPPOSE SB 257

Attorney Patricia M. Cavey
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Milwaukee, WI 53207
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pcavey@execpc.com

STATE OF WISCONSIN
BOARD ON AGING AND LONG TERM CARE
214 North Hamilton Street
Madison, WI 53703-2118
Medigap Helpline (800) 242-1060
Fax (608) 261-6570
http://longtermcare.state.wi.us

Testimony of the Board on Aging and Long Term Care
Before the Wisconsin Senate
Committee on the Judiciary, Consumer Affairs and Campaign Finance
13 Feb 2002

Good Morning, Sen. George and members of the Committee. I am William P. Donaldson, Counsel to the Board on Aging and Long Term Care. I am hear today to express the support of this agency for SB 257.

As advocates for residents of long term care facilities, our Long Term Care Ombudsmen frequently encounter situations where indigent residents are found to be in need of guardianship and protective placement to assure their rights, safety and well-being. In some cases, it is the case that an agent under a durable power of attorney for health care is not acting according to the expressed wishes of the principal or is unable to do so. Unfortunately, the economic disincentives placed on facilities, counties and interested third parties by the current language of the statute is sometimes a very real impediment to the prompt satisfaction of the resident's need. Where an agent would be faced with the expense of securing a guardianship or when a county, a facility or a third party would be a petitioner in this kind of process, our agency has seen the costs of obtaining a guardianship become a cause of delay in the process.

> An Ombudsman reports having been called by a facility in a situation where a DPOA-HC was clearly acting in a way that contradicted the principal's stated wishes relating to medical treatment as expressed in writing and verbally to the facility staff. When asked about the facilities concern's, the agent stated her intent to do "as she thought best" rather than follow the statutory requirement to respect the principal's direction. The facility was advised of the option to seek guardianship if further counsel with the agent was unsuccessful The facility staff dismissed that option out-of-hand due to the potential costs of the process.

In the case above, the agent did not fully acknowledge the resident's wishes, neither the facility nor the county Department of Health and Social Services sought a guardianship, and, to our knowledge, the resident's interest in controlling her own care has yet to be completely fulfilled. Passage of SB 257 would ease this sort of burden on the care providers, counties and interested third parties and simplify the process of protecting the interests of vulnerable individuals in this sort of situation.

The Board on Aging and Long Term Care asks that you quickly move to recommend passage of SB 257.

CWAG

Elder Law Center

Coalition of Wisconsin Aging Groups

TO: Senate Judiciary Committee

FROM: Helen Marks Dicks, Director
Elder Law Center of the Coalition of Wisconsin Aging Groups

RE: **2001 Senate Bill 257**
Relating to payment from a ward's estate of reasonable attorney's fees and costs for successful petitioners in incompetence and guardianship proceedings

DATE: February 13, 2002

The Coalition of Wisconsin Aging Groups' Elder Law Center strongly supports the passage of 2002 Senate Bill 257. This bill remedies a serious problem with current guardianship law, one that creates unnecessary financial hardships for the families of wards and provides a significant barrier to obtaining guardianships when it is in the best interests of the ward. We request your favorable consideration of this bill.

Currently, a judge who has granted a petition for guardianship has the discretion, after considering several listed factors, to determine whether or not to order that the petitioner's attorney's fees and costs be paid out of the ward's estate. However, current law prohibits judges from exercising their discretion if the ward had previously executed a financial power of attorney or a power of attorney for health care or had engaged in other advance planning. Senate Bill 257 removes this blanket prohibition and authorizes judges to consider the existence of advance planning as one of several factors used to determine whether the ward's estate should pay for the petitioner's attorney's fees and costs.

The Coalition's Elder Law Center runs the Guardianship Support Center Hotline, which receives thousands of calls a year from families, nursing homes, elders and others who have questions about powers of attorney and guardianships. We know from these calls that there are many circumstances where the current law creates an inappropriate hardship on people acting in the best interests of an incapacitated family member, and provides an unnecessary, indeed harmful, disincentive to begin guardianship proceedings. There are simply many cases where the ward had previously executed a financial power of attorney or a power of attorney for health care, but a guardianship was nevertheless *essential* to protect the best interests of the ward. There is no sound public policy that should prohibit the award of petitioner's attorney's fees and costs from the ward's estate under these circumstances.

2850 Dairy Drive • Suite 100 • Madison, WI 53718-6751 • 608/224-0660 • Fax 608/224-0607

Senate Judiciary Committee
2001 Senate Bill 257
February 13, 2002

Here are a number of examples of circumstances where a guardianship is needed despite the existence of a power of attorney document. In all of these circumstances, present law prohibits a judge from awarding petitioner's fees and costs from the ward's estate. SB 257 would permit the judge to award petitioner's fees and costs from the ward's estate in these circumstances.

1. The agent (or alternate) under a Power of Attorney for Health Care or a Power of Attorney for Finances has died or become incapacitated, and thus there is no one authorized to make an incapacitated principal's health care or financial decisions. Guardianship of the person, estate or both must be pursued.

2. The principal revokes his or her Power of Attorney for Health Care after incapacity. Although revocation after incapacity is permitted by chapter 155, creation of a new document is not. Therefore, no one is authorized to make health care decisions for the principal and guardianship of the person must be sought.

3. The incapacitated principal objects to the decisions being made by the health care agent. Therefore, the agent is not authorized to make these health care decisions, and a guardianship of the person must be sought.

4. The principal had named the spouse as agent under a Power of Attorney for Health Care, but the marriage subsequently ends in divorce. The document is invalidated pursuant to sec. 155.40 (2). If the principal then becomes incapacitated without executing another document, a guardianship of the person must be sought.

5. A family gets an incapacitated nursing home resident to sign either a Power of Attorney for Health Care document or a Power of Attorney for Finances document. The nursing home staff, believing that the principal was not of sound mind as required by law, refuses to witness the document. The family then gets witnesses outside the facility. The nursing home refuses to honor the document because it was not done voluntarily or while the principal was of sound mind, and tells the family to get a guardianship. The family refuses, and the facility must initiate guardianship proceedings.

6. The agent under a Power of Attorney for Health Care neglects his or her responsibilities and is not available to make health care decisions on behalf of the incapacitated principal. If the principal did not select an alternate, or if the alternate is also neglectful, a guardianship of the person must be pursued.

7. The agent under a Power of Attorney for Finances is abusing his or her fiduciary responsibilities by using the principal's money for the agent's benefit. A guardianship of the estate must be pursued in order to stop the financial abuse.

8. The principal executed a Power of Attorney for Health Care but not a Power of Attorney for Finances. The principal is incapacitated but, because there is no Power of Attorney for Finances, no one is authorized to manage the principal's estate. A guardianship of the estate is therefore needed to file tax returns, pay bills, etc.

9. The principal executed a Power of Attorney for Finances but not a Power of Attorney for Health Care. The principal is incapacitated but, because there is no Power of Attorney for Health Care, no one is authorized to make health care decisions. Therefore, a guardianship of the person is needed.

10. The Power of Attorney for Health Care is invalid because certain legal requirements have not been met, but these flaws are not discovered until after the principal has become incapacitated. (Frequent errors are failure to have the principal's signature witnessed properly, or to include the appropriate notice provisions.) Because the document is invalid, a guardianship of the person must be pursued.

11. The principal executed a Power of Attorney for Health Care but did not expressly authorize nursing home admission for long-term care as required by ch. 155. If nursing home admission is appropriate, a guardianship of the person and protective placement is needed.

These examples illustrate that there are countless situations where guardianship is in the best interests of the ward, even though the ward had previously executed a Power of Attorney for Health Care, a Power of Attorney for Finances, or both. Petitioners are not overreaching in these circumstances; they are simply doing their best to protect their family members.

It is fundamentally unfair that petitioners should have to bear the financial burden of the fees and costs associated with a guardianship proceeding in these circumstances. Many families and friends, although willing to take on the emotional burden and commitment of time, simply cannot afford to pay for guardianship proceedings for a loved one. Therefore, already overworked county staff will have to initiate guardianship proceedings. If they decline to do so, guardianships will not be pursued at all. This is not sound public policy.

SB 257 is sound public policy. A judge should not be prohibited from considering the existence of a Power of Attorney as one of the factors in determining whether the ward's estate should pay for petitioner's fees and costs.

Thank you for your consideration.

STATE BAR of WISCONSIN®
5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

MEMORANDUM

To: Members of the Senate Judiciary, Consumer Affairs and Campaign Finance Reform Committee

From: State Bar of Wisconsin
Elder Law Section
Real Property, Probate and Trust Law section

Date: February 13, 2002

Re: Senate Bill 257 - Petitioners Attorneys Fees

The State Bar of Wisconsin, its Elder Law Section and Real Property, Probate and Trust Law Section support Senate Bill 257, corrective legislation to address language enacted under 1999 Act 183.

The State Bar of Wisconsin urges your support of SB 257.

History
In the 1999-2000 session, the Elder Law Section and the Real Property, Probate and Trust Law Section (RPPT) worked to see legislation enacted which allowed the court to award petitioners attorneys fees out of a ward's estate only after a list of factors was considered and it was then deemed equitable to award reasonable fees. The Elder Law Section drafted the legislation and worked for several years to see the changes enacted under Act 183. Others supporting the law were the Coalition for Wisconsin Aging Groups and the Milwaukee Bar Association.

However, the original legislation was amended late in the legislative process to include one prohibition on awarding fees—in cases where the ward had executed a durable power of attorney, power of attorney for health care or had engaged in other advance planning to avoid guardianship.

Senate Bill 257
Senate Bill 257 is simple legislation which makes one change to the original law – it removes the prohibition and, instead, takes the law back to how it was originally drafted. In sum, SB 257 removes the prohibition on awarding fees if a ward executed a power of attorney for finances or a health care power of attorney and makes it a factor that must be considered before deciding whether it is equitable to award fees (or not to award fees).

The State Bar of Wisconsin, its Elder Law and RPPT Law Sections urge your support of this corrective measure.

WISCONSIN COALITION FOR ADVOCACY

THE PROTECTION AND ADVOCACY SYSTEM FOR PEOPLE WITH DISABILITIES

February 13, 2002

To: Members of Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform

From: Dianne Greenley
Wisconsin Coalition for Advocacy

Re: Senate Bill 257 - Payment of Attorney Fees in Guardianship Cases

The Wisconsin Coalition for Advocacy opposes Senate Bill 257 which removes the protection from having to pay attorney fees in guardianship cases for individuals who have engaged in reasonable advance planning in order to avoid guardianship. It seems particularly unfair to charge an individual's estate for attorney fees and other costs for a guardianship proceeding which the person may contest and which the person has tried to avoid.

We understand that situations have arisen in which the person who is the agent under a power of attorney becomes incapacitated and a successor has not been named or the agent is misusing the individual's funds. In these cases guardianship may be needed in order to protect the person. In addition, cases may arise where the power of attorney does not address the issue which is the subject of the guardianship, for example, the person has a health care power of attorney and needs a guardian of the estate. However, we believe that these situations can be handled by a different approach than that put forth in S. B. 257. We propose that the current Section 880.24 (3)(b) be amended as follows:

(b) If the court finds that 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, the court may not make the award specified in par. (a) unless the court finds that the agent is unable or unwilling to act and no alternate agent has been named, that the agent has engaged in misconduct or is not performing his/her duties in accordance with the terms of the power of attorney instrument, or the power of attorney does not cover the issues which are the subject of the guardianship.

This approach would retain the prohibition on payment of fees when the individual has engaged in advance planning, but would allow the payment of fees in those extraordinary situations when the agent is unable or unwilling to perform and there is no alternate, when the agent is abusing his/her power, or when the agent's powers do not cover the issues underlying the need for guardianship. We believe that this more focused solution provides better protection for the individual who may be facing incompetency and needs a substitute decision-maker.

Madison office: 16 North Carroll Street, Suite 400, Madison, WI 53703 Voice & TDD 608 267 0214
Fax 608 267 0368 Toll Free 800 928 8778 (consumers & family members only)

PATRICIA M. CAVEY
Attorney - at - Law

OPPOSE SB 257

I would like to register my opposition to SB 257. As a public interest lawyer, I have been involved in thousands of guardianship court proceedings. I have filed petitions for guardianships. I have served as guardian ad litem and defense counsel.

I am appalled that SB 257 is pitched as a way of "protecting" vulnerable adults. The proponents of the original amendment to § 880.24 (private attorneys looking for an easy source of attorney fees) agreed, at that time, that they would respect life planning or power of attorney documents and would "only" seek fees when they determined that a guardianship should be filed. Greed is such a motivating factor that these private attorneys cannot limit their "practice" to representing clients as others lawyers must. They seek a self-appointed role of private attorney general so that anyone may call them, express concern about a vulnerable person and this private lawyer should then be insulated from the financial risk of having a client pay for their lawyer's services. The self-appointed private "attorney general," then denied the alleged vulnerable person a referral to a qualified protective service worker and subjects the guardianship defendant to the loss of their estate to fund litigation which, if they have created an effective power of attorney document, should insulate them from guardianship litigation. The argument seems to be that: woe is me--these vulnerable people need the private attorney (to represent someone else) and that the vulnerable person's estate is best used by the private attorney for fees rather than being used for the vulnerable person's care.

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EXAMPLE 1) MILWAUKEE COUNTY: A hospital does not agree with the family/power of attorney agent and principal's decision to return home rather than accept a transfer to a nursing home. The hospital (with their private attorney) initiates a guardianship so that a nursing home transfer can be accomplished without the knowledge or consent of the patient or agent. The hospital refuses to tell the agent where the family member was discharged to. The patient/nursing home resident calls the family member and advised him of her location. Upon coming to the nursing home, the nursing home social worker asks the family member how he was able to find the relative and is advised that she called him. The nursing home social workers states that he didn't think she was incompetent but also states the behavior of the hospital is not uncommon. The nursing home social worker was unaware of the fact of the power of attorney documents. Threatened with a lawsuit, the hospital and their private attorney agree to dismiss the guardianship without payment of costs. Because of the hospital's behavior, the nursing home resident incurred costs for her attorney and was discharged to her home saving the State of Wisconsin thousands of dollars in potential Medicaid payments to the nursing home.

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

PATRICIA M. CAVEY
Attorney - at - Law

EXAMPLE 2): WAUKESHA COUNTY: An elderly woman with valid power of attorney documents residing in an assisted living facility is advised by the facility that her family must pursue a guardianship because the state requires a guardianship for her because of some change in licensing. The first attorney the family approached advised them to just get a guardianship--no big deal. The family is incensed that their mother's wishes are not respected via her power of attorney documents. The family believes they should be able to handle their family business without lawyers and without court involvement. The supposed authority (state agency) for the order that all those with POA's must get guardianships is baffled by the misunderstanding of the assisted living facility but admits that they have received numerous calls. There is apparently some understanding theat guardianships are good things to have or better than POAs so everyone should have them AND, if you don't have a lawyer, the facility can refer you to a private lawyer for no cost--no worries--the attorney fees come from the vulnerable person. The private elder law/divestment attorneys have done enough marketing to convince institutions that they must get guardianships.

EXAMPLE 3): DANE/SHEBOYGAN COUNTY: An attorney employed by the State of Wisconsin is informed that her relative's POA is not as good as a guardianship and that the family must pursue a guardianship (same "policy" as Example 2). The state employee/attorney/family members contacts the Coalition for Wisconsin Aging Groups and is informed by this organization that she should just get a guardianship--it's such an easy thing to do. She is also informed that this organization does not represent guardianship defendants or people seeking to enforce their power of attorney documents. The state attorney/family member/agent decides to hire an attorney to enforce her relative's advance directives and is hopeful to correct the misunderstanding that guardianships must be sought even when there is a pre-existing POA document. This nursing home resident is on Medicaid, so the costs of the court proceeding and advocate attorney and guardian ad litem will be funded by State Medicaid dollars which could otherwise be used for patient care.

EXAMPLE 4): MILWAUKEE COUNTY: A private attorney drafts valid power of attorney documents for his elderly client. Months later another elderly person contacts this same lawyer complaining that the first client should not be spending her money to live in her own home but should be in a nursing home. This private attorney agrees to file a guardianship against his first client and represent the second client in the guardianship action (against the first client). He informs his new client that the first client will pay for the fees. The agent under the POA is incredulous that baseless allegations and personal opinion of how someone is living caused the triggering of the court systems and violation of attorney/client privilege. The guardianship is eventually dismissed but not without incurring thousands of dollars in guardian ad litem fees and defense fees. The elderly client continues to live in her home and she is happily paying for 24 hour care out of her own pocket with the oversight and assistance of her power of attorney agent. Without defense counsel, this woman would have paid thousand of dollars to her former attorney who ignored a clear conflict and filed a guardianship against her. Without a defense attorney, she

would have been placed in a nursing home, used up her resources and been placed on Medicaid. An easy "divestment" plan for the first lawyer--first pay the lawyers, use what's left for the nursing home--no worries--Medicaid will pick up the tab.

EXAMPLE 5: OUTAGAMIE COUNTY: A valid guardianship is ordered for a disabled person upon her reaching majority with her father appointed as her guardian. Father and daughter are satisfied with the guardianship but the mentally deranged ex-wife/mother want to use guardianship court as a forum to act out her mental illness. The father spends thousands of his own dollars to defend his daughter's guardianship. The daughter is indigent. No one proposed that the county should pick up the tab for this litigation. If the daughter had money, should she have to fund her mother's litigation?

Necessary protections are lost when private attorneys have an incentive to filed guardianship cases against people especially when their source of payment is from someone other than their client. Likewise, leaving the decision as to when a guardianship is to be filed with the institution social worker who has a vested financial interest in the patient being admitted to the facility or continued stay at the facility, does not provide the neutral protective service to which vulnerable people are entitled. Especially when they have planned, in advance, to avoid guardianship. Once the court papers have been filed, the individual has already been transferred to an institution. The damage is done and is often irrevocable. Last week the Wisconsin Court of Appeals, District I recognized the abused of the guardianship system by private attorneys. Despite this decision and clear caselaw to protect vulnerable adults from fee shifting, it is not surprising that the Wisconsin State Bar would support a system whereby private attorneys can make a fee off of vulnerable people. The State Bar has not, however, presented to the Legislature the fact that the Public Interest Section of the State Bar took a position to strongly oppose SB 257. The State Bar took the unprecedented position to support one Section's goal to make money over another Section's interest in the public and integrity of the law.

The vulnerable people of the State of Wisconsin, and all of us who have executed life planning or power of attorney documents, are more important than passing a bill to line the pockets of private attorneys who seek to defeat our life plans. OPPOSE AB 257

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SB257

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Re: SB 257

Dear Senators:

I testified on behalf of the State Bar of Wisconsin at the hearing on SB 257 on February 13, 2002. Because of the lateness of the hour at the hearing, I did not have time to go into my views in as much depth as I would have liked. I would like to take this opportunity to expand my views on this legislation.

The original legislation relating to guardianship attorneys fees (A.B. 742) as drafted provided that the existence or non existence of a power of attorney for health care or a power of attorney for finances was one of several factors to be considered in deciding whether petitioners' attorneys fees should be awarded in a successful guardianship proceeding. This factor was included in recognition of the importance of the use of powers of attorney for finance and health care in advance planning for clients. Late in the legislative process, without opportunity to fully consider the ramifications of the change, the presence of alleged advance planning was made an absolute prohibition rather than one factor to be considered.

In my practice, I draft countless financial and health care powers of attorney every year. Two years ago, I was privileged to chair a statewide program sponsored by the State Bar of Wisconsin (Life Planning) to encourage the execution of advance medical directives. Many private attorneys in the Elder Law Section of the State Bar also devoted countless volunteer hours to this project. I speak regularly on this topic to both lawyers and the general public. I am a believer in advance planning, both of finances and health.

However, I am also experienced and realistic enough to recognize that in some situations, guardianship may be necessary, even where advance directives are present. I highlighted several in my testimony:

- Person has Health Care Power of Attorney, but no financial power of attorney. Upon the person becoming incapacitated, it is necessary for someone to have authority to manage his or her finances. Under the current law, if a family member brought a guardianship, he or she could not be reimbursed for the fees in bringing the guardianship because of the presence of the health care power of attorney.

- Person has a financial power of attorney but the agent under the power is abusing his/her authority. A concerned family member or friend brings a guardianship action to protect the person from the abusive agent. Under the current law, that family member could not recover his/her fees from the estate which is being protected.

- Person has health care power of attorney and no financial power of attorney. The agent under the health care power of attorney is not following the wishes of the principal. A family member or friend brings a guardianship action to assert the interests of the principal. Under existing law, this friend or family could not recover the fees in bringing this guardianship action.

As Helen Marks Dicks from the Coalition of Wisconsin Aging Groups indicated in her written testimony, there are numerous other examples that could also be considered.

I have reviewed Ms. Cavey's lengthy e-mail on this topic. I would suggest, without knowing both sides of each of these cases, if indeed the guardianship were improper and not granted, fees would not be allowed in any event. Even if the guardianship were deemed proper, under the proposed legislation the court would still have the right to consider whether granting the fees would be "inequitable" and could consider, among other factors, the existence of the powers of attorney in each case. All that the proposed legislation does is to provide our judges with discretion to decide whether fees are proper in individual cases. The rigid prohibition in the current statute serves no purpose other than to discourage guardianships where there may be very good reasons to bring them. In point of fact, 90-95% of guardianships in Wisconsin are straight forward and uncontested. To focus on a few questionable examples distorts the actual practice context.

In his testimony, Jeff Meyer, from Legal Action of Wisconsin, asserted that the proper solution to the problem would be to have the counties pursue the guardianship actions in cases where there are powers of attorney. This is objectionable on several grounds. First of all, it takes the matter away from the family and puts it in the hands of the government. As a general matter, I believe that the family should deal with these private and sensitive issues as much as possible. Second, especially given the possible severe tightening of county budgets, they do not need another unfunded mandate like that proposed by Mr. Meyer. Third, the role proposed for the guardian ad litem by Mr. Meyer, to pursue and promote the guardianship, is antithetical to the guardian ad litem's independent role in these proceedings.

S.B. 257 strikes a proper balance between encouraging and supporting advance financial and medical directives on the one hand, and the need in some limited cases for guardianships, notwithstanding such directives, on the other hand. I encourage you to support this legislation.

As a final note, you should know my perspective. I am an attorney in private practice (as is Ms. Cavey, despite her self identification as a "public interest" lawyer). I normally represent families who, as petitioners in guardianship cases, are grappling with the often difficult task of caring for a seriously impaired family member. Guardianship is often the only remedy they have to gain the necessary legal authority to provide proper care. I have also acted as guardian ad litem in some cases.

I am an advisor to the State Bar's Elder Law Section Board (and a former section chair) and an instructor in Elder Law at the University of Wisconsin Law School where I teach about both guardianship and advance financial and health care directives. I serve on the committee which is developing comprehensive revisions to the guardianship law. I am also a member of the National Academy of Elder Law Attorneys.

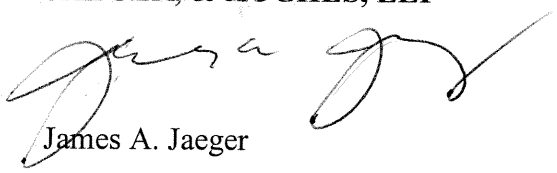
In this matter I testified on behalf of the State Bar of Wisconsin, whose Board of Governors overwhelmingly voted to support this legislation. I note that at the hearing, Jeff Meyer of Legal Action of Wisconsin testified. Inasmuch as the Legal Aid Society of Milwaukee also does a lot of guardianship work, it may be instructive for the committee to solicit their views

on this topic.

I believe that enactment of SB 257 is important to allow families to continue to practice their important role in the care of elderly and disabled individuals. I urge your support.

Very truly yours,

HILL, GLOWACKI,
JAEGER, & HUGHES, LLP



James A. Jaeger

cc: Barbara Becker (Chair, Elder Law Section)
Gerald Mowris (President, State Bar of Wisconsin)

CWAG

Elder Law Center

Coalition of Wisconsin Aging Groups

February 21, 2002

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RE: **2001 Senate Bill 257**
Relating to payment from a ward's estate of reasonable attorney's fees and costs for successful petitioners in incompetence and guardianship proceedings

Dear Senators:

I am writing in response to the testimony of Attorney Patricia Cavey and Attorney Jeffery Myer at the February 13 hearing on the above bill, as well as in response to Attorney Cavey's February 13 e-mail to Senator George's office. As you will remember, I testified in support of 2001 Senate Bill 257.

