MINUTES OF THE MEETING OF THE JUDICIARY COMMITTEE
March 12, 1981

The meeting of the House Judiciary Committee was called to order by Chairman Kerry Keyser at 8:00 a.m. in Room 437 of the Capitol. Rep. Conn and Rep. Anderson were absent. Rep. Huennekens and Rep. Teague were both excused. Jim Lear, Legislative Council, was present.

SENATE BILL 245 SENATOR MAZUREK, sponsor, stated this bill was requested by the Department of Health and Environmental Sciences. The purpose is to generally revise the laws relating to health and the family. Under the present law there is a requirement that a physical examination be performed in addition to the serological test.

Section 3 relates to the confidentiality of adoption proceedings. It allows an adopted child at 18 to have access to his birth certificate. Sections 3 and 9 make the law consistent. Section 4 is a grammar change. Line 9 on page 4, "dissolution of marriage" makes the terms consistent.

Section 6 of the bill changes the fee for a certified copy of a birth certificate to $3.00. One dollar of the fee will go to the earmarked revenue fund. Sections 7 and 8 change the date on which the marriage and dissolution records must be submitted by the 10th of the month. Failure to comply would be a misdemeanor.

JOHN WILSON, Department of Health and Environmental Sciences, supported the bill. EXHIBIT 1. WILSON demonstrated how the books were kept many years ago in big complex manuals. An updated, easier-to-locate materials manual is now in use.

There were no further proponents.

There were no opponents.

The Senator closed the bill.

REP. MATSKO stated all the dates in the bill are changed to the 10th except in Section 9, which is left as the 16th. WILSON stated that is not a problem. Those records come in and are cycled on a different schedule.

REP. HANNAH asked why it is not appropriate for someone who is adopted to have free access to the records. SENATOR MAZUREK replied it would not be appropriate. There needs to be some guidelines and a workable system. Medical history needs to be provided.

SENATE BILL 267 SENATOR MAZUREK, sponsor, stated this bill is to revise adoption, relinquishment and placement of children for adoption laws. This bill is introduced on behalf of the SRS. This deals with the black market baby situation.

Section 1 of the bill outlines information that is required in a petition. Section 2 requires that mothers receive counseling. Section 3 would set up the process of updating an order of relinquishment. Section 4 is a clean up provision. When an agency is working with the mother and she wants to give up the child, the agency sometimes runs into a problem because they don't know what the father's option is. Under present statute it is difficult to do that.

Section 5 are definitions that are generally used but not in the act. Section 7 lists the status of who may be adopted. Section 8 updates the language who is required to consent to adoption. Section 10 lists who may place the child. Section 11 is a new requirement aimed at the black market situation. In any agency adoption the agency is required to investigate the home and family. The idea is to require information be given at that point, i.e. medical history. If a mother just gave her child to a family, they might not file the adoption for a number of years. This would provide that at the time of placement an investigation be made.

Section 12 provides that a petition for adoption must be filed within one year.

JOHN FRANKINO, Montana Catholic Conference, was in support of the bill. The private adoption agencies have reviewed this. They are sensitive about this subject but with the amendment they approve of the bill.

BETTY BAY, SRS, was in support of the bill. EXHIBIT 2.

There were no further proponents.

There were no opponents.

In closing, SENATOR MAZUREK stated the change FRANKINO was referring to is on page 11 of the bill. Agencies do not have the financial backing to do this.

REP. CURTISS asked how many licensed agencies there are in the state. The Senator replied he was not sure. The role of the agencies, however, would not change at all.

REP. HANNAH asked if there was any danger by changing on page 11 to the Department setting up a government agency that would be responsible for all adoption in the state. SENATOR MAZUREK replied they are responsible for investigating priorities to any adoption. REP. HANNAH stated if the government is responsible it seems we are taking away the authority of the private agencies. The Senator replied he did not think so. If a private agency is involved an investigation is conducted to determine if the person is acceptable to be on the waiting list.

REP. HANNAH asked if it addressed the ability to become a licensed child placement agency. No was the answer.

REP. SEIFERT asked if this also refers to tribal courts. It was replied in domestic matters they have jurisdiction on the reservation. The Indian Child Welfare Act was passed a few years ago.

REP. CURTISS asked if the department is cooperative with the private organizations. FRANKINO replied yes, always. REP. CURTISS asked if any agency has ever been refused a license. SENATOR MAZUREK was not aware of any.

SENATE BILL 404 SENATOR MAZUREK, sponsor, stated this bill's purpose is to generally revise the law relating to the appointment of guardians for incapacitated persons. This bill has had much work performed in the interim committee. EXHIBIT 3.

The American Bar Association adopted a resolution to encourage the enactment of this legislation. A large number of disabled persons do not have the capacity to act on their own.

The provisions under existing law on probate do not deal with guardianship. This recommends the updating of those procedures. This is not a tool for people to file lawsuits against the state. We need the bill because it will clear up many things.

Section 1 of the bill provides limited guardianship. As the disabled person goes out in the community he may not be able to handle a certain item. A guardian might not want to take all the responsibility for the person but will take some of it. The listing of priority in subsection A provides that the association is at the top of the list. Whoever is appointed must be the best qualified and willing to serve. Section 10 authorizes temporary guardians.

This bill is necessary because the people are not willing to step forward and do this. This will allow them the flexibility and will encourage more people to respond.

JOE ROBERTS, Developmental Disabilities Legislative Committee, was in support of the bill. The group he represents is made up of people in the community working in these programs and receiving service from them. When this bill was presented to his committee it was unanimously agreed upon. There is a need for this. Many times parents are not anxious to take over full custody. The child may be very capable in most areas but in limited areas a guardianship may be appropriate.

ROSEMARY ZION was in support of the bill. She stated when this bill was introduced last session it was researched, drafted, introduced and killed in January. The main objection was from the Veterans Administration. There is, however, no objection to the bill this session by the Administration. ZION felt this bill clarifies the law and is very important. ZION gave EXHIBITS 4, 5, and 6 in support of the bill.

BETH RICHTER, Developmentally Disabled Advisory Council, was in support of the bill.

CARY LUND, SRS, was in support of the bill. This will allow the department flexibility.

There were no further proponents.

There were no opponents.

SENATOR MAZUREK, in closing, stated he felt the bill was a product of hard work by many people and he urged support.

REP. HANNAH asked if the parents were able to support the needs of the disabled person but when he reaches the age of majority they will be released of the financial burden. ZION replied that is already existing law and this bill does not effect that.

REP. CURTISS asked if this would provide that the court appoint a guardian in every instance where there is no guardian. SENATOR MAZUREK replied no. It does not appoint a guardian for every person.

REP. CURTISS asked about page 13, lines 3-9. The Senator replied that is for temporary guardianship where an emergency happens this is the only person who could give permission.

REP. CURTISS asked about conservators appointed. SENATOR MAZUREK responded conservators are for property when land needs to be managed.

REP. CURTISS asked what types of people would be coming forward to become guardians. SENATOR MAZUREK hoped that parents of the people, people who are interested in this and people who are in

this field. ZION stated that many people would be willing to become a limited guardian. An agency might be able to recruit service organizations for this; it would be like a Big Brother Big Sister Program.

SENATE BILL 403 SENATOR MAZUREK, sponsor, stated this bill is to conform provisions applicable to protective services to Montana's Guardianship and Conservator law. This would ensure that if the SRS became a guardian they follow the procedures in the guardianship act. It would require the compiling of a list of qualifying factors. That information would be available to the courts. This bill fits with Senate Bill 404.

ROSEMARY ZION was in support of the bill. This would require the SRS to make information available to the judges. The judges do not have the time to look thoroughly into this matter. It makes sense to have the information at the judges disposal.

CARY LUND, SRS, was in support of the bill.

There were no further proponents.

There were no opponents.

SENATOR MAZUREK closed the bill.

EXECUTIVE SESSION

The House Judiciary Committee went into Executive Session at 9:50 a.m.

SENATE BILL 161 REP. HANNAH moved do pass.

The motion carried unanimously. The statement of intent was also concurred in.

SENATE BILL 164 REP. BROWN moved do pass.

REP. BROWN felt the pressures placed on the child are severe.

REP. HANNAH did not like section 10 of the bill. REP. EUDAILY agreed.

REP. MCLANE asked what the present law is concerning the withholding of wages. REP. YARDLEY stated minimum wage is exempt. It is a formula the federal government uses.

REP. SEIFERT felt that the two year period was not enough time.

REP. EUDAILY felt that the $5.00 deduction was steep. REP. IVERSON thought that $1.00 was not enough to compensate the employer's bookkeeping records yet if it would not exceed $5.00 it would be justifiable. REP. YARDLEY stated it would be just a payroll deduction. REP. EUDAILY stated once it is set up the deduction would be automatic. Not that much cost would be involved. REP. HANNAH replied it is not just automatic. A bookkeeper would have to keep track of it and it would add more paperwork to the files. REP. BROWN stated this would be at the discretion of the courts.

REP. CURTISS moved to strike 2 years and insert 5 years. She felt this could go back for quite awhile and 2 years might be insufficient to cover it. REP. CURTISS withdrew her motion.

REP. EUDAILY moved to strike section 10 of the bill in its entirety.

REP. BROWN opposed the motion. REP. HANNAH stated the debt would have to be substantial to go after it.

REP. YARDLEY stated that money was the best thing to go after in these type of cases. If a car or television set was confiscated it would have to be sold at the sheriff's sale.

REP. MATSKO stated many people who have the obligation to pay child support do not. The father quits his job and draws welfare and unemployment to avoid paying. REP. BROWN stated if the father was so inclined he would do that anyway.

REP. CURTISS felt the Department of Revenue and SRS would benefit from the bill. It gives them authority to recover. REP. YARDLEY stated when a father is past due on payment the mother goes to a lawyer for help in recovery. The father ends up paying the amount past due yet the mother has to pay some of that money for the attorney's fees. The father wins and the mother loses.

The amendment to delete section 10 of the bill failed with MCLANE, CURTISS and EUDAILY voting for it.

The motion of do pass by REP. BROWN carried with EUDAILY, MCLANE, and CURTISS voting against the motion.

SENATE BILL 144 REP. BROWN moved do pass.

REP. EUDAILY moved to strike "PURPOSELY AND" from page 2, line 5. The motion carried unanimously.

REP. BROWN moved do pass as amended. The motion carried.

SENATE BILL 222 REP. HANNAH moved do pass.

REP. CURTISS moved following "costs" to insert "and attorney's fees" on line 7. The motion carried.

REP. CURTISS moved following "awarded" on line 9 to strike "if" and insert "unless". The motion carried.

REP. EUDAILY moved on page 2, line 15 following "of" to strike "costs" and to insert "attorney's fees". The motion carried.

REP. BENNETT moved to strike ":" after "if" on page 1, line 24 and on page 1, line 25 to strike "(a)". The motion carried.

REP. EUDAILY asked about the fiscal note for the bill. REP. IVERSON stated when the fiscal note was first drawn up it included torts, which according to testimony, involved about 5-10% of the money. REP. EUDAILY thought that could make a difference in the budgets. REP. IVERSON felt this bill would not survive on the present fiscal note.

REP. CURTISS moved to hold the bill until another fiscal note is made. The motion carried.

SENATE BILL 245 REP. BROWN moved do pass.

REP. BENNETT moved to delete section 10. He felt the language conflicts with abortions. Reporting abortions is of no benefit. There is no need for these reports to be made to the state. REP. MATSKO stated that was current law. REP. BENNETT withdrew his motion.

REP. BROWN moved to delete Section 10.

REP. BROWN moved to hold action on the bill. The motion carried.

The meeting adjourned at 10:50 a.m.

KERRY KEYSER, CHAIRMAN

mr

Exhibit 1

Testimony in Support of Senate Bill 245, 1981 Montana Legislative Session

Mr. Chairman and Members of the Committee:

My name is John C. Wilson. I am Chief of the Bureau of Records and Statistics, and am appearing on behalf of the Department of Health and Environmental Sciences regarding sections 3 through 12 of the bill.

Section 3 concerns the release of data from the Department's files for persons who have been adopted. The last session of the legislature amended 50-15-206 M.C.A. to require a court order for an adopted person born out-of-wedlock before he or she could get information from the sealed file (that is the file created pursuant to adoption, which contains the original birth certificate, the certificate of adoption form, and related documents). Section 50-15-304 provides in (2) (c):

> "The Department shall seal original birth records and open them only on demand of the adoptive person if of legal age or on order of a court."

Section 50-15-206 was amended to read:

> "Disclosure of illegitimacy of birth or information from which illegitimacy can be ascertained may be made only: (a) upon an order of a court to determine personal or property rights. An adoptive person of legal age may apply to the court for such an order."

Since there seemed to us to be a contradiction between the two sections as to whether or not the court order was required before a sealed file could be opened, we contacted our legal division which subsequently contacted the Montana Attorney General for an opinion in ths matter. The essence

of his reply, dated January 8, 1980 is:

> "You have requested my opinion on the following question:
>
> Is a court order required before an adopted person may be allowed access to his or her sealed original birth records?"

His opinion stated:

> "Legitimately born adopted persons of legal age may have their sealed original birth records opened on demand pursuant to section 50-15-304 (2) (c), M.C.A. Illegitimately born adopted persons may apply to the court for disclosure of their sealed original birth records pursuant to section 50-15-206 (1) (a), M.C.A."

Since it is not possible to ascertain when a person presents himself in our office with a request to open his sealed file whether he was born in- or out-of-wedlock members of our staff have to excuse themselves, open the sealed file, and determine whether or not the person is legitimate. If the person was born in-wedlock, we may open the sealed file and provide hime with certified copies of the documents ~~contained therein~~. If the person was born out-of-wedlock, we have to advise him that, due to circumstances surrounding his birth, we are not able to provide a certified copy unless we have a court order. This situation is awkward, both for our staff and for the registrants. We believe that out of fairness, all persons ought to be treated the same, whether they were born in- or out-of-wedlock. Senator Mazurek suggests that all persons desiring to have their sealed files opened be required to have a court order.

Section 4 simply adds two new definitions to the definitions sections of the Montana Vital Statistics Law. The new definitions are "dissolution of marriage", formerly called a divorce, and "invalid marriage", formerly called an annulment.

Section 5 replaces the word divorce with "dissolution of marriage" or "invalid marriage", to be consistent with other Montana statutes.

Section 6 has to do with the fees charged for certified copies of birth and death certificates. It brings Montana fees for certified copies more into line with those charged by other states. Inflation has affected fees for certified copies nationwide. One dollar of the fee is to be deposited in an earmarked revenue fund to be used by the Department for the maintenance of indexes to, and costs for the preservation of vital records.

Sections 7 and 8 simply change the date for marriages, divorces, annulments , and annulment of adoption to be due in our office on the 10th of the month instead of the 16th. Our processing is monthly and the cutoff date for the receipt of births, deaths, and fetal deaths is the 10th of the month. Over the years, Clerks of District Courts have cooperated with us in having their reports by the 10th also. We don't know why the 16th was listed as the cutoff date in the first place, the 10th of the month makes the production of vital statistics more timely, so that all kinds of records can be processed on the same schedule.

Section 9 is related to section 3 regarding the opening of sealed files ~~on~~ For persons who have been adopted. The change here is to remove permission to open a sealed file on demand of the adopted person if of legal age.

Section 10 simply provides that failure to report legally induced abortions to our Bureau is a misdemeanor.

Exhibit 2

TESTIMONY ON SENATE BILL NO. 267

An Act to generally revise the laws relating to adoption and to ammend the laws relating to relinquishment and placement of children for adoption by their parents without Agency involvement.

The Department of Social and Rehabilitation Services requested introduction of this Bill. The Bill is supported by the licensed Child Placing Agencies in the State. The purpose of the Bill is to insure that the rights of those individuals involved in an adoption are protected. The rights of children placed for adoption by their parents without Agency involvement may not always be properly insured. Currently SRS is ordered to investigate all adoptions when the Petition to Adopt is filed in District Court. The Petition to Adopt may be filed by the prospective adoptive parents at one week, one month or one year after the child is placed by the birth parents in the home of their choice. It is believed that the appropriateness of the child for placement, the suitability of the home for the child and insurance of rights of all parties should be investigated prior to placement of a child into a prospective adoptive home. For this reason, parents will be required to file a petition in District Court stating their decision to make an adoption plan for their child. The Report to the Court, which will be completed by SRS or a licensed placing agency, will advise the Court of the findings so a good decision may be made for the child. This requirement may be waived where the child is a member of the extended family of one of the petitioners or is a stepchild of the petitioner.

The second part of the Bill clarifies language in the Adoption Act currently in use. This fulfills a need for definition of adoption terms used in the current statute.

sa

Betty Bay
S.R.S.

Exhibit 2

DEPARTMENT OF
SOCIAL AND REHABILITATION SERVICES

TED SCHWINDEN, GOVERNOR

P.O. BOX 4210

STATE OF MONTANA

HELENA, MONTANA 59604

2 February 1981

The Honorable Joe Mazurek
Montana State Senate
Capitol Station
Helena, MT 59601

Dear Senator Mazurek:

The Director, the Office of Legal Affairs and the concerned divisions of the Department of Social and Rehabilitation Services have reviewed, as introduced by you, the bill amending the Montana guardianship laws and the Protective Service Acts to allow for limited guardianships in Montana. We support your bill in that it would provide the means for tailoring appropriate guardianships for the particular situations. The Department of Social and Rehabilitation Services has responsibilities in many situations where limited guardianship would be preferred to a full guardianship. Accompanying this letter is a statement detailing our reasons for supporting the bill.

If we can be of any assistance in explaining how this proposed legislation relates to the responsibilities of our agency, or should there be any questions, please contact me.

Sincerely,

Cary B. Lund, Attorney
Office of Legal Affairs

CBL/na

cc: Rosemary Zion

STATEMENT OF SRS IN SUPPORT OF BILL AMENDING
GUARDIANSHIP AND PROTECTIVE SERVICE ACTS

The Department of Social and Rehabilitation Services supports the proposed amendments to the Guardianship Act, creating a limited guardianship and the proposed amendments to the Protective Services Acts, limiting their effect in relation to the Guardianship Law.

The changes proposed in the Guardianship and Protective Services Acts will serve to clarify the relationship of those acts to each other and will also define the roles that the Social Services Division of the Department of Social and Rehabilitation Services may assume in providing Protective Services and undertaking legal responsibilities for incapacitated persons.

The acts as they are currently written are to an extent duplicative in that the Protective Services Acts allow the State to assume substantial legal responsibilities for incapacitated persons in a manner that is similar to guardianship and conservatorship. This lack of distinction between the Guardianship Act and the Protective Services Acts has lead to some confusion among attorneys and the courts. Consequently, the State has on occasion, received by the language of Court Orders for Protective Services significant guardianship authority over and thus legal responsibilities for an incapacitated person. This authority often is neither necessary nor desired. A further problem is that such authority is received by protective services procedures which not only differ from those required in guardianship proceedings but which are also less stringent.

The concept of limited guardianship would provide courts greater discretion in designing appropriate guardianships. Under the current law a limited guardianship is only implied. The proposed changes would incorporate the concept into the law and set forth specifically the procedure for and elements of such a guardianship. Under the present law, the authority and responsibilities given a guardian may be far in excess of that actually needed. Consequently, the State and private parties often find guardianship to be a burden upon them and the ward when it is granted. Potential guardians are reluctant to take on the tasks and legal responsibilities of a full guardianship. Limited guardianship would encourage concerned parties to more readily assume responsibility for the individual in the realms where it is needed while allowing the individual to retain those responsibilities he is capable of exercising. An incapacitated person's needs could be more appropriately met in this manner.

The authority and responsibilities granted to a limited guardian would have to be specifically stated in a court decree. Such authority and responsibilities as are granted

by a court order would have to be predicated upon stated findings as to the need for guardianship. The guardian would know from the court decree what his legal responsibilities are in relation to a ward and the guardian's legal liabilities might consequently be limited by this clearer definition.

Exhibit 4

MEMORANDUM

TO: Interested Provider and Advocacy Groups for the Developmentally Disabled

From: Rosemary B. Zion, on contract with DD/Planning & Advisory Council

RE: Proposed Limited Guardianship Legislation for Montana

Date: December 9, 1980

The Developmental Disabilities Planning and Advisory Council estimates that there are approximately 8,692 developmentally disabled adults living in Montana. The vast majority of these individuals are living in the community. They live independently, with family members, in group homes or planned semi-independent arrangements, in foster homes, in ICF/MRs, in nursing homes. It is impossible to obtain an accurate breakdown of the degree of disabilities suffered by these developmentally disabled adults. While many of them undoubtedly possess the intellectual abilities and social skills necessary to make knowing, intelligent choices about their life circumstances, it is clear that many do not possess such skills and abilities.

Regardless of the degree of disability from which they suffer, it is probable that the majority of developmentally disabled adults living in the community in Montana are legally their own guardians. How many have guardians is impossible to say. However, figures obtained on the developmentally disabled population of Boulder River School and Hospital suggest that very few do. Of the approximately 189 developmentally disabled adults residing at Boulder River School and Hospital, only about 21 have guardians appointed. Yet this population is clearly the most severely limited of the states developmentally disabled population in terms of ability to function independently.

The adult developmentally disabled person who is legally his own guardian but who is functionally unable to exercise independent judgement on his own behalf presents a serious problem both for that person and for people who deal with him. The disabled adult is clearly in danger of being victimized by persons who may gain control of his person or money, who make decisions for him that are not in his interests, who deny him fundamental rights or withhold services from him to which he is entitled. What is often less apparent until problems arise is that the persons providing services or making decisions for this person may also be in danger of "victimization."

If a physician is considering surgery or other hazardous medical procedures which may be beneficial to the person's health but which carry certain risks, the physician may be unable to obtain a free and knowing consent to the procedure because the developmentally disabled patient is not capable of giving free and knowing consent and because nobody else has legal authority to give such consent. This can even be a problem in the case of routine medical procedures

since almost all medical procedures carry some risks (remember Swine Flu shots !).

When as part of a behavior program, a service provider commences a program which contains any aversive elements or any restrictions on the liberty of the developmentally disabled person, the problem may arise again. I have seen many forms which purport to be a waiver authorizing certain procedures signed by the developmentally disabled client. But unless the client is in fact capable of understanding what his rights are, what a waiver is, what is proposed, and his ability to refuse to go along, then the "waiver" is neither freely made nor knowingly given. It is doubtfull that it would be held to have any legal effect. Many developmentally disabled adults in the community have "advocates" . But unless these advocates have been accorded some legal status by law or court appointment, then they have no power to "consent" on behalf of the developmentally disabled person to anything. Right now there is no law which would accord advocates such status unless they are appointed full guardians of the person.

If a person is prevented from bringing a legal action because of mental incapacity, the statute of limitations, that is the time within which the person may bring the action, may be extended up to five years longer than it would run for a person who did not suffer a mental incapacity. Thus persons implementing programs which control the person, restrict the liberties, determine the kind of residence, or affect the wellbeing of a developmentally disabled person who is not capable of knowingly and freely approving of what is done and for whom no guardian has been appointed may be subjecting themselves to a lengthy period in which their actions could be challenged by either the developmentally disabled person himself or by an advocate or guardian appearing later on the scene. This situation benefits neither provider nor client. It creates a kind of a legal "never-never-land" in which nobody knows how valid or acceptable his actions were until there is trouble.

Despite the obvious advantages of having guardians for people who are unable to make their own decisions freely and knowingly, the vast majority of developmentally disabled adults, as stated above, do not have guardians. There are several reasons for this. Some developmentally disabled adults simply do not have concerned family members or friends willing to act as guardian. Some family members and advocates are leary of court procedures. In many cases, however, there are family members or friends or advocates who would be willing to accept the at least some of the responsibilities of guardian but who, for various reasons, do not want to assume full guardianship responsibilities.

Many persons who are the most concerned about the developmentally disabled do not want to restrict the rights of a developmentally disabled friend or relative to exercise choice in those areas where the person is capable of exercising choices. Many do not want to automatically impair the person's civil rights, such as the right to vote, to choose to marry, etc. Others are not willing to accept all of the responsibilities of full guardianship, although they would be willing to accept responsibility for such things as protection of rights and approval of medical procedures.

Montana's present guardianship laws make no explicit provision for limited guardianship. They provide for the creation of a guardian of the person and/or a conservator of the property of an incapacitated or protected person. The laws were enacted as a part of the Uniform Probate Code at a time when the concept of limited guardianship was little known. Since the enactment of Montana's guardianship and conservatorship laws, there has been considerable interest throughout the country in the development of limited guardianship laws.

The Commission on Mental Disabilities of the American Bar Association has proposed a model law for the creation of guardianships and sonservatorships which includes extensive provisions for limited guardianship. The delegates to the most recent American Bar Association Convention approved a resolution favoring the adoption of limited guardianship laws by the states. The Commissioners on Uniform State Laws, original drafters of the Uniform Probate Code, are now in the process of reviewing and re-drafting the model laws regarding guardianships and conservatorships to reflect need for limited guardianship and conservatorship. Unfortunately it may be several years before the results of this revision are available in final form.

To meet the present need for a limited guardianship law, I have proposed revisions of the present guardianship law in Montana to provide specifically for the appointment of limited guardians in appropriate cases. The proposed bill provides that in addition to appointing a full guardian of the person, a court may appoint a limited guardian with only those powers and duties explicitly described in the order. A limited guardian could, for example, have authority to care for and maintain the incapacitated person, have authority to assert and protect his rights and best interest, be able to provide consent to medical procedures, assist in acquisition of training, habilitation or education. Or the limited guardian could have some combination of these powers . The point is that if a person is a limited guardian, his powers and responsibilities are specifically spelled out in the court's order. In addition, the bill specifies that any limitation of civil rights to be imposed on the incapacitated person (such as, for example, the right to vote), must be specifically spelled out in the order.

It is to be hoped that this flexibility in the responsibilities which a limited guardian might assume will make guardianship more attractive to relatives and friends of developmentally disabled persons and other persons suffering some degree of incapacity.

The proposed bill also attempts to clarify some cloudy areas in the present law. For example, it spells out what must be contained in a guardianship petition. It expands the list of persons and entities with priority to be appointed guardian to include persons associated with the kinds of advocacy groups which are one of the most likely sources of limited guardians. It attempts to prohibit the appointment of guardians with conflicts of interest (although it was necessary to preserve as a fall-back position, the possibility of appointing a state or federal agency providing

protective services to the person as guardian if there is no other appropriate person to assume the role).

To accompany the limited guardianship bill is a second bill which clarifies certain sections of the law dealing with the powers of the department of social and rehabilitation services. This bill was drafted after consultation with the legal staff of SRS . It's purpose is to make sure that the protective services laws implemented by SRS are coordinated with the guardianship laws.

At the time this memorandum is being drafted and circulated, the draft bills have not yet been introduced. This memorandum is being circulated to organizations providing services to the developmentally disabled, to advocacy groups for the developmentally disabled, to groups and individuals concerned with other kinds of persons who may be incapacitated, to various members of the bar and the judiciary. My intent is to solicit comments and suggestions, and to acquaint these organizations and individuals with the proposed bills and the ideas behind them. I would appreciate hearing from any and all of those who receive this memorandum and a copy of the proposed bills so that your ideas can be considered and, where appropriate, incorporated into the bill either before introduction or, if that is not possible, before consideration in committee during the legislature.

Comments , questions, suggestions, should be sent to:

Rosemary B. Zion
Zion Law Firm
P.O. Box 1255
Helena, Montana 59624
Tel (406) 442-3261

Exhibit 5

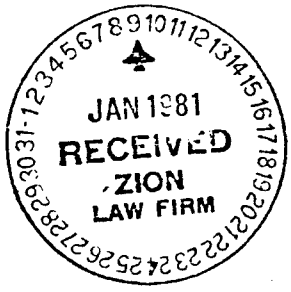
SCHOOL OF LAW

(406) 243-4311

University of Montana

Missoula, Montana 59812

January 7, 1981



Rosemary Zion, Esq.
Suite 201, Power Block
P.O. Box 1255
Helena, MT 59601

Dear Rosemary:

Thank you for sending the latest draft of your bill dealing with limited guardianships. I have read this draft and have no criticism of it, except for having found some typographical errors and some words for which I have substituted different words.

Martin Burke was the only member of the faculty who expressed any interest in the bill. He tells me that he has some experience with guardianships and said he will send his comments on your bill directly to you.

I hope you will continue to let me know what you are doing with this bill.

Very truly yours,

Lester

Lester R. Rusoff
Professor of Law

LRR:ss

Exhibit 6

1800 M STREET, N.W., WASHINGTON, D.C. 20036 / TELEPHONE: (202) 331-2240 / 331-2276

February 10, 1981

Developmental Disabilities/Montana
Advocacy Program (DD/MAP), Inc.
1215 East 8th Avenue
Helena, MT 59601

Dear Colleague:

At its Annual Meeting in August 1980 the American Bar Association adopted as Association policy a resolution proposed by the Commission on the Mentally Disabled. The resolution urges states to enact laws calling for limited guardianship, where appropriate, to assist persons of diminished capacity to live with maximum self-sufficiency in the general community.

Enclosed for your information is a copy of that resolution both as proposed and as approved with minor amendments to the recommendation.

Sincerely,

McNeill Smith
Chairman

MS:cdw
Enclosures

Mentally Disabled, Commission on the (Report No. 111)

After the Committee accepted two amendments, its recommendation was approved by voice vote. As amended, it reads:

> *Be It Resolved,* That the American Bar Association calls upon all states to assist persons of diminished mental capacity or under guardianship or conservatorship proceedings to live with maximum self-sufficiency in the general community, by enacting laws allowing court appointment of limited or partial guardians, where persons of diminished capacity need some, but not total, assistance in making decisions concerning their personal affairs or estates; and directs the attention of the states to the special committee of the National Conference of Commissioners on Uniform State Laws which is presently drafting a proposed amendment to the Uniform Probate Code and a free-standing uniform act on limited guardianships.

APPROVED RESOLUTION

AMERICAN BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

COMMISSION ON THE MENTALLY DISABLED

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association calls upon all states to assist persons of diminished mental capacity to live with maximum self-sufficiency in the general community, by enacting laws allowing court appointment of limited or partial guardians, where persons of diminished capacity need some, but not total, assistance in making decisions concerning their personal affairs or estates.

REPORT

This resolution urges all state legislatures to enact laws permitting the appointment of limited or partial guardians, in lieu of total or plenary guardians, where this would assist mentally disabled persons to live successfully in the community. Such laws would recognize the varying adaptive potentials of the elderly, the mentally ill, or persons with developmental disabilities (e.g., mental retardation, epilepsy, cerebral palsy, autism), the habilitative value of guardianships which facilitate independent life in the community, and the desirability of limiting as much as possible infringements on basic civil rights and freedoms. Appointment of limited or partial guardians would enhance the court's ability to deliver guardianship services appropriate for individual needs, and to focus rationally a guardian's attention on the specific needs of a ward.

A significant problem for persons of diminished or limited mental capacity has been the vagueness and inflexibility of customary guardianship proceedings and the deplorable exploitation that has often occurred under traditional all-or-nothing guardianship

systems.[1] Traditional guardianship also has the consequence that a person found to be incompetent is virtually without the power to sue contract, marry, vote and perform a number of other important legal acts.[2] The inflexibility of guardianship has been recognized by the Social Security and Veteran's Administrations which have for a number of years required the appointment of special third-party "representative payees" to receive and manage monies due persons with questionable capacity to make certain financial decisions.[3] In recent years, a number of states have examined the adequacy of their guardianship laws and have enacted so called "limited" or "partial" guardianship legislation.[4]

NATIONAL POLICY RECOMMENDATIONS

The notion of limited guardianship has received the endorsement of a number of national, blue-ribbon panels and organizations. In 1962, the President's Panel on Mental Retardation recommended in its Report of the Task Force on Law that

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[1] See, International League of Societies for the Mentally Handicapped San Sebastian Symposium on Guardianship of the Mentally Retarded (19 Dussault, Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens, 13 Gonz L. Rev. 585 (197 and, Note, Limited Guardianship for the Mentally Retarded 8 N. Mex. Rev. 231 (1978).

[2] United States Senate Special Committee on Aging, Protective Service for the Elderly - A Working Paper 39-40 (July 1977).

[3] 20 C.F.R. §404.1601 et seq., and 38 C.F.R. Part 13. See generally The Mentally Disabled and the Law at 261 (rev. ed. S. Brakel and R. Rock eds. 1971).

[4] Conn. Gen. Stat. §45-78(c) (Cum. Supp. 1979); Fla. Stat. Ann. §744. (Supp. 1979); Id. Code §56-239 to 242 (Supp. 1979); Ill. Ann. Stat. 110½ §11a-23 (Smith - Hurd Supp. 1979); Ky. Rev. Stat. §387.287 (Sup 1978); N.C. Gen. Stat. §35-1.6 (Supp. 1977); N.Y. Mental Hyg. Law §§77.19 and 77.25 (McKinney 1976 and Supp. 1977); S.C. Code §21-19-2 (1977); Tenn. Code Ann. §34-1201 et seq. (as amended by Pub. ch 499, "Conservatorship Law of 1980"); Tex. Prob Code 5 §130H (1978); Wash. Rev. Code Ann. §11.88.005; §11.88.125 (Supp. 1977); W. Va. Code §44-10A-2 (Supp. 1978); Wisc. Stat. Ann. §880.37 (1978).

> . . .as much as possible, mentally retarded adults be allowed freedom -- even freedom to make their own mistakes. We suggest the development of limited guardianships of the adult person, with the scope of the guardianship specified in the judicial order.[5]

The Panel's Task Force Report goes on to recommend that "plenary guardianship should be reserved for those who are judicially determined to be incapable of undertaking routine day-to-day decisions and who are found to be incapable of basic self-management."[6]

The American Association on Mental Deficiency released a position paper in 1973 entitled "Guardianship for Mentally Retarded Persons" in which the following general principle was endorsed:

> The boundaries of a specific guardianship should be specified, taking full cognizance of the social competencies and limitations of the individual ward. In other words, the guardian's mandate should be prescriptive in nature permitting the retarded adult to act in his own behalf on all matters in which he is competent.[7]

While not using the term limited guardianship per se, this recommendation embodies the essential aspects of specificity of guardianship control and recognition of individual competencies. In general, the AAMD policy statement urges conservative use of guardianship and maximum feasible participation of retarded persons in decisions which will affect them.

More recently, the President's Commission on Mental Health recommended that

> State guardianship laws provide for a system of limited guardianship in which rights are removed, and supervision is provided, for only those activities

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[5]The President's Panel on Mental Retardation, Report of the Task Force on Law at 42 (1963).

[6]Id. at 43.

[7]American Association on Mental Deficiency, Position Paper on Guardianship for Mentally Retarded Persons at 17 (1973).

The Commission noted that guardianship "is a highly restrictive method of providing supervision and assistance to mentally disabled persons. . .,"[9] and that "It is therefore essential that guardianship laws be carefully tailored to avoid any unnecessary restrictions on the rights of individuals."[10]

Finally, the President's Committee on Mental Retardation, in its 1976 Report to the President, called for the availability of a personal representative for every mentally retarded person who wishes or requires one. Insofar as this includes appointment of a legal guardian, the Report noted the following:

> There is, however, need in many states to improve and refine the laws to preserve to the individual the exercise of those functions of which he is capable.[11]

COMMUNITY CARE AND LESS RESTRICTIVE FORMS OF GUARDIANSHIP

There has emerged in recent years a national commitment to providing care, treatment, habilitation, and social support for various disabled groups in a community setting. A General Accounting Office report issued in January, 1977 found that since 1963 a number of federal laws and programs have been mandated by the executive, legislative and judicial branches of government to prevent the unnecessary institutionalization of the mentally disabled and to develop alternative programs and services in the community.[12] The depth of this commitment has been reaffirmed by the President's Commission on Mental Health which completed a

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[8]The President's Commission on Mental Health, Report to the President at 43 (1978).

[9]Id.

[10]Id. at 71.

[11]President's Committee on Mental Retardation, Report to the President - Mental Retardation: Century of Decision at 93 (1976).

[12]The Comptroller General, Summary Report to the Congress - Returning the Mentally Disabled to the Community: Government Needs to do More at 1 (1977).

year long study of the nation's mental health programs in 1978:

> In our judgement, people are usually better off when they are cared for within their communities, near families, friends, and homes. Our assessment of the past twenty years shows that progress has been made toward this end.[13]

The Senate Special Committee on Aging has condemned the destructiveness of institutionalization on the elderly and has urged the use of more effective alternatives:

> Most elderly persons would prefer to remain in their homes if at all possible. Many can if appropriate care and assistance are available. In the long run, this can produce savings for our nation because institutionalization is the most expensive form of care.[14]

The fact of "deinstitutionalization", which has brought greater numbers of the mentally disabled back into the community, and the accompanying expansion in types of care, habilitation, and treatment services, has placed new strains on existing guardianship mechanisms. Most state guardianship laws still emphasize the total decisionmaking role of the guardian,[15] with the result that the prevailing guardianship structure is in many ways more restrictive of personal freedoms than other forms of individual protection and assistance (such as self-help groups, advocacy agencies, and social work services). Consequently, if the guardian is to make possible the degree of autonomy, dignity and personal integrity necessary for successful reintegration into the community, his role must have clear limits.

LIMITED GUARDIANSHIP AND THE UNIFORM PROBATE CODE

The Uniform Probate Code, approved by the Uniform Law Commissioners and the ABA in 1969, constitutes the most significant comprehensive proposal for guardianship law reform in recent decades. The Code is based upon a general principle of unsupervised

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[13] President's Commission on Mental Health, supra note 8 at 17.

[14] United States Senate Special Committee on Aging, supra note 2 at iv

[15] American Bar Association Developmental Disabilities State Legislative Project, A Review of Guardianship Legislation 18-21 (August 1979).

estate administration, and takes the innovative step of separating procedures for guardianship of incapacitated persons from those for the protection of the property of persons under disability (conservatorship or protective orders).[16]

The Code, adopted in significant part by eleven states,[17] is liberal and detailed as to the administrative and distributive powers of conservators, and gives the court clear authority to enlarge or limit the powers of a conservator. The Code's guardianship provisions set the powers and duties of a guardian to be generally the same as those of a parent, although the court may modify them as may be appropriate. An important step taken by the Code is the elimination of the typical incompetency standard in favor of one based on capacity to make general decisions.

Unfortunately, the Uniform Probate Code is silent on the following key elements of limited guardianship:

* Assessment of actual mental and adaptive limitations of the person needing assistance or protection.

* Court finding of lack of capacity to do specific kinds of tasks or to make specific kinds of decisions.

* Court order of limited guardianship which specifies those legal disabilities to be imposed and grants only those powers the guardian will need in order to act where a legal disability has been specified.

The purpose of such provisions would be consistent with the underlying direction taken by the UPC in establishing a discreet, protective mechanism for managing and preserving the estates of the mentally incapacitated. The idea of limited guardianship would simply require all parties to examine formally at the start the nature and purpose of the appointment of guardian that is sought. Although additional specificity would be required in the petition and order, the use of limited guardianship should not be at odds with the general freedom of the guardian to act independently (once his mandate is clear) that is a cornerstone of the UPC.

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[16] See, Uniform Probate Code, Art. 5, Parts 3 and 4.

[17] These are Alaska, Arizona, Colorado, Idaho, Maine, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah.

Sixteen states explicitly permit the court to place some limitations on the powers of a guardian.[18] Generally, this is merely discretionary on the part of the court. Of these, twelve states have enacted formal "limited guardianship" laws which require a court to specify the legal disabilities and the restrictions to be placed on a limited guardian's powers.[19] Limited guardianship bills are currently being considered in the legislatures of seven states.[20]

Existing limited guardianship laws are quite similar in most respects. For instance, petitions for limited guardianship must usually set forth the nature and degree of any disability, the specific protections needed and limitations of rights required, and the term of limited guardianship requested. The court is required to order an outside investigation or evaluation by a physician, multidisciplinary panel, or designated agency, upon which it will base its decision as to whether a limited guardianship is appropriate.

An important characteristic of the court's order of limited guardianship is that incompetence is not presumed except insofar as a specific legal disability has been imposed. Also, the existing laws allow restriction of decisionmaking authority on issues pertaining to both property and personal affairs. The legislative purpose is generally to "encourage the development of maximum self-reliance and independence in the individual"[21] needing limited guardianship services, and appointment of a limited guardianship is to occur only "as is necessary to promote and protect the well-being of the individual."[22] Those states now considering limited guardianship laws are reviewing bills containing comparable provisions.

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[18] These are Florida, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, New York, North Carolina, South Carolina, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin.

[19] See fn. 4 supra.

[20] These states are Alaska, Connecticut, Delaware, Florida, Indiana, Oregon, and Pennsylvania.

[21] 1977 Tex. Gen. Laws, S.B. 699.

[22] Idaho Code §§ 56-239 to 242. (Supp. 1979).

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE

BILL 245 Date 3/12/81

SPONSOR Mazurek

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
John C. Wilson	Helena, MT	DH&ES	✓	
Joe Roberts	Helena	DD leg Actn Comm	✓	
John Mudlester	Helena	DHES	✓	

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PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE

BILL 403 Date 3/12/81

SPONSOR Mazurek

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Joe Roberts	Helena	DD Legislative Com	✓	
Rosemary B Zion	Helena	Self	✓	
Beth Richter	"	DD Advisory Council	✓	
Larry B Lund	"	SRS	✓	

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VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE

BILL 404 Date 3/12/81

SPONSOR Mazurek

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Joe Roberts	Helena	DD Leg Actn Comm	404	
Rosemary Bzim	Helena	Self	✓	
Beth Richter	"	DD Advisory Council	✓	
Larry B Lund	"	SRS	✓	

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VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE

BILL 267 Date 3/12/81

SPONSOR Mazurek

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Norma Vestre	Helena	SRS	X	
Betty Bay	"	"	X	
Cerry B Lund	"	SRS	X	
John Hankins	"	Mont. Cath. Conf	X	

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