



PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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CHAPTER 54

GUARDIANS AND WARDS

****NOTE: "Guardians and Wards" is the title of ch. 880; is it what you want as the title of ch. 54?

SUBCHAPTER I

DEFINITIONS

54.01 Definitions. In this chapter:

(1) "Activities of daily living" means bathing; dressing; eating; mobility; transferring from a surface, including a bed, to another surface, including a chair; and toileting.

****NOTE: In accordance with the memo, this definition is modeled after HFS 10.13 (1), Wis. Admin. Code (the definition used for Family Care).

(2) "Agency" means any public or private board, corporation, or association which, including a county department under s. 51.42 or 51.437, that is concerned with the specific needs and problems of mentally retarded, developmentally disabled, mentally ill, alcoholic, drug dependent and aging persons, including a county department under s. 51.42 or 51.437 individuals with mental retardation,

1 developmental disability, mental illness, alcoholism, or drug dependency and of
2 aging individuals.

****NOTE: "Mental retardation" is a disfavored term; is it necessary to retain it in this definition? Is "mental deficiency" a possibility? Is either term necessary if "developmental disability" is used? In addition, "developmentally disabled person" is also a disfavored term, because it seems to describe the totality of the person as such; therefore, I have amended the definition under s. 54.01 (7) to refer to "individual with a developmental disability"; okay?

3 (3) "Conservator" means a person who is appointed or qualified by a court at
4 an individual's request under s. 54.76 (2) to manage the estate of the individual.

****NOTE: I omitted the language "or qualified" in your proposal, as s. 54.76 (2) (renumbered from s. 880.31 (2) does not mention qualification.

5 (3m) "Durable power of attorney" has the meaning given in s. 243.07 (1) (a).

6 (4) "Guardian" means ~~one a person~~ appointed by a court to ~~have care, custody~~
7 ~~and control of the person~~ act on behalf of a minor or an incompetent or ~~the~~
8 ~~management of~~ to provide for the personal needs or manage the estate of a minor, an
9 incompetent, or a spendthrift.

****NOTE: Please check this definition carefully; I used the term "person," rather than "corporation, public agency, any other person, or legal entity," because the definition of "person" in s. 990.01 (26) (which applies to all the statutes) is so broad. Your proposal retains mention of "spendthrift," yet the provisions concerning spendthrifts currently under ss. 880.01 (9), 880.03, 880.07 (1) (b), 880.08 (2), 880.15 (1) and (1s), 880.215, and 880.26 (2) (c) are eliminated from your proposal. Your proposal also does not mention current subch. IV of ch. 880, which also applies to spendthrifts. Are these omissions intentional? Do you want "spendthrift" deleted from this subsection? What do you wish to do about subch. IV of ch. 880?

****NOTE: In accord with the memo, I have removed "who is 18 years of age or older".

10 (5) "Incapacity" has the meaning given in s. 155.01 (8).

****NOTE: I have drafted this definition because the term is used in the definition of "standby guardian" (created as s. 54.01 (15) — okay? Note that this term is also used under ss. 54.12 (2) (renumbered from s. 880.04 (2)), 54.12 (3) (renumbered from s. 880.04 (2m)), 54.12 (4) (renumbered from s. 880.04 (3)), 54.34 (1) (b) (renumbered from s. 880.07 (1) (b)), 54.15 (3) (renumbered from s. 880.09 (2)), 54.15 (4) (renumbered from s. 880.09 (6)), and 54.52 (2) (renumbered from s. 880.36 (2)). Is this different from "functional incapacity," as used in s. 54.36 (renumbered from 880.33 (1))?

11 (6) (intro.) "Incompetent" means ~~a person adjudged by a court of record to be~~
12 ~~substantially incapable of managing~~ an individual who is unable to meet the

1 essential requirements for his or her physical health or safety or to be unable
2 adequately to manage his or her property or caring for himself or herself by reason
3 of infirmities of aging, developmental disabilities, or other like incapacities. Physical
4 disability without mental incapacity is not sufficient to establish incompetence.
5 financial affairs so as to meet the essential requirements for his or her physical
6 health or safety, because of all of the following:

***NOTE: See the ***Note under s. 54.01 (6) (b).

7 (a) The inability to receive and evaluate information effectively or to
8 communicate decisions.

9 (b) Mental deficiency, physical illness, physical disability, chronic mental
10 illness, chronic alcohol abuse, chronic use of prescription drugs, as defined in s.
11 450.01 (20), or controlled substances, as defined in s. 961.01 (4), or any other physical
12 or mental reason.

***NOTE: Please review this definition; it is more specific than your proposal.

***NOTE: According to the memo, Roy Froemming is working on reformulating this
definition.

13 (7) “Developmentally disabled person Individual with developmental
14 disability” means any individual having a disability attributable to mental
15 retardation, cerebral palsy, epilepsy, autism or another neurological condition
16 closely related to mental retardation or requiring treatment similar to that required
17 for mentally retarded individuals, which has continued or can be expected to
18 continue indefinitely, substantially impairs the individual from adequately
19 providing for his or her own care or custody, and constitutes a substantial handicap
20 to the afflicted individual. The term does not include a person an individual affected
21 by senility which is primarily caused by the process of aging or the infirmities of
22 aging.

****NOTE: Please see the ****NOTE under s. 880.01 (1) (renumbered s. 54.01 (2)). Also, this definition uses the term “infirmities of aging”; your proposal does not include the definition for that term (s. 880.01 (5), stats.), but because you use the term in this definition, I have retained the definition of s. 880.01 (5) (renumbered s. 54.01 (8); had you wanted some other language for the term?

1 (8) “Infirmities of aging” means organic brain damage caused by advanced age
2 or other physical degeneration in connection ~~therewith~~ with advanced age to the
3 extent that ~~the person so afflicted~~ an individual is substantially impaired in ~~his or~~
4 ~~her~~ ability to adequately provide for his or her own care or custody.

****NOTE: See NOTE under s. 880.01 (2) (renumbered s. 54.01 (7)).

5 (9) “Interested person” means any of the following:

****NOTE: I repealed s. 880.01 (6) (the definition of “interested person”), because it is replaced by the definition under s. 54.01 (9). I also repealed s. 880.01 (7) (the definition of “minor”), because the definition of “minor” in s. 990.01 (20) serves sufficiently for ch. 54 and for the remaining subchapters of ch. 880.

6 (a) For purposes of a petition for guardianship or protective placement, any of
7 the following:

****NOTE: Do you intend to amend ch. 55 to use this definition? If not, the reference to “protective placement” should be eliminated.

- 8 1. The proposed ward, if he or she has attained 14 years of age.
9 2. The spouse or adult child of the proposed ward, or the parent of a proposed
10 ward who is a minor.
11 3. For a proposed ward who has no spouse, child, or parent, any heir at law of
12 the proposed ward.

****NOTE: In this context, would an “heir at law” include the state? Should it? Should “child” be “adult child”?

13 4. Any individual who is nominated as fiduciary or appointed to act as fiduciary
14 for the proposed ward by a court of any state, any trustee for a trust established by
15 or for the proposed ward, or any person appointed as agent under a power of attorney
16 for health care or as attorney-in-fact under a durable power of attorney.

****NOTE: Is this language intended to include the guardian?

1 5. If the proposed ward is a minor, the individual who has exercised principal
2 responsibility for the care and custody of the proposed ward during the period of 60
3 consecutive days immediately before the filing of the petition.

4 6. If the proposed ward is a minor and has no living parent, any individual
5 nominated to act as fiduciary for the minor in a will or other written instrument that
6 was executed by a parent of the minor.

 ****NOTE: Is “executed” okay? What other “written instrument” would be
applicable here? Should the “written instrument” be required to be lawful or valid?

7 7. If the proposed ward is receiving moneys paid, or if moneys are payable, by
8 the federal department of veterans affairs, a representative of the federal
9 department of veterans affairs, or, if the proposed ward is receiving moneys paid, or
10 if moneys are payable, by the state department of veterans affairs, a representative
11 of the state department of veterans affairs.

12 8. If the proposed ward is receiving long-term support services or similar public
13 benefits, the county department of human services or social services that is providing
14 the services or benefits.

 ****NOTE: The “long-term support services or other public benefits” is in accord
with the memo.

15 9. The corporation counsel of the county in which the petition is filed and, if the
16 petition is filed in a county other than the county of the proposed ward’s residence,
17 the corporation counsel of the county of the proposed ward’s residence.

 ****NOTE: This language includes the corporation counsel of the county in which
the petition is filed; the language is somewhat different from that proposed in the memo
— the issue is not proposed *residence*, I believe, but place of filing for the proposed ward
— please also see s. 54.30 (2) (renumbered from s. 880.05).

18 10. Any other person required by the court.

19 (b) For purposes of proceedings following the hearing on the petition for
20 guardianship or protective placement, any of the following:

****NOTE: Is “any” correct — should it, instead, be “one”? Do you need language about the order of priority, i.e., must 1. be designated before 2.? Do you intend to amend ch. 55 with this definition? If not, the reference to “protective placement” should be eliminated.

- 1 1. The guardian.
- 2 2. The spouse or adult child of the ward or the parent of a minor ward.
- 3 3. Any other individual that the court may require, including any fiduciary that
- 4 the court may designate.

****NOTE: Because the provision that authorizes a court specifically to waive notice to any individual under (a) or (b) is substantive, I have, instead of placing it in the definitions, added it to s. 54.38 (2) (b) 4.

- 5 4. The county of venue, if the county has an interest.

****NOTE: This language is in accord with the memo.

- 6 (10) “Meet the essential requirements for physical health or safety” means
- 7 perform those actions necessary to provide the health care, food, shelter, clothes,
- 8 personal hygiene, and other care without which serious physical injury or illness will
- 9 likely occur.

****NOTE: Because the provision, “Mere old age, eccentricity, poor judgment, or physical disability, singly or together, without mental impairment, may not be used to establish incompetence,” is essentially a standard, I have not included it in this definition but have, instead, placed it in s. 54.10 (3) (a) (intro.).

- 10 (11) “Not competent to refuse psychotropic medication” means that, because
- 11 of chronic mental illness, as defined in s. 51.01 (3g), and after the advantages and
- 12 disadvantages of and alternatives to accepting the particular psychotropic
- 13 medication have been explained to an individual, one of the following is true:

- 14 (a) The individual is incapable of expressing an understanding of the
- 15 advantages and disadvantages of accepting treatment and the alternatives.

- 16 (b) The individual is substantially incapable of applying an understanding of
- 17 the advantages, disadvantages and alternatives to his or her chronic mental illness

1 in order to make an informed choice as to whether to accept or refuse psychotropic
2 medication.

****NOTE: Your proposal does not include this definition (“not competent to refuse psychotropic medication”); however, I understand from Betsy Abramson that your intent is to include provisions relating to this issue—is that correct? Are there changes that you wish to make to this definition?

3 (12) “Physician” has the meaning given in s. 448.01 (5).

4 (13) “Psychologist” has the means a licensed psychologist, as defined given in
5 s. 455.01 (4).

6 (14) “Spendthrift” means an individual who, because of the use of intoxicants
7 or drugs or because of gambling, idleness, debauchery, or other wasteful course of
8 conduct, is unable to attend to business or is likely to affect the health, life, or
9 property of himself or herself or others so as to endanger his or her support and
10 dependents or expose the public to the support.

****NOTE: I created this definition in ch. 54 because it is used in s. 880.01 (3) (renumbered s. 54.01 (4), the definition of “guardian”). Please see the ****NOTE below that subsection. I am not sure what you want to do with this definition and its antiquated language or with the other provisions mentioned in that ****NOTE. See also s. 54.10 (3) (a) 1. and its ****NOTE. I did not affect the definition of “spendthrift” in s. 880.01 (9), because it is used in remaining subchapters in ch. 880.

11 (15) “Standby guardian” means any individual designated by the court under
12 s. 54.52 (2) whose appointment as guardian becomes effective immediately upon the
13 death, incapacity, or resignation of the initially-appointed guardian, or if the
14 initially appointed guardian is unable or unavailable to fulfill his or her duties.

15 (16) “Ward” means an individual for whom a guardian has been appointed.

****NOTE: I created this definition, rather than renumbering it from ch. 880, because the remaining provisions in ch. 880 that are untouched by this draft use this term.

16

SUBCHAPTER II

17

APPOINTMENT OF GUARDIAN

1 **54.10 Appointment of guardian; determination of incompetence. (1)**

2 STANDARD. A court of appropriate jurisdiction may appoint a guardian, or separate
3 guardians of the person and of the estate, for an individual who is a proposed ward
4 if the court determines that any of the following applies:

5 (a) The individual is a minor.

6 (b) The individual is an incompetent and the appointment is necessary for at
7 least one of the following reasons:

8 1. To provide for the personal needs of the individual, including food, clothing,
9 shelter, health care, or safety.

10 2. To manage the property and financial affairs of the individual.

11 **(2) NECESSITY OF APPOINTMENT.** In determining whether the appointment of a
12 guardian is necessary under sub. (1) (b), the court shall consider all of the following:

13 (a) The report of the guardian ad litem, as required under s. 54.40 (4) (b).

 ***NOTE: Is the cross-reference to s. 54.40 (4) (b) to the report that you intended
 here?

14 (b) The sufficiency and reliability of available resources to provide for the
15 individual's personal needs or property management without the appointment of a
16 guardian.

 ***NOTE: Your proposal refers to "the sufficiency and reliability of available
 resources, as defined in sub.____," but no definition was included.

 ***NOTE: Your proposal included a limitation on powers of guardian at this point;
 I have placed that language under s. 54.18 (1).

17 **(3) DETERMINATION OF INCOMPETENCE.** All of the following apply to the
18 determination under sub. (1) (b) that an individual is an incompetent:

19 (a) The determination shall be based on clear and convincing evidence; may
20 not, unless the proposed ward has a severe inability to communicate, be based on

1 mere old age, eccentricity, poor judgment, or physical disability; and shall require a
2 finding that the individual is likely to suffer harm because of all of the following:

***NOTE: Is “all” correct here, or should it be “any”?; your proposal for subd. 2.
below seemed to indicate “all.”

***NOTE: The language concerning “severe inability to communicate” is from the
memo.

3 1. The individual is unable to provide for personal needs or property
4 management.

***NOTE: Is this standard intended to replace the “spendthrift” concept?

5 2. The individual cannot adequately understand and appreciate the nature and
6 consequences of the inability under subd. 1.

7 (b) In reaching its determination, the court shall give primary consideration
8 to the functional level and functional limitations of the individual, including an
9 assessment of all of the following:

10 1. The individual’s management of the activities of daily living.

11 2. The individual’s understanding and appreciation of the nature and
12 consequences of any inability he or she may have to manage the activities of daily
13 living.

14 3. The individual’s preferences, desires, and values with regard to management
15 of the activities of daily living.

16 4. The nature and extent of the individual’s property and financial affairs and
17 his or her ability to manage them.

18 5. The extent of the demands placed on the individual by his or her personal
19 needs and by the nature and extent of his or her property and financial affairs.

20 6. Any physical illness of the individual and the prognosis of the illness.

1 7. Any mental disability, alcoholism, or substance dependence of the individual
2 and the prognosis of the mental disability, alcoholism, or substance dependence.

 ***NOTE: Your proposal refers to the terms “mental disability,” “alcoholism,” and
“substance dependence,” “as defined in sub. _____,” but no definition was included.
Also, the terms “drug dependence” and “substance dependence” are used interchangeably
in this chapter and should be made uniform. Which would you prefer?

3 8. Any medication with which the individual is being treated and the
4 medication’s effect on the individual’s behavior, cognition, and judgment.

5 (c) In addition to the assessment under par. (b), the court shall consider all
6 other relevant facts and circumstances regarding all of the following:

7 1. The individual’s functional level.

8 2. The individual’s understanding and appreciation of the nature and
9 consequences of his or her functional limitations.

10 **54.12 Exceptions to appointment of guardian.** (1) EMANCIPATION OF
11 MARRIED MINORS. Except for minors found to be incompetent incompetents, upon
12 marriage, a minor shall is no longer be a proper subject for guardianship of the
13 person and a . A guardianship of the person is revoked by the marriage of a minor
14 ward. Upon application, the court may release in whole or in part the estate of a
15 minor ward to the ward upon the ward’s marriage. ~~Upon marriage, the guardianship~~
16 ~~of an incompetent is subject to review under s. 880.34.~~

 ***NOTE: I repealed the last sentence (it is broader than merely applying to a
minor), but am uncertain if that is what you want. Your proposal does not touch s. 880.34
(2)—do you no longer want to have marriage of an incompetent considered as a trigger
for review of the guardianship?

17 (2) SMALL ESTATES. If a minor or an incompetent, except for his or her incapacity,
18 is entitled to possession of possess personal property of a value of valued at \$10,000
19 or less, any court ~~wherein~~ in which an action or proceeding involving said the

1 property is pending may, ~~in its discretion~~, without requiring the appointment of a
2 guardian, order that the clerk of court do one of the following:

***NOTE: I have assumed from the language in par. (a) (below) that the clerk of court would perform these functions. Correct?

3 (a) Deposit the property in a savings account in a bank, ~~the payment of whose~~
4 ~~accounts in cash immediately upon default of the bank are~~ or other financial
5 institution insured by an agency of the federal deposit insurance corporation; deposit
6 ~~in a savings account in a savings bank or a savings and loan association that has its~~
7 ~~deposits insured by the federal deposit insurance corporation; deposit in a savings~~
8 ~~account in a credit union having its deposits guaranteed by the Wisconsin credit~~
9 ~~union savings insurance corporation or by the national board, as defined in s. 186.01~~
10 ~~(3m);~~ government or invest the property in interest-bearing obligations of the
11 United States. The fee for ~~the clerk's services~~ of the clerk of court in depositing and
12 disbursing the funds under this paragraph is prescribed in s. 814.61 (12) (a).

13 (b) ~~Payment~~ Make payment to the natural guardian of the minor or to the
14 person having actual custody of the minor.

***NOTE: The proposed material referred to “the natural guardian of the minor, as defined in sub. _____,” but no definition was included, unless you were referring to the definition of “minor.” What is a “natural” guardian? Is it the parent?

15 (c) ~~Payment~~ Make payment to the minor.

16 (d) ~~Payment~~ Make payment to the person having actual or legal custody of the
17 incompetent or to the person providing for the incompetent's care and maintenance
18 for the benefit of the incompetent.

19 (e) Make payment to the agent under a durable power of attorney of the ward.

***NOTE: Because I defined “durable power of attorney” in s. 54.01 (3m), it is unnecessary to use the term “durable financial power of attorney,” as requested in the memo.

1 ~~and shall consider all of the following nominations made by any interested person~~
2 ~~and, in its discretion, shall appoint a proper guardian, having due regard for the~~
3 ~~following applicable preferences, and criteria in determining who is appointed as~~
4 ~~guardian:~~

***NOTE: Your proposed material did not address s. 880.09 (1), which authorizes a minor over 14 years to nominate his or her own guardian and, if the minor is in the armed service, permits the court to dispense with the right of nomination. Therefore, I repealed it. Is that what you want?

5 (1) AGENT UNDER DURABLE POWER OF ATTORNEY. The court shall appoint as
6 guardian the agent under a proposed ward's durable power of attorney, unless the
7 court finds that the appointment of the agent is not in the best interests of the
8 proposed ward.

***NOTE: This provision is written as a requirement, as are ss. 54.15 (2) (renumbered from s. 880.09 (7)), 54.15 (3) (renumbered from s. 880.09 (2)), and 54.15 (4) (renumbered from s. 880.09 (6)); what does the judge do if they conflict? Should the "shalls" be "mays"?

9 (2) ~~ANTICIPATORY NOMINATION; PREFERENCE PERSON NOMINATED BY PROPOSED WARD.~~
10 Any person individual other than a minor may, ~~at such time as if~~ the person
11 individual has sufficient capacity to form an intelligent preference, execute a written
12 instrument, in the same manner as the execution of a will under s. 853.03,
13 nominating ~~a person~~ another to be appointed as guardian of his or her person or
14 property or both ~~in the event that if~~ a guardian is in the future appointed. ~~Such~~
15 ~~nominee shall be appointed as guardian by the~~ for the individual. The court shall
16 appoint this nominee as guardian unless the court finds that the appointment of such
17 nominee is not in the best interests of the person for whom, or for whose property, the
18 guardian is to be appointed proposed ward.

19 (3) PREFERENCE PARENT OF A PROPOSED WARD. If one or both of the parents of a
20 minor, ~~a developmentally disabled person~~ an individual with developmental

1 disability, or a person with other like incapacity are suitable and willing, the court
2 shall appoint one or both of them as guardian unless the proposed ward objects. The
3 ~~court shall appoint a corporate guardian under s. 880.35 only if no suitable~~
4 ~~individual guardian is available.~~

***NOTE: I deleted the last sentence from this subsection because I included this restriction in s. 880.35 (renumbered s. 54.15 (5)).

***NOTE: Your proposed material did not address s. 880.09 (3), which authorizes a court to appoint as guardian the nominee of a minor, if neither parent is suitable and willing. Therefore, I repealed it. Is that what you want?

5 (4) ~~TESTAMENTARY GUARDIANSHIP OF CERTAIN PERSONS~~ NOMINATION BY PROPOSED
6 WARD'S PARENTS. Subject to the rights of a surviving parent, a parent may by will
7 nominate a guardian and successor guardian of the person or estate of for any of his
8 or her minor children who ~~are~~ is in need of guardianship. For ~~a person~~ an individual
9 who is over the age of 18 and is found to be in need of guardianship under s. 880.33
10 54.10 by reason of a developmental disability or other like incapacity, a parent may
11 by will nominate a testamentary guardian. The parent may waive the requirement
12 of a bond for such an estate that is derived through the will.

***NOTE: I do not understand the intended meaning of the last sentence, under your proposal and as drafted.

13 (5) ~~NONPROFIT CORPORATION AS GUARDIAN~~ PRIVATE NONPROFIT CORPORATION OR
14 OTHER ENTITY. A private nonprofit corporation organized under ch. 181, 187, or 188
15 ~~is qualified to act~~ or any other nonprofit or for profit entity that is approved by the
16 court may be appointed as guardian of the person or of the property or both, of ~~an~~
17 ~~individual found to be in need of guardianship under s. 880.33, if a proposed ward,~~
18 if no suitable individual is available as guardian and the department of health and
19 family services, under rules established under ch. 55, finds the corporation or entity
20 to be a suitable agency to perform such duties.

***NOTE: What would be an example of a nonprofit entity that is not organized under ch. 181, 187, or 188? In addition, please note that I did not draft proposed

Subchapter 3 Section One (1) (e) and (f), paragraphs that were identical and are redundant to the language in this subsection “if no suitable individual is available as guardian.”

1 **(6) OPINIONS OF PROPOSED WARD AND FAMILY.** ~~In appointing a guardian, the~~ The
 2 court shall take into consideration the opinions of the ~~alleged incompetent~~ proposed
 3 ward and of the members of ~~the~~ his or her family as to what is in the best interests
 4 of the proposed ~~incompetent~~ ward. However, the best interests of the proposed
 5 ~~incompetent~~ ward shall control in making the determination when the opinions of
 6 the family are in conflict with ~~the clearly appropriate decision~~ those best interests.
 7 The court shall also consider potential conflicts of interest resulting from the
 8 prospective guardian’s employment or other potential conflicts of interest. If the
 9 proposed ~~incompetent~~ ward has executed a power of attorney for health care under
 10 ch. 155, the court shall ~~give consideration to the appointment of the health care agent~~
 11 ~~for the individual~~ consider appointing the agent under that power of attorney as the
 12 individual’s guardian.

****NOTE: Language in your proposal for this subsection states “If the proposed incompetent has executed a durable financial power of attorney under ch. 243, the court shall give consideration to the appointment of the agent or the person nominated as guardian in the document, if different, for the individual as the individual’s guardian of the estate.” This statement is in direct conflict with language you have proposed under Subch. 3, Section One (1) (a), which I have drafted as s. 54.15 (1), and which REQUIRES appointment of the agent unless the appointment is not in the proposed ward’s best interests. Which is your preference? If it is the latter, do you want the agent of a health care power of attorney also to be required to be appointed?

****NOTE: Please note that I have amended current law that refers to “proposed incompetent” to instead refer to “proposed ward,” and have tried to make that change consistent in this draft. Is this drafting decision acceptable?

13 **(7) STATEMENT OF ACTS BY PROPOSED GUARDIAN.** (a) At least 96 hours before the
 14 hearing under s. 54.44, the proposed guardian shall submit to the court a sworn and
 15 notarized statement as to whether any of the following is true:

16 1. The proposed guardian has been convicted of a crime, as defined in s. 939.12.

****NOTE: Is this definition of a crime what you want? Note that it includes misdemeanors (which are distinguished from felonies in that felonies are punishable by

imprisonment in state prison, whereas misdemeanors are punishable by imprisonment in a county jail).

1 2. The proposed guardian has filed for or received protection under the federal
2 bankruptcy laws.

3 3. Any license, certificate, permit, or registration of the proposed guardian that
4 is required under chs. 440 to 480 or by the laws of another state for the practice of
5 a profession or occupation has been suspended or revoked.

****NOTE: I added “suspension” to this paragraph; okay? Also, I deleted
“cancellation,” because it seems redundant to revocation.

6 (b) If par. (a) 1., 2., or 3. applies to the proposed guardian, he or she shall include
7 in the sworn and notarized statement a description of the circumstances
8 surrounding the applicable event under par. (a) 1., 2., or 3.

****NOTE: Note that I put under s. 54.44 (6) the language concerning court action
if the proposed guardian is inappropriate.

9 **(8) LIMITATION ON NUMBER OF WARDS OF GUARDIAN.** No ~~person one~~, except a
10 nonprofit corporation approved by the department of health and family services
11 under s. 880.35 54.15 (5), who has guardianship of the person of 5 or more adult
12 wards who are unrelated to the person him or her may accept appointment as
13 guardian of the person of another unrelated adult ward ~~unrelated to the person,~~
14 unless approved by the ~~department~~ court. No ~~such person individual~~ may accept
15 appointment as guardian of more than 10 ~~such adult wards who are unrelated to the~~
16 ~~person him or her, and no approved nonprofit corporation may accept appointment~~
17 as guardian of more than 10 adult wards.

****NOTE: This subsection is extremely confusing. Most of the confusion exists in
current law. First, the word “person” is used in this subsection in three different ways:
as an individual, as an entity under the definition of “person” in s. 990.01 (26), stats.
(which, for all the statutes, defines “person” to include all partnerships, associations, and
bodies corporate and politic) and as “guardian of the person.” I think that the “person”
referred to in the second sentence was intended to mean the corporation and have tried
to clarify that in amending the subsection. However, that interpretation means that a
nonprofit corporation is authorized to be guardian to more than 10 adult wards—is that
correct? Second, your proposed change to this subsection is from “department” to “court”

in the first sentence. When that change is made, I'm not exactly sure that the sentence has real meaning: it seems to say that the court may not appoint someone guardian of more than 5 adult wards unless the court wants to. Third, to add to the confusion, I don't understand what "or more" means in the first sentence—where is the line being drawn? Fourth, under s. 54.15 (5) (renumbered from s. 880.35) in this draft, DHFS may approve not just nonprofit corporations but also nonprofit and for profit entities—shouldn't they be added to the first sentence? Lastly, the subsection is written to prohibit a person (whatever that may be) from accepting appointment as a guardian if certain conditions exist—but isn't this actually a prohibition on a court from appointing such a guardian?

1 **54.18 General duties and powers of guardian; limitations; immunity.**

2 (1) A ward retains all his or her rights that are not assigned to the guardian or
3 otherwise limited by statute. A guardian acting on behalf of a ward may exercise only
4 those powers that the guardian is authorized to exercise by statute or court order.
5 A guardian may be granted only those powers necessary to provide for the personal
6 needs or property management of the ward in a manner that is appropriate to the
7 ward and that constitutes the least restrictive form of intervention.

 ***NOTE: I changed the sentence, "All other rights are reserved to the ward," in your proposal to refer explicitly to the ward's (and not other) rights.

 ***NOTE: Please see s. 54.63 for the procedure for expanding powers of the guardian, as proposed in the memo.

 ***NOTE: Your proposal refers to "the least restrictive form or intervention, as defined in _____," but no definition was included.

8 (2) A guardian shall do all of the following:

9 (a) Exercise the degree of care, diligence, and good faith when acting on behalf
10 of a ward that an ordinarily prudent person exercises in his or her own affairs.

 ***NOTE: The "ordinarily prudent person" language is in accord with the memo.

11 (b) Act in all proceedings of the ward as the ward's advocate, including, if the
12 ward is protectively placed under ch. 55 and if applicable, advocating for the ward's
13 applicable rights under ss. 50.09 and 51.61.

 ***NOTE: Because ss. 50.09 and 51.61 are not automatically applicable to ch. 55, I added the "and if applicable" language.

14 (c) Exhibit the utmost degree of trustworthiness, loyalty, and fidelity in relation
15 to the ward.

1 (3) No guardian may do any of the following:

2 (b) ~~No guardian shall purchase~~ Purchase property of the ward, ~~unless sold at~~
3 ~~public sale except at fair market value, subject to ch. 786, and~~ with the approval of
4 the court, ~~and then only if the guardian is a spouse, parent, child, brother or sister~~
5 ~~of the ward or is a cotenant with the ward in the property.~~

6 (h) ~~No guardian shall lend guardianship~~ Lend funds of the ward to himself or
7 herself.

****NOTE: Please see the ****NOTE under s. 54.20 (2) (L) (renumbered from s.
880.19 (4) (b)).

8 (4) ~~Any~~ A guardian of the person ~~or of the estate~~ is immune from civil liability
9 for his or her acts or omissions in performing the duties of the guardianship if he or
10 she performs the duties in good faith, in the best interests of the ward, and with the
11 degree of diligence and prudence that an ordinarily prudent person exercises in his
12 or her own affairs.

13 **54.19 Duties of guardian of the estate.** Except as specifically limited in the
14 order of appointment, the guardian of the estate shall do all of the following in order
15 to provide a ward with the greatest amount of independence and self-determination
16 with respect to property management in light of the ward's functional level,
17 understanding, and appreciation of his or her functional limitations and the ward's
18 personal wishes and preferences with regard to managing the activities of daily
19 living:

20 (1) ~~The guardian of the estate shall take~~ Take possession of ~~all of the ward's~~
21 real and personal property, and of any rents, income, issues, and benefits ~~therefrom,~~
22 ~~whether accruing before or after the guardian's appointment~~ from the property, and
23 of the any proceeds arising from the sale, mortgage, lease, or exchange ~~thereof~~ of the

1 ~~property and prepare an inventory of these. Subject to such this possession, the title~~
2 ~~of all such the estate and to the increment and proceeds thereof shall be of the estate~~
3 ~~is in the ward and not in the guardian. It is the duty of the guardian of the estate~~
4 ~~to protect and preserve it, to retain, sell and invest it as hereinafter provided, to~~
5 ~~account for it faithfully, to perform all other duties required of the guardian by law~~
6 ~~and at the termination of the guardianship to deliver the assets of the ward to the~~
7 ~~persons entitled thereto.~~

****NOTE: I did not add “or a specified portion of the ward’s property,” as in your proposal, because s. 54.19 (intro.), which governs this paragraph, already requires that the guardian act within the limitations of the court order, and it would be the court order, I assume, that would specify any portion of the ward’s property that the guardian would be allowed to act upon.

8 (2) Retain, expend, distribute, sell, or invest the ward’s property, rents, income,
9 issues, benefits, and proceeds and account for all of them.

****NOTE: Please see the ****NOTE under s. 54.22 (renumbered from s. 880.19 (5)
(b).

10 (3) Determine, if the ward has executed a will, the will’s location, determine
11 the appropriate persons to be notified in the event of the ward’s death, and, if the
12 death occurs, notify those persons.

13 (4) Use the ward’s income and property to maintain and support the ward and
14 any dependents of the ward and to provide for the postsecondary education expenses
15 of any children of the ward.

****NOTE: Please see the ****NOTE under s. 54.22 (renumbered from s. 880.19 (5)
(b).

16 (5) Prepare and file an annual account as specified in s. 54.62.

17 (6) At the termination of the guardianship, deliver the ward’s assets to the
18 persons entitled to them.

19 (7) With respect to claims, do all of the following:

1 (a) ~~Every general guardian shall pay~~ Pay the just debts of the ward ~~out of from~~
2 the ward's personal estate and ~~the income of the ward's real estate, if sufficient, and~~
3 ~~if not, then out of the ward's real estate upon selling the same as provided by law.~~
4 ~~But a temporary guardian shall pay the debts of his or her ward only on order of the~~
5 ~~court.~~

***NOTE: This language is in accord with the memo.

6 (b) ~~The guardian or a creditor of any ward may apply~~ Apply to the court for
7 adjustment of any claims against the ward incurred ~~prior to~~ before entry of the order
8 appointing the guardian or the filing of a lis pendens as provided in s. 880.215. The
9 court shall by order fix the time and place it will adjust claims and the time within
10 which all claims ~~must~~ shall be presented ~~or be barred.~~ Notice of ~~the time and place~~
11 ~~so fixed and limited~~ these times and the place shall be given by publication as ~~in~~
12 ~~estates of decedents; and all statutes relating to claims against and in favor of estates~~
13 ~~of decedents~~ provided in s. 879.05 (4), and ch. 859 generally shall apply. ~~As in the~~
14 ~~settlement of estates of deceased persons, after~~ After the court has made the order,
15 no action or proceeding may be commenced or maintained in any court against the
16 ward upon any claim ~~of~~ over which the circuit court has jurisdiction.

***NOTE: Your proposal placed this provision under the duties, rather than the powers, of the guardian, notwithstanding the fact that current law uses the term "may apply to the court." It seemed to me that, indeed, this should be a duty; therefore, I left it in s. 54.19 (which has the effect of changing "may" to "shall") and added "any" to "claims," because it is possible that no claims were incurred against the ward before entry of the order. Have I interpreted this correctly? Please review the reference to s. 879.05 (4) and ch. 859, stats. Also, the provision refers to s. 880.215, which is not touched by your proposal; how do you want me to deal with that provision?

17 (8) ~~The guardian shall settle~~ Settle all accounts of the ward and ~~may demand,~~
18 ~~sue for, collect and receive all debts and claims for damages due him or her, or may,~~
19 ~~with the approval of the circuit court, compound and discharge the same, and shall~~

1 appear for and represent ~~his or her~~ the ward in all actions and proceedings except
2 ~~where those for which~~ another person is appointed ~~for that purpose~~.

****NOTE: This provision is in part a duty and in part a power; accordingly, I have amended out the authority to demand, etc. Please look at s. 54.20 (2) (k), as renumbered from s. 880.19 (3), and see if the language I have amended out of this provision should be placed there.

3 (9) File with the register of deeds of any county in which the ward possesses
4 real property a sworn and notarized statement that specifies the legal description of
5 the property, the date that the ward is determined to be an incompetent, and the
6 name, address, and telephone number of the ward's guardian and any surety on the
7 guardian's bond.

****NOTE: It was unclear to me what is the intent of the proposed language for this provision—is it to somehow provide notice to anyone who would seek to transfer title of the real property to another that the owner is an incompetent? Or is it to provide notice to the tax assessor of that fact? (If it is the latter, the “register of deeds of any county” should be replaced with the “assessor of any taxation district.”) Is there some other intent? Please review this provision carefully; I tried to tailor it by using terms relevant to Wisconsin law.

8 (10) Perform any other duty required by the court.

****NOTE: Proposed language was to require performance of “all other duties required by law”; I didn't draft that, because it is unnecessary, but I thought that there might be additional duties imposed by a court upon the guardian. Okay?

9 **54.20 Powers of guardian of the estate. (1) STANDARD. The In exercising**
10 the powers under this section, the guardian of the estate may, without the approval
11 of the court, retain any real or personal property possessed by the ward at the time
12 of appointment of the guardian or subsequently acquired by the ward by gift or
13 inheritance without regard to ch. 881, so long as such retention constitutes the
14 exercise of shall use the judgment and care under the circumstances then prevailing,
15 which that persons of prudence, discretion, and intelligence exercise in the
16 management of their own affairs, not in regard to speculation but in regard to
17 including the permanent, rather than speculative, disposition of their funds,

1 ~~considering and consideration of the probable income as well as the probable and~~
2 ~~safety of their capital.~~

****NOTE: I did not draft the following material in your proposal: “Consistent with the functional limitations of the ward, the ward’s understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to manage property and financial affairs, and the ward’s personal wishes, preferences and desires with regard to managing the activities of daily living, and the least restrictive form of intervention, the court may authorize the guardian to exercise those powers necessary and sufficient to manage the property and financial affairs of the ward; to provide for the maintenance and support of the ward, and those persons depending upon the ward; to transfer a part of the ward’s assets to or for the benefit of another person on the ground that the ward would have made the transfer if he or she had the capacity to act. Transfers made pursuant to this section may be in any form that the ward could have employed if he or she had the requisite capacity, except in the form of a will or codicil. Except as to the powers enumerated in subs. **** below, all such powers may be exercised by the guardian without approval of the court.” My reasons for not drafting this material are the following: (1) The majority of these powers are redundant to the duties of the guardian of the estate under s. 54.19 (2) and (4) of this draft and to s. 54.22 of the draft; if you want “except by will or codicil” to be added as a qualifier to s. 54.19 (2), please let me know. (2) The proposed language is internally conflicting, in that it indicates both that “the court may authorize” the powers and that the “powers may be exercised by the guardian without approval of the court.” (3) I’m not sure what “the ward’s understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to manage property and financial affairs” means or how it would be applied: are you contemplating some form of informed consent between the guardian and the ward here? What if, in the face of a court finding of incompetency, the ward indicates that the harm he or she may suffer outweighs the benefit? (4) How would the ward’s intent (to “have made the transfer if he or she had the capacity to act”) be evidenced? (5) What if the ward’s “personal wishes, preferences and desires with regard to managing the activities of daily living, and the least restrictive form of intervention” are naive or delusional and are inconsistent with available housing or the practical judgment of the guardian, or of the court, for that matter?

3 (2) POWERS REQUIRING COURT APPROVAL. The guardian of the estate may do any
4 of the following with respect to the ward only with prior written approval of the court,
5 including, if applicable, approval of a petition specified under s. 54.21:

6 (a) Make gifts, under the terms, including the frequency, amount, and specific
7 donees, specified by the court.

****NOTE: Please review s. 54.21 (5) (d) and this provision; have I captured the intent of the memo?

8 (b) ~~Upon petition by the guardian, a parent, the spouse, any issue or next of kin~~
9 ~~of any person, assets of the person may, in the discretion of the court and upon its~~
10 ~~order, after such notice as the court may require, be transferred~~ Transfer assets of

1 ~~the ward to the trustee or trustees of an~~ any existing revocable living trust created
2 ~~by the person for the benefit of~~ that the ward has created for himself or herself and
3 ~~those dependent upon the person for support~~ any dependents, or, if the ward is a
4 minor, to the trustee or trustees of a any trust created for the exclusive benefit of the
5 ~~person, if a minor, which~~ ward that distributes to him or her at age 18 or 21, or, if the
6 ward dies before age 18 or 21, to his or her estate, or as he or she appoints if he or
7 ~~she dies prior to age 18 or 21~~ the guardian appoints.

****NOTE: The words “or as he or she appoints” in s. 880.175 are extremely confusing, because it is unclear what the antecedent to “he or she” is. I finally concluded that the antecedent must be the guardian, although an argument might be made that, in fact, it should be the trustee; clearly, it is not the minor. Please review. I also changed “an existing revocable living trust” to “any existing revocable living trust” and made a like change to “a trust created for the exclusive benefit of the ward,” because it is not certain that such a trust exists in all cases.

8 (c) Establish a trust as specified under 42 USC 1396p (d) (4) (A), (B), or (C) and
9 transfer assets into the trust.

****NOTE: The federal law cited specifies several kinds of trusts to which the provisions of 42 USC 1396d (d) do not apply; is that your intent?

10 (d) Purchase an annuity or insurance contract and exercise rights to elect
11 options or change beneficiaries under insurance and annuity policies and to
12 surrender the policies for their cash value.

13 (e) Exercise any elective rights that accrue to the ward as the result of the death
14 of the ward’s spouse or parent.

15 (f) Release or disclaim any interest of the ward that is received by will, intestate
16 succession, nontestamentary transfer at death, or transfer.

****NOTE: Please review this language carefully. Have I captured your intent?

17 (g) ~~A guardian of the estate appointed under this chapter for a married person~~
18 ~~may exercise with the approval of the court, except as limited under s. 880.37, any~~
19 ~~management and control right over the marital property or property other than~~

1 ~~marital property and any right in the business affairs which the married person~~
2 ~~could exercise under ch. 766 if the person were not determined under s. 880.12 to be~~
3 ~~a proper subject for guardianship. Under this section, a guardian may consent to act~~
4 ~~together in or join in any transaction for which consent or joinder of both spouses is~~
5 ~~required or may execute Execute under s. 766.58 a marital property agreement with~~
6 ~~the other ward's spouse, but may not make, amend or revoke a will.~~

***NOTE: Because a marital property agreement may be entered into before marriage, shouldn't this also include the ward's intended spouse, if any?

***NOTE: Your proposal does not address prohibiting a guardian from making, amending, or revoking a will, so I repealed that part of the last sentence. Do you intend that a guardian have that power?

7 (h) Provide support for an individual whom the ward is not legally obligated
8 to support.

9 (i) Convey or release a contingent or expectation interest in property, including
10 a marital property right and any right of survivorship that is incidental to a joint
11 tenancy or survivorship marital property.

***NOTE: I used the term "expectation interest," rather than the proposed term "expectant interest," because Black's Law Dictionary lists the former but not the latter. Also, because Black's distinguishes between a contingent interest and an expectation interest, I differentiated between the two and used "or," rather than the proposed "and."

12 (j) Compound and discharge all debts and claims for damage due the ward.

***NOTE: Are these debts of the ward or debts payable to the ward? If the former, the language is redundant to s. 54.19 (7) (a) (renumbered from s. 880.22 (1)).

13 (k) In all cases ~~where~~ in which the court ~~deems it~~ determines that it is
14 advantageous to continue the business of a ward, such business may be continued
15 by the guardian of the estate on such ~~continue the business on any~~ terms and
16 conditions ~~as may be~~ specified in the order of the court.

17 (L) ~~The guardian of the estate may, with the approval of the court, after~~ After
18 such notice as the court directs and subject to ch. 786, invest the proceeds of sale of
19 any guardianship assets of the ward and any of the ward's other moneys in the

1 guardian's possession in such ~~the~~ real or personal property as ~~the court determines~~
2 that is determined by the court to be in the best interests of the guardianship estate,
3 without regard to of the ward, notwithstanding ch. 881.

****NOTE: Please see the **** NOTE under s. 54.20 (3) (h) (renumbered from s.
880.19 (4) (a)). Please also note my change to the term "guardianship estate."

4 **(3) POWERS THAT DO NOT REQUIRE COURT APPROVAL.** The guardian of the estate
5 may do any of the following without first receiving the court's approval:

6 (a) Provide support from the ward's estate for an individual whom the ward is
7 legally obligated to support.

****NOTE: I repealed s. 880.21, because the language is so much wordier than s.
54.20 (3) (a) and otherwise seems unnecessary.

8 (b) Enter into a contract, other than a contract that is specified in sub. (2) or
9 that is otherwise prohibited under this chapter.

10 (c) Exercise options of the ward to purchase securities or other property.

11 (d) Authorize access to or release of the ward's confidential records.

****NOTE: Are there confidential records of the ward that this provision would cover
that are in addition to mental health court and treatment records under s. 51.30 (5) (b)
1., stats., and patient health care records under s. 146.82, stats.? If not, perhaps this
paragraph should specify only those types of records.

12 (e) Apply for public and private benefits.

****NOTE: I did not draft the proposed language, "Take such other actions as may
be reasonable or appropriate to carry out the duties of the guardian of the estate except
for those actions specified in sub. a." This seems redundant to the actions specified in s.
50.19 (10).

13 (f) Take any other action, except an action specified under sub. (2), that is
14 reasonable or appropriate to the duties of the guardian of the estate.

15 ~~The guardian of the estate may, with the approval of the court, after such~~
16 ~~notice as the court directs, retain~~ Retain any real or personal property possessed by
17 that the ward at the time of the appointment of the ~~possesses when the~~ guardian or
18 ~~subsequently acquired by~~ is appointed or that the ward acquires by gift or

1 inheritance for such period of time as shall be designated in the order of the court
2 approving such retention, without regard to ch. 881 during the guardian's
3 appointment.

****NOTE: Note that, as in your proposal, this provision appears to combine s. 880.19 (2) (a) and (b), stats.; with respect to s. 880.19 (2) (b), stats., it changes current law, which requires court approval, to language that specifically provides for this action without court approval; is that your intent? In addition, language in current law under s. 880.19 (2) (a) and (b), stats., includes “without regard to ch. 881”; I deleted the language “without regard to ch. 881” in this paragraph because ch. 881 does not require that the ward’s possessions be invested; rather, it sets forth standards and procedures for investing—therefore, it need not be referenced here, because it does not prohibit the guardian from exercising the power to retain the ward’s assets. Note, however, that I retained this language for s. 54.20 (3) (h) renumbered from s. 880.19 (4) (a)).

4 (h) ~~The guardian of the estate may, without approval of the court, invest~~ Invest
5 and reinvest the proceeds of sale of any guardianship assets of the ward and any of
6 the ward's other moneys in the guardian’s possession in accordance with ch. 881.

****NOTE: Please note my changes to the term “guardianship assets” and “moneys in the guardian’s possession.”

7 (i) ~~The guardian of the estate may, without approval of the court, sell~~ Subject
8 to ch. 786, sell any property of the guardianship estate of the ward that is acquired
9 by the guardian ~~pursuant to sub. (4)~~ under sub. (2) (L) or par. (h).

10 **54.21 Petition for authority to transfer ward’s assets to another. (1)**
11 In this section, “will or similar instrument” includes a revocable or irrevocable trust,
12 a durable power of attorney, or a marital property agreement.

****NOTE: The marital property agreement language comports with the memo.

13 (2) A guardian or other person who seeks authority to exercise a power that
14 includes the transfer of any of a ward’s assets to or for the benefit of any person shall
15 submit to the court a petition that specifies all of the following:

16 (a) Whether a proceeding by anyone seeking this authority with respect to the
17 ward’s property was previously commenced and, if so, a description of the nature of
18 the proceeding and the disposition made of it.

1 (b) The amount and nature of the ward's financial obligations, including
2 moneys currently and prospectively required to provide for the ward's maintenance,
3 support, and well-being and to provide for others dependent upon the ward for
4 support, regardless of whether the ward is legally obligated to provide the support.
5 If the petitioner has access to a copy of a court order or written agreement that
6 specifies support obligations of the ward, the petitioner shall attach the copy to the
7 petition.

8 (c) The property of the ward that is the subject of the petition, the proposed
9 disposition of the property, and the reasons for the disposition.

10 (d) If they may be ascertained, the wishes of the ward.

11 (e) As specified in sub. (3), whether the ward has previously executed a will or
12 similar instrument.

13 (f) A description of any significant gifts or patterns of gifts that the ward has
14 made.

15 (g) The names, post-office addresses, and relationships to the ward of all of the
16 following:

17 1. Any presumptive adult heirs of the ward.

18 2. If the ward has previously executed a will or similar instrument, the named
19 or described beneficiaries under the most recent will or similar instrument executed
20 by the ward.

21 (3) (a) If a ward has previously executed a will or similar instrument and the
22 petitioner is able, with reasonable diligence, to obtain a copy, the petitioner shall
23 provide the copy to the court, together with a statement that specifies all of the
24 following:

****NOTE: The proposed language refers to the “petitioner or guardian”; however, under sub. (2) (intro.), a guardian seeking the authority would also be the petitioner; hence, I have used just the term “petitioner.”

****NOTE: I’m not sure what is meant by the proposed language concerning “appropriate safeguards for confidentiality.” Are these safeguards that the person obtaining the copy is supposed to take, or the court? How would this be done? I can require that the court treat the copy as confidential; is that what you intended?

- 1 1. The manner in which the copy was secured.
- 2 2. The manner in which the terms of the will or similar instrument became
- 3 known to the petitioner.
- 4 3. The basis for the petitioner’s belief that the copy is of the ward’s most recently
- 5 executed will or similar instrument.

6 (b) If the petitioner is unable to obtain a copy of the most recently executed will

7 or similar instrument or is unable to determine if the ward has previously executed

8 a will or similar instrument, the petitioner shall provide a statement to the court that

9 specifies the efforts that were made by the petitioner to obtain a copy or ascertain the

10 information.

11 (c) If a copy of the most recently executed will or similar instrument is not

12 otherwise available, the court may order the person who has the original will or

13 similar instrument to provide a photocopy to the court for in camera examination.

14 The court may provide the photocopy to the parties to the proceeding unless the court

15 finds that doing so is contrary to the ward’s best interests.

16 (4) The petitioner shall serve notice upon all of the following, together with a

17 copy of the petition, stating that the petitioner will move the court, at a time and

18 place named in the notice, for the order described in the petition:

****NOTE: Is this language okay? I have modeled it after s. 804.02 (1) (b), stats.

19 (a) The persons entitled to notice under sub. ***.

****NOTE: To whom does this language refer?

1 (b) Unless the court dispenses with notice under this subsection, the persons
2 specified in sub. (2) (g), if known to the petitioner.

3 (c) The county corporation counsel, if the county has an interest in the matter.

****NOTE: This language comports with the memo. By the way, this means that the
petitioner determines whether the county has an interest and gets notice. Is that okay?

4 (5) The court shall consider all of the following in reviewing the petition:

5 (a) The wishes of the ward, if known.

6 (b) Whether the duration of the ward's disability is likely to be sufficiently brief
7 so as to justify dismissal of the proceedings in anticipation of the ward's recovered
8 ability to decide whether, and to whom, to transfer his or her assets.

9 (c) Whether, after the proposed transfer is made, the needs of the ward, his or
10 her spouse, if any, and any other persons legally dependent upon the ward for support
11 are able to be met from the remainder of the ward's assets without resort to public
12 assistance and whether making the proposed transfer would render the ward
13 ineligible under s. 49.453 (2).

****NOTE: Does this language do what you intend?

14 (d) Except for gifting that is authorized under s. 54.20 (2) (a), whether the
15 donees or beneficiaries under the proposed disposition are reasonably expected
16 objects of the ward's generosity and whether the proposed disposition is consistent
17 with any ascertained wishes of the ward or known estate plan or pattern of lifetime
18 gifts that he or she has made.

****NOTE: It seemed to me that "reasonably expected objects of the ward's
generosity" was clearer language than "natural objects of the bounty of the ward."

****NOTE: Please review s. 54.20 2) (a) and this provision; have I captured the intent
of the memo?

1 (e) Whether the proposed disposition will produce tax savings that will
2 significantly benefit the ward, his or her dependents, or other persons for whom the
3 ward would be concerned.

4 (f) Any other factors that the court determines are relevant.

****NOTE: Wouldn't you also want the court to be required to consider the factors
and information specified under subs. (2) (a) to (g) and (3)?

5 (6) The court may grant the petition under sub. (2) if the court finds and records
6 all of the following:

7 (a) That the ward lacks the requisite mental capacity to perform the act for
8 which approval is sought and is not likely to regain that capacity within a reasonable
9 period of time.

10 (b) That a competent individual in the position of the ward would likely perform
11 the act under the same circumstances.

12 (c) That either of the following applies to the ward:

13 1. Before the ward lacked the requisite mental capacity to perform the act for
14 which approval is sought, he or she did not manifest intent that is inconsistent with
15 the act.

16 2. If, before the ward lacked the requisite mental capacity to perform the act
17 for which approval is sought he or she manifested intent that is inconsistent with the
18 act, it is likely that the ward would have changed his or her intent under the
19 circumstances that exist at the time of the filing of the petition.

20 (7) Nothing in this section requires a guardian to file a petition under this
21 section and a guardian is not liable or accountable to any person for having failed to
22 file a petition under this section.

****NOTE: I don't really understand sub. (7). Subsection (2) indicates that a
guardian must file a petition if he or she proposes to make any transfers covered under
the section. What is the intent here?

1 **54.22 Petition for authority to sell, mortgage, pledge, lease, or**
2 **exchange ward's property.** The court, on the application petition of the guardian
3 of the estate or of any other person interested in the estate of any a ward, after such
4 notice if any, as any notice that the court directs, may authorize or require the
5 guardian to sell, mortgage, pledge, lease, or exchange any property of the
6 guardianship estate of the ward upon such terms as the court may order, subject to
7 ch. 786, for the purpose of paying the ward's debts, providing for the ward's care,
8 maintenance, and education and the care, maintenance, and education of the ward's
9 dependents, investing the proceeds, or for any other purpose which that is in the best
10 interest of the ward.

 ***NOTE: This provision appears to be in direct conflict with s. 54.19 (2) and (4), each of which require the guardian to act with respect to the ward's property in ways that are redundant to this provision, but *without* requiring court approval. Which alternative do you prefer? Is the issue related to a dollar value on the property, i.e., property over a value of, say, \$100,000 would require court approval before the guardian may act? Or should either this provision or s. 54.19 (2) and (4) drop out?

11 **54.23 Trust Banks and trust companies; exemption from investment**
12 **restraints.** The limitations of this section ss. 54.18 (3) (a) and (b), 54.19 (1), (2), and
13 (6), and 54.20 (1), (2) (k) and (L), and (3) (g), (h), and (i) relating to retention, sale,
14 investment, or reinvestment of any asset shall not be applicable to any bank or trust
15 company authorized to exercise trust powers.

 ***NOTE: Please scrutinize this provision. It was included without change in your proposal. I have amended it, so far as I can tell that it applies. The effect of this provision in current law is to place no limitations on the sale, investment, etc., of any of a ward's assets by a bank or trust company (this, I assume, is as opposed to the restrictions that guardians must abide by, such as court approval, prudent disposition, etc.) Do you want to continue this lifting of all restrictions on these actions by banks and trust companies?

16 **54.25 Guardian Duties and powers of guardian of the person of**
17 **incompetent.** (1) DUTIES. A guardian of the person shall do all of the following:
18 (a) ~~A guardian of the person of an incompetent appointed under s. 880.33 shall~~
19 ~~make~~ Make an annual report on the condition of the ward to the court that ordered

1 the guardianship and to the county department designated under s. 55.02. ~~That~~
2 ~~county department~~ The county shall develop reporting requirements for the
3 guardian of the person. The report shall include, ~~but not be limited to,~~ the location
4 of the ward, the health condition of the ward, any recommendations regarding the
5 ward, and a statement of as to whether or not the ward is living in the least restrictive
6 environment consistent with the needs of the ward. ~~The guardian may fulfill the~~
7 ~~requirement under this subsection by submitting the report required under s. 55.06~~
8 ~~(10).~~

****NOTE: "That county department" is changed to "The county" in accord with the
memo. I'm not sure I understand this change. Who or what in the county will develop
the reporting requirements?

9 (b) ~~A guardian of the person shall endeavor~~ Endeavor to secure any necessary
10 care, or services or appropriate protective placement on behalf of for the ward. that
11 are in the ward's best interests, based on all of the following:

12 1. Regular inspection in person of the ward's condition, surroundings, and
13 treatment.

14 2. Examination of the ward's patient health care records and treatment
15 records.

16 3. Attendance at and participation in staff meetings of any facility in which the
17 ward resides or is a patient, if the meeting includes a discussion of the ward's
18 treatment and care.

19 4. Inquiry into the risks and benefits of, and alternatives to, treatment for the
20 ward, particularly if drastic or restrictive treatment is proposed.

****NOTE: I did not draft the following material proposed: "(c) A guardian of the
person may bind the ward or the ward's property, to carry out the powers and duties set
forth in subs. (1) and (2) of this section." My reasons for not drafting this provision are
the following: (1) Although the provision is stated as a power, it is included in the duties
of the guardian of the person; as a power, it overlaps or conflicts with the powers and
duties of the guardian of the estate. (2) It is unclear to me what the term "bind the ward"

means—are you referring to entering into contracts that bind the ward to some action or financial commitment? Problems with this language aside, it does raise an interesting issue—if, for instance, the guardian of the person decides on a particular personal caregiver or type of treatment for the ward, must the guardian of the person work directly in concert with the guardian of the estate to secure a contract for provision of that care or treatment? Are there actually instances in which the guardian of the person differs from the guardian of the estate? If so, in the case of disagreement, who trumps?

1 (c) A guardian of the person of an incompetent, upon order of the court, may
2 have custody of the person, may receive all notices on behalf of the person, and may
3 act in all proceedings as an advocate of the person, but may not have the power to
4 bind the ward or the ward's property, or to represent the ward in any legal
5 proceedings pertaining to the property, unless the guardian of the person is also the
6 guardian of the property. A guardian of the person of an incompetent or a temporary
7 guardian of the person of an incompetent may not make a permanent protective
8 placement of the ward unless ordered by a court under s. 55.06 but may admit a ward
9 to certain residential facilities under s. 55.05 (5) or make an emergency protective
10 placement under s. 55.06 (11). The guardian of the person has the power to apply for
11 placement under s. 55.06 and for commitment under s. 51.20 or 51.45 (13).

***NOTE: I was confused about how to treat this provision; it does not appear in your proposal. Because I didn't know what else to do with it, I renumbered it s. 54.25 (1) (c), but I don't know what disposition you intend to make of it. It appears to be a hybrid of powers and limitations on powers of the guardian of the person. Also, it has parts that are redundant to other provisions. Did you intend that it be repealed?

12 **(2) POWERS.** Consistent with the functional limitations of the ward, the court
13 may authorize the guardian of the estate to do all of the following:

NOTE: I did not draft the following material proposed: “[Consistent with the functional limitations of the ward], the ward's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to provide for personal needs, and the ward's personal wishes, preferences and desires with regard to managing the activities of daily living as defined in sub. *, and the least restrictive form of intervention, and subject to the limitations contained in the Determination and Order Appointing Guardian . . .” My reasons for not drafting this material are the following: (1) I'm not sure what “the ward's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to provide for personal needs” means or how it would be applied: are you contemplating some form of informed consent between the guardian of the person and the ward? (2) What if the ward's “personal wishes, preferences and desires with regard to managing the activities of daily living . . . and the least restrictive form of intervention” are naive or delusional or inconsistent with the

practical judgment of the guardian, or of the court? (3) Since the proposed language requires that the court authorize the guardian of the person to exercise the powers, it is unnecessary to indicate that they are subject to the limitations contained in the court order of appointment. (4) Although I have drafted it (see above), the language requiring that the court authorize the guardian of the estate to perform the powers (that are specified below as s. 54.25 (2) (a) to (i)) seems to require that the court specifically authorize the actions in its order—wouldn't it be simpler to grant the guardian of the person these powers, as is done under s. 54.20 (3), and add a last power that would be something like "(j) Other powers specifically authorized by the court."?

1 (a) Make decisions concerning the ward's personal caregivers.

2 (b) Make decisions concerning the ward's social environment and other aspects
3 of the ward's social life, including marriage.

****NOTE: Does this provision mean that the guardian of the person must consent to any marriage of the ward and therefore can block a marriage? What about divorce?

4 (c) Restrict travel by the ward.

5 (d) Authorize the ward to obtain, retain, or renew a license, permit,
6 registration, or certification for which the ward is determined to be qualified, or
7 restrict the ward from obtaining, retaining, or renewing such a license, permit,
8 registration, or certification.

9 (e) Authorize access to or release of the ward's confidential records.

****NOTE: This power is exactly the same as that specified for the guardian of the estate under s. 54.20 (3) (d) (please see ****NOTE under that paragraph). Who trumps if the guardian of the estate and the guardian of the person conflict on this point?

10 (f) Make decisions concerning the ward's education.

11 (g) Apply for public and private benefits if a guardian of the estate has not been
12 appointed and if no other person is authorized to so apply.

13 (h) Make decisions on consenting to health care for the ward.

****NOTE: This language is in accord with the memo.

14 (i) Select the ward's place of residence, including admitting the ward to a
15 nursing home or to a community-based residential facility under s. 54.50 (2) (b). In
16 making the selection, the guardian of the person may consider all of the following:

***NOTE: I did not draft language of your proposal that requires that petitions for protective placement be directed to the circuit court, because such a provision more properly belongs in ch. 55. Do you want me to draft it there?

***NOTE: The second sentence of this provision is perplexing—does my change from “person” to “nonresident” appear to be accurate?

***NOTE: “Residence” is defined in ss. 46.27 (1) (d), 49.001 (6), and 49.686 (1) (f), stats., as follows: “. . . the voluntary concurrence of physical presence with intent to remain in a place of fixed habitation. Physical presence is prima facie evidence of intent to remain.” If “residence” is not defined for ch. 54, it is likely that a court would look to this definition for interpretation of s. 54.30 (2); should I define the term and use this definition?

1 **(3) CHANGE OF VENUE. (a) *Original proceeding.*** The court ~~wherein~~ in which a
2 petition is first filed shall determine venue. ~~If it is determined~~ the court determines
3 that venue lies in another county, the court shall order the entire record certified to
4 the proper court. A court ~~wherein~~ in which a subsequent petition is filed shall, upon
5 ~~being if it is satisfied of that~~ an earlier filing took place in another court, summarily
6 dismiss ~~such~~ the petition.

7 **(b) *Change of residence of ward or guardian.*** ~~If a guardian removes from the~~
8 ~~county where appointed to another county within the state or a ward removes from~~
9 ~~the county in which he or she has resided~~ changes residence from one county to
10 ~~another county within the state, the circuit court for the county in which the ward~~
11 ~~resides may appoint a new guardian as provided by law for the appointment of a~~
12 ~~guardian. Upon verified petition of the new guardian, accompanied by a certified~~
13 ~~copy of appointment and bond if the appointment is in another county, and upon the~~
14 ~~notice prescribed by s. 879.05 to the originally appointed guardian, unless he or she~~
15 ~~is the same person, and to any other persons that the court shall order, the court of~~
16 ~~original appointment may order the guardianship accounts settled and the property~~
17 ~~delivered to the new guardian.~~ venue may be transferred to the ward’s new county
18 of residence under the following procedure:

1 1. A person shall file a petition for change of venue in the county in which venue
2 for the guardianship currently lies.

3 2. The person filing the petition under subd. 1. shall give notice to the
4 corporation counsel of the county in which venue for the guardianship currently lies
5 and to the register in probate for the county to which change of venue is sought.

 ***NOTE: Should notice also be given to the corporation counsel of the county to
 which change of venue is sought?

6 3. If no objection to the change of venue is made within 15 days after the date
7 on which notice is given under subd. 2., the circuit court of the county in which venue
8 for the guardianship currently lies may enter an order changing venue. If objection
9 to the change of venue is made within 15 days after the date on which notice is given
10 under subd. 2., the circuit court of the county in which venue for the guardianship
11 currently lies shall set a date for a hearing within 7 days after the objection is made
12 and shall give notice of the hearing to the corporation counsel of that county and to
13 the corporation counsel and register in probate of the county to which change of
14 venue is sought.

 ***NOTE: I have tried to give active voice to s. 54.30 (3) (b) 1. to 3. Please review.

15 **54.32 Liability for fees.** If the ~~person proposed ward is an adult who is~~
16 ~~indigent, the county of legal settlement shall be~~ in which venue lies for the
17 guardianship proceeding is the county liable for any fees due the guardian ad litem
18 and, if counsel was not appointed under s. 977.08, for any legal fees due the person's
19 legal counsel. ~~If the person is a minor, the person's parents or the county of legal~~
20 ~~settlement shall be liable for any fees due the guardian ad litem as provided in s.~~
21 ~~48.235 (8).~~

 ***NOTE: I was unsure what to do here. Please review carefully your proposal and
 the language of s. 54.46 (4) (renumbered from s. 880.24 (3)). Not all of the expenses
 specified in your proposal are included in s. 54.46 (4). Is s. 54.46 (4) the "section position

on petitioner's counsel attorney fees" to which your proposal refers? Should there just be a cross-reference in this provision, if the proposed ward is not indigent, to s. 54.46 (4)?

1 **54.34 Petition; fees for guardianship.** (1) Any relative, ~~public official or~~
2 ~~other person,~~ may petition for the appointment of a guardian ~~of a person subject to~~
3 ~~guardianship for an individual.~~ Such The petition shall state, ~~so far as may be~~ all of
4 the following, if known to the petitioner:

5 (a) The name, date of birth, residence and post-office address of the proposed
6 ward.

7 (b) The specific nature of the proposed ward's alleged incapacity ~~with~~
8 ~~specification of the incompetency or spendthrift habits.~~

9 (c) The approximate value of the proposed ward's property and a general
10 description of its nature.

11 (d) Any assets of the proposed ward previously derived from or benefits of the
12 proposed ward now due and payable from the U.S. department of veterans affairs.

13 (e) Any other claim, income, compensation, pension, insurance or allowance to
14 which the proposed ward may be entitled.

15 (f) Whether the proposed ward has any guardian presently.

16 (g) The name and post-office address of any person nominated as guardian by
17 the petitioner.

18 (h) The names and post-office addresses of ~~the spouse and presumptive or~~
19 ~~apparent adult heirs of the proposed ward, and all other persons believed by the~~
20 ~~petitioner to be interested parties.~~

21 (i) The name and post-office address of the person or institution ~~having the~~ ,
22 if any, that has care and custody of the proposed ward or the facility, if any, that is
23 providing care to the proposed ward.

****NOTE: I have amended this paragraph because its application otherwise seems to be limited—no one would have “care and custody” of the proposed ward unless he or she had been detained or committed under ch. 51, had been confined in jail or prison, was on parole, extended supervision, or probation, or was adjudicated under ch. 971 or 980, or for a minor, was under a CHIPS order under ch. 48 or a JIPS order under ch. 938. For an elderly person, however, a facility might well be providing care only to him or her.

1 (j) The interest of the petitioner, and, if a public official or creditor is the
2 petitioner, ~~then the fact of indebtedness or continuing liability for maintenance or~~
3 ~~continuing breach of the public peace as well as~~ and the authority of the petitioner
4 to act.

****NOTE: To me, this language seems to assume that you wish to include spendthrifts in this chapter, but that issue is unclear.

****NOTE: 880.07 (1m) (petition alleging person is not competent to refuse psychotropic medication) is totally left out of your proposal. What is your intent here?

5 (k) Whether the proposed ward is a recipient of a public benefit, including
6 medical assistance or a benefit under s. 46.27.

7 (L) The agent under any current, valid power of attorney for health care or
8 durable power of attorney that the proposed ward has executed.

9 (m) Whether the petitioner is requesting a full or limited guardianship.

****NOTE: If the petitioner is requesting a limited guardianship, shouldn't the petitioner be required to list the particulars of the limitations?

10 (n) Whether the proposed ward, if married, has children who are not children
11 of the current marriage.

12 (2) A petition for guardianship may ~~also~~ include an application for protective
13 placement or protective services or both under ch. 55.

14 (3) If a petition for guardianship of the estate is filed, the fee prescribed in s.
15 814.66 (1) (b) shall be paid by the petitioner at the time of filing of the inventory or
16 other documents setting forth the value of the estate.

****NOTE: Who pays this fee? The petitioner? The ward's estate?

17 **54.36 Examination of proposed ward.** Whenever it is proposed to appoint
18 a guardian on the ground of a proposed ward's alleged incompetency, ~~a licensed~~

1 ~~physician or licensed psychologist, or both, shall furnish a written statement~~
2 ~~concerning the mental condition~~ the court shall direct that a comprehensive
3 evaluation, based on personal examination, be made of the functional incapacity of
4 the proposed ward, based upon examination and that a statement based on the
5 evaluation be submitted to the court. The court may utilize available
6 multidisciplinary resources in the community in determining the need for the
7 guardianship. The privilege under s. 905.04 ~~shall~~ does not apply to ~~this the~~
8 statement based on the evaluation. A copy of the statement shall be provided to the
9 proposed ward, ~~or his or her counsel, the guardian ad litem, and the petitioner's~~
10 ~~attorney. Prior to the examination, under this subsection, of a person alleged to be~~
11 ~~not competent to refuse psychotropic medication under s. 880.07 (1m), the person the~~
12 proposed ward shall be informed that his or her statements may be used as a basis
13 for a finding of incompetency and an order for protective services, ~~including~~
14 ~~psychotropic medication or protective placement.~~ The person shall also be informed
15 that he or she has a right to ~~remain silent~~ refuse to participate in the examination
16 or speak to the examiner and that the examiner is required to report to the court even
17 if the person ~~remains silent~~ does not speak to the examiner. The issuance of such a
18 warning to the person prior to each examination establishes a presumption that the
19 person understands that he or she need not speak to the examiner. Nothing in this
20 section prohibits the use of a report by a physician or psychologist that is based on
21 an examination of the proposed ward by the physician or psychologist before filing
22 the petition for appointment of a guardian, but the court will consider the recency
23 of the report in determining whether the report sufficiently describes the proposed
24 ward's current state and in determining the weight to be given to the report.

****NOTE: Does “functional incapacity” differ from incapacity? (Please see definition of “incapacity” under s. 54.01 (5) and the NOTE that accompanies it.)

****NOTE: Because the provisions concerning providing the ward with a copy of the statement and informing the ward are written in the passive voice, it is unclear who has the responsibility for performing these actions. If the person conducting the evaluation is the likely party, the sentences should be rewritten to give him or her that duty.

****NOTE: Please review this language to make sure I’ve captured the intent in accord with the memo.

****NOTE: Should the statement copy be required to be provided to the petitioner’s attorney? What if the petitioner has no attorney or is an attorney?

1 **54.38 Notice. (1) FORM AND DELIVERY OF NOTICE.** A notice shall be in writing
2 and shall include the names of all persons who are petitioning for guardianship. A
3 copy of the petition shall be attached to the notice. Unless otherwise provided, notice
4 may be delivered in person, by certified mail with return receipt requested, or by
5 facsimile transmission. Notice is considered to be given by proof of personal delivery
6 or by proof that the notice was mailed to the last-known address of the recipient or
7 was sent by facsimile transmission to the last-known facsimile transmission
8 number of the recipient.

9 **(2) NOTICE OF HEARING FOR APPOINTMENTS AND REHEARINGS.** (intro.) Upon the
10 filing of a petition for guardianship, and the court being of the person or of the estate,
11 including appointment or change of a guardian, if the court is satisfied as to
12 compliance with s. 880.07 54.34, the court shall, except as provided in sub. (3), order
13 delivery of notice by the petitioner of the time and place of the hearing as follows:

14 (a) ~~A petitioner shall have notice served of a petition for appointment or change~~
15 ~~of a guardian upon~~ On the proposed incompetent ward and existing guardian, if any,
16 by personal service at least 10 days before the time set for hearing. If ~~such proposed~~
17 ~~incompetent~~ the proposed ward is in custody or confinement, a the petitioner shall
18 have notice served by registered or certified mail on the proposed incompetent’s
19 ward’s custodian, who shall immediately serve it on the proposed incompetent ward.

1 The custodian shall inform the proposed ~~incompetent~~ ward of the complete contents
2 of the notice and ~~certify thereon~~ , certify on the notice that the custodian served and
3 informed the proposed ~~incompetent~~ ward, and ~~return~~ and returned the certificate
4 and notice to the circuit judge. ~~The notice shall include the names of all persons who~~
5 ~~are petitioning for guardianship. A copy of the petition shall be attached to the~~
6 ~~notice. The court shall cause the proposed incompetent, if able to attend, to be~~
7 ~~produced at the hearing. The proposed incompetent is presumed able to attend~~
8 ~~unless, after a personal interview, the guardian ad litem certifies in writing to the~~
9 ~~court the specific reasons why the person is unable to attend. If the person is unable~~
10 ~~to attend a hearing because of physical inaccessibility or lack of transportation, the~~
11 ~~court shall hold the hearing in a place where the person may attend if requested by~~
12 ~~the proposed ward, guardian ad litem, adversary counsel or other interested person.~~
13 ~~Such notice shall also be given personally or by mail at least 10 days before the~~
14 ~~hearing to the proposed incompetent's counsel, if any, guardian ad litem,~~
15 ~~presumptive adult heirs or other persons who have legal or physical custody of the~~
16 ~~proposed incompetent whose names and addresses are known to the petitioner or can~~
17 ~~with reasonable diligence be ascertained, to any governmental or private agency,~~
18 ~~charity or foundation from which the proposed incompetent is receiving aid and to~~
19 ~~such other persons or entities as the court may require. The court shall then proceed~~
20 ~~under s. 880.33~~ court.

****NOTE: Please note that I have changed the language of s. 880.08 (1) considerably
to make it more intelligible. The stricken provisions are contained in s. 54.38 (1) and (2)
(b), and in s. 54.44 (4). Please review.

21 (b) Personally or by mail at least 10 days before the time set for hearing, to all
22 of the following:

23 1. The proposed ward's counsel, if any.

- 1 2. The proposed ward's guardian ad litem.
- 2 3. Any presumptive adult heirs of the proposed ward.
- 3 4. Any other interested persons, unless specifically waived by the court.
- 4 5. The agent under any durable power of attorney or power of attorney for
- 5 health care of the ward.
- 6 6. Any person who has legal or physical custody of the proposed ward.
- 7 7. Any public or private agency, charity, or foundation from which the proposed
- 8 ward is receiving aid or assistance.
- 9 8. Any person that the court requires.

10 (3) NOTICE OF HEARING FOR APPOINTMENT OF GUARDIAN FOR A MINOR. ~~When~~ If the
11 proposed ward is a minor, ~~notice shall be given~~ the court shall order distribution of
12 notice by the petitioner of the time and place of the hearing as provided in s. 879.05
13 to all of the following persons, if applicable:

- 14 (a) The proposed ward's spouse, if any.
- 15 (b) The proposed ward's ~~parents~~ parent, unless the parent's parental rights
16 have been judicially terminated.
- 17 (c) ~~A minor~~ The proposed ward, if the proposed ward is over 14 years of age,
18 unless the ~~minor~~ proposed ward appears at the hearing.

 ****NOTE: I'm not sure that I understand what this provision means—The proposed ward, if a minor, receives notice unless he or she is under 15 or unless he or she appears at the hearing? How would the 15-year-old know where and when the hearing is? Does it still make sense to have s. 879.05, stats., instead of s. 880.08 (1) (renumbered s. 54.38 (2) (a)) apply?

- 19 (d) Any other person, ~~agency, institution, welfare department or other entity~~
20 having that has the legal or actual custody of the minor.

 ****NOTE: How does "actual" custody in this provision differ from "physical" custody in s. 54.38 (2) (b) 6.? Shouldn't they be the same?

1 (4) REHEARINGS. Notice of a rehearing to determine if a ward is a proper subject
2 to continue under guardianship shall be given as required for the appointment of a
3 guardian under subs. (1), (2), and (3).

4 (5) NOTICE OF APPOINTMENT OF GUARDIAN OF A MINOR WARD. If for any reason the
5 court fails to appoint as guardian the nominee of the minor, the guardian who
6 qualifies shall give notice of the guardian's appointment to the minor by certified
7 mail addressed to the minor's last-known post-office address and shall file an
8 affidavit of such the mailing shall be filed with the court within 10 days after the
9 issuance of letters notice is given.

 ***NOTE: This provision makes reference to the fact that, under s. 880.09 (1) and
(3), stats., a minor may nominate his or her own guardian. Your proposed material
includes it without change. However, neither s. 880.09 (1) or (3), stats., is addressed by
your proposed material (most of s. 880.09 is renumbered in this draft to be in s. 54.15),
so I repealed them (see ****NOTES under those provisions). Is that what you want with
respect to those provisions and in this one? If you want to keep all three, have I amended
this provision accurately?

10 **54.40 Guardian ad litem in incompetency cases; appointment; duties;**
11 **termination.** (1) APPOINTMENT. The court shall appoint a guardian ad litem
12 whenever it is proposed that the court appoint a guardian on the ground of
13 incompetency-under s. 880.33 54.15, protectively place a person or order protective
14 services under s. 55.06, review any protective placement or protective service order
15 under s. 55.06, or terminate a protective placement under s. 55.06, or at any other
16 time that the court determines it is necessary.

 ***NOTE: Wouldn't it be more accurate to say "when a petition is brought under s.
54.34," rather than "whenever it is proposed that the court appoint a guardian on the
ground of incompetency under s. 54.15"?

 ***NOTE: The option for the court to appoint at any other time is in accord with the
memo.

17 (2) QUALIFICATIONS. The guardian ad litem shall be an attorney admitted to
18 practice in this state and shall meet the requirement under s. 757.48 (1) (a). No

1 person who is an interested party in a proceeding, appears as counsel in a proceeding
2 on behalf of any party, or is a relative or representative of an interested party may
3 be appointed guardian ad litem in that proceeding.

****NOTE: I added the requirement that the GAL have completed 3 hours of CLE under ch. 767 to this provision, rather than s. 880.331 (4) (intro.), as proposed, because it seemed to fit better here.

4 (3) RESPONSIBILITIES. The guardian ad litem shall be an advocate for the best
5 interests of the proposed ward ~~or alleged incompetent~~ as to guardianship, protective
6 placement, and protective services. The guardian ad litem shall function
7 independently, in the same manner as an attorney for a party to the action, and shall
8 consider, but ~~shall not be~~ is not bound by, the wishes of the proposed ward ~~or alleged~~
9 ~~incompetent~~ or the positions of others as to the best interests of the proposed ward
10 ~~or alleged incompetent~~. The guardian ad litem has none of the rights or duties of a
11 general guardian.

****NOTE: The term “alleged incompetent” appears in this section, but in very few other places in ch. 880. I have repealed it, because it does not seem to be necessary. Please let me know if this drafting decision is not correct.

12 (4) GENERAL DUTIES. A guardian ad litem shall do all of the following:

13 (a) Interview the proposed ward ~~or alleged incompetent~~ and explain the
14 contents of the petition, the applicable hearing procedure, the right to counsel, and
15 the right to request or continue a limited guardianship.

16 (b) Interview the proposed guardian, the proposed standby guardian, if any,
17 and any other person seeking appointment as guardian and report to the court
18 concerning the fitness of each individual interviewed to serve as guardian and
19 concerning the report under s. 54.15 (7).

****NOTE: Have I handled this provision as the memo intends? It was not clear to me that it had been agreed to employ the criminal history and patient abuse record search under s. 50.065, stats., for s. 54.15 (7) or here.

1 (c) Advise the proposed ward ~~or alleged incompetent~~, both orally and in writing,
2 of that person's rights to be present at the hearing, to a jury trial, to an appeal, to
3 counsel, and to an independent medical or psychological examination on the issue
4 of competency, at county expense if the person is indigent.

****NOTE: I did not make the change in your proposal for this paragraph, from "that person's" to "the ward's," because the proposed ward is not yet a ward.

****NOTE: The addition of the right to be present at the hearing is in accord with the memo.

5 (d) Request that the court order additional medical, psychological, or other
6 evaluation, if necessary.

7 (e) If applicable, inform the court and petitioner's attorney that the proposed
8 ward ~~or alleged incompetent~~ objects to a finding of incompetency, the present or
9 proposed placement, or the recommendation of the guardian ad litem as to the
10 proposed ward's ~~or alleged incompetent's~~ best interests or that the proposed ward's
11 ~~or alleged incompetent's~~ position on these matters is ambiguous. If the guardian ad
12 litem recommends that the hearing be held in a place other than a courtroom, the
13 guardian ad litem shall provide the information under this paragraph as soon as
14 possible.

****NOTE: Shouldn't the reference to "petitioner's attorney" be, instead, to "petitioner"? What if the petitioner has no attorney or is an attorney?

15 (f) If the proposed ward requests representation by counsel, inform the court
16 and the petitioner or the petitioner's counsel, if any.

17 (g) Attend all court proceedings related to the guardianship.

18 (h) Present evidence concerning the best interests of the proposed ward ~~or~~
19 ~~alleged incompetent~~, if necessary.

20 (i) Report to the court on any ~~other relevant~~ matter that the court requests.

1 (5) COMMUNICATION TO A JURY. In jury trials under ch. 55 or 880, the court or
2 guardian ad litem may tell the jury that the guardian ad litem represents the
3 interests of the proposed ward ~~or alleged incompetent~~.

4 (6) TERMINATION AND EXTENSION OF APPOINTMENT. The appointment of a
5 guardian ad litem under sub. (1) terminates upon the entry of the court's final order
6 or upon the termination of any appeal in which the guardian ad litem participates,
7 even if counsel has been appointed for the proposed ward ~~or alleged incompetent~~.
8 The court may extend that appointment, or reappoint a guardian ad litem whose
9 appointment under this section has terminated, by an order specifying the scope of
10 responsibilities of the guardian ad litem. At any time, the guardian ad litem, any
11 party, or the person individual for whom the appointment is made may request that
12 the court terminate any extension or reappointment. The guardian ad litem may
13 appeal, or may participate in an appeal ~~or may do neither~~. If an appeal is taken by
14 any party and the guardian ad litem chooses not to participate in that appeal, he or
15 she shall file with the appellate court a statement of reasons for not participating.
16 Irrespective of the guardian ad litem's decision not to participate in an appeal, the
17 appellate court may order the guardian ad litem to participate in the appeal.

18 **54.42 Rights of proposed ward.** (1) RIGHT TO COUNSEL. (a) The proposed
19 ward has the right to counsel ~~whether or not present at the hearing on determination~~
20 ~~of competency. The court shall in all cases require the appointment of an attorney~~
21 ~~as guardian ad litem in accordance with s. 757.48 (1) and shall in addition require~~
22 ~~representation by full legal counsel whenever the petition contains the allegations~~
23 ~~under s. 880.07 (1m) or if, at least 72 hours before the hearing, the alleged~~
24 ~~incompetent requests; the guardian ad litem or any other person states that the~~
25 ~~alleged incompetent is opposed to the guardianship petition; or the court determines~~

1 ~~that the interests of justice require it. The proposed ward has the right to a trial by~~
2 ~~a jury if demanded by the proposed ward, attorney or guardian ad litem, except that~~
3 ~~if the petition contains the allegations under s. 880.07 (1m) and if notice of the time~~
4 ~~set for the hearing has previously been provided to the proposed ward and his or her~~
5 ~~counsel, a jury trial is deemed waived unless demanded at least 48 hours prior to the~~
6 ~~time set for the hearing. The number of jurors shall be determined under s. 756.06~~
7 ~~(2) (b). The proposed ward, attorney or guardian ad litem shall have the right to~~
8 ~~present and cross examine witnesses, including the physician or psychologist~~
9 ~~reporting to the court under sub. (1). The attorney or guardian ad litem for the~~
10 ~~proposed ward shall be provided with a copy of the report of the physician or~~
11 ~~psychologist at least 96 hours in advance of the hearing. Any final decision of the~~
12 ~~court is subject to the right of appeal. if any of the following occurs:~~

****NOTE: Under this amendment, the proposed ward's formerly unconditioned right to counsel is now conditioned. It was unclear from the language of your proposal whether the 72-hour limitation was intended to apply to all instances of a right to counsel. I applied it only to s. 54.42 (1) (a) 1. Please review. Note that the reference to psychotropic medication is removed; this issue should be revisited, depending on what you decide to do about psychotropic medication.

- 13 1. At least 72 hours before the hearing, the proposed ward requests counsel.
- 14 2. The guardian ad litem or another person states to the court that the proposed
15 ward is opposed to the guardianship petition.

****NOTE: I added "states to the court," because it is otherwise unclear how a statement of opposition triggers action appointing counsel. Should "and the court so appoints" also be added?

- 16 3. The court determines that the interests of justice require counsel for the
17 proposed ward.

18 (b) Any attorney obtained under par. (a) or appointed under par. (c) shall be a
19 zealous advocate for the expressed wishes of the proposed ward.

****NOTE: I did not include the language requiring maintenance of a "normal client-lawyer relationship with the client"—the standard for such a relationship should

be the State Bar Code of Ethics and need not be required by statute. In general, is the requirement for zealous advocacy meaningful, i.e., do you intend that an attorney be prosecuted for lack of zeal?

1 (c) ~~If the person requests but is par. (a) 1., 2., or 3. applies but the proposed ward~~
2 ~~is unable to obtain legal counsel, the court shall appoint legal counsel. If the person~~
3 ~~is represented by counsel appointed under s. 977.08 in a proceeding for a protective~~
4 ~~placement under s. 55.06 or for the appointment of a guardian under s. 880.07 (1m),~~
5 ~~the court shall order the counsel appointed under s. 977.08 to represent the person.~~

6 (2) RIGHT TO JURY TRIAL. The proposed ward has the right to a trial by a jury
7 if demanded by the proposed ward, his or her attorney, or the guardian ad litem,
8 except that the right is waived unless demanded at least 48 hours before the time set
9 for the hearing. The number of jurors for such a trial is determined under s. 756.06

10 (2) (b). The proposed ward, his or her attorney, or the guardian ad litem has the right
11 to present and cross-examine witnesses, including any physician or licensed
12 psychologist who reports to the court concerning the proposed ward.

13 (3) RIGHT TO INDEPENDENT MEDICAL EXAMINATION. If requested by the proposed
14 ward or anyone on the proposed ward's behalf, the proposed ward has the right at his
15 or her own expense, or if indigent at the expense of the county where the petition is
16 filed, to secure an independent medical or psychological examination relevant to the
17 issue involved in any hearing under this chapter, and to present a report of this
18 independent evaluation or the evaluator's personal testimony as evidence at the
19 hearing.

20 (4) WARD'S RIGHT TO PAYMENT OF EXPENSES IN TO CONTEST PROCEEDINGS. ~~When~~ If
21 a guardian is appointed the court may allow reasonable expenses incurred by the
22 ward in contesting the appointment.

1 (5) RIGHT TO BE PRESENT AT HEARING. The proposed ward has the right to be
2 present at any hearing regarding the guardianship.

 ***NOTE: This provision is in accord with the memo.

3 (6) RIGHT TO HEARING IN ACCESSIBLE LOCATION. The proposed ward has the right
4 to have any hearing regarding the guardianship conducted in a location that is
5 accessible to the proposed ward.

 ***NOTE: This provision is in accord with the memo.

6 **54.44 Hearing. (1) TIME OF HEARING; PROVISION OF REPORTS.** A petition for
7 guardianship shall be heard within 90 days after it is filed. The guardian ad litem
8 and attorney for the proposed ward shall be provided with a copy of the report of the
9 examining physician or psychologist under s. 54.36 at least 96 hours before the time
10 of the hearing.

 ***NOTE: I numbered this provision sub. (1), instead of sub. (5), because it fits
better chronologically. Because this provision exists, it is unnecessary to repeat the 60
day requirement under s. 54.38 (2) (intro.) (renumbered from s. 880.08 (intro.)), and
therefore I removed it from that provision.

 ***NOTE: Your proposed material does not affect s. 880.075, stats. Do you intend
that I repeal it?

 ***NOTE: The change to 90 days accords with the memo.

 ***NOTE: Because of the changed language of s. 54.36 (renumbered from s. 880.33
(1)), should the reference to “report of the examining physician or psychologist” be
changed to “comprehensive evaluation”?

11 (2) STANDARD OF PROOF. Any determination by the court as to whether the
12 proposed ward is an incompetent shall be by clear and convincing evidence.

13 (3) PRESENCE OF PROPOSED GUARDIAN. The proposed guardian shall be physically
14 present at the hearing unless the court excuses the proposed guardian’s attendance
15 or, for good cause shown, permits attendance by telephone.

 ***NOTE: The language referring to the “proposed” guardian is in accord with the
memo. Should this provision also be applied to any proposed standby guardian?

16 (4) PRESENCE OF PROPOSED WARD. The petitioner shall ensure that the proposed
17 ward attends the hearing unless the attendance is waived by the guardian ad litem.