It is incorrect for opponents to state that SB 257 mandates that the ward's estate pay the attorney's fees and costs of a successful petitioner even though the ward previously executed a Power of Attorney for Health Care or a Power of Attorney for Finances. Although current law uses the term "shall award," a reading of the entire statute makes it clear that opponents' interpretation is incorrect.

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Current law states that there is a presumption that fees and costs shall be paid by the ward's estate. This is not a mandate, however, as current law also makes it quite clear that the court has the discretion to determine that petitioner's fees and costs should not come out of the ward's estate. Section 880.24 (3) (a) states:

> [t]he court shall award from the ward's estate payment of the petitioner's reasonable attorney's fees and costs, . . . unless the court finds, after considering all of the following, that it would be inequitable to do so."

SB 257 merely adds another factor for the court to consider when deciding whether or not to award fees and costs to petitioner out of the ward's estate.

Despite the opponents' assertion that a Power of Attorney is always better than a guardianship, in fact sometimes a particular Power of Attorney is not as good as guardianship. For instance, a Power of Attorney for Health Care is not good for financial decision-making. Likewise, a Power of Attorney for Finances is not good for health care decision-making. A Power of Attorney for Health Care where the principal has checked "no" to long term nursing home or CBRF admission is not good for long-term care nursing home or CBRF admissions. In those circumstances, and in others detailed in my February 13 memo to the Committee, guardianship is the only way to provide the necessary decision-making authority and to safeguard the principal. Current law prevents the ward's estate from paying the successful petitioner's fees and costs in these circumstances. SB 257 would permit, but not mandate, the court to authorize payment from the ward's estate.

Attorney Cavey admits in her February 13 e-mail that it is only an effective power of attorney that should insulate someone from a guardianship proceeding. But current law states that even an ineffective Power of Attorney bars petitioner from having their fees and costs paid for by the ward's estate. Unfortunately, sometimes Powers of Attorney are ineffective. As already noted, a Power of Attorney may simply not address the decision that needs to be made. Sometimes, Powers of Attorney do not meet the statutory requirements for execution and thus are invalid. Sometimes, they address the particular issue and are executed correctly, but the agent has died or has become incapacitated. Again, there are numerous instances when Powers of Attorney are ineffective. In these circumstances, guardianship is the only way to provide a legally authorized decision-maker and protect the rights of the principal, yet current law bars the court from ordering that the ward's estate pay the petitioner's fees and costs in these circumstances. Again, SB 257 would permit, but not mandate, the court to authorize payment.

It is not true that one must have a guardian to be admitted to a nursing home or other facility for long term care. Any facility or individual who phoned this office would be so informed. However, they would also be advised that Wisconsin law states that someone who is not competent to self-admit and who does not have a valid Power of Attorney for Health Care that authorizes admission to those facilities, must, depending on

the circumstances, have a guardian (and protective placement order) or be the subject of a pending guardianship and protective placement proceeding.

CWAG and the Elder Law Center have been staunch proponents of Powers of Attorneys, both Health Care and Financial[1]. We have distributed thousands of copies of the statutory forms, complete with instructions on how to fill them out. Staff give workshops, write articles, and answer phone calls on the subject. Probably no other agency has done more to support the advisability of this kind of advance planning. Our extensive experience in this area leads us to conclude, however, that SB 257 should be passed. There are simply many situations where, despite the existence of advance directives, guardianship needs to be pursued.

The passage of SB 257 will not insulate lawyers from financial risk and will not provide an incentive for filing inappropriate cares. Under current law, lawyers who file guardianship proceedings are not guaranteed that the ward's estate will pay. Similarly, SB 257 does not guarantee that the ward's estate will pay; it will continue to be within the judge's discretion to determine whether the ward's estate should pay petitioner's fees and costs.

I urge your support of 2001 Senate Bill 257.

Thank you.

Sincerely,

Helen Marks Dicks

Helen Marks Dicks, Director

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[1] It should be recognized, however, that Powers of Attorney for Finances can be dangerous to the financial health of the principal, often serving as the vehicle for an agent to steal from the principal's estate. We expect that a bill will be introduced next session to improve safeguards, and we urge your consideration of this proposal.