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STATEMENT/TESTIMONY
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Oversight and other Protections in Adult Guardianship

1. General Background of Idaho Systems

Idaho adopted the Uniform Probate Code in 1972, the first State in United States to do so. The Code covers a multitude of subjects, but deals with all protective procedures except developmental disability cases, which are in a separate area. Starting in 1989, the Idaho law on protective procedures has been substantially revised, especially concerning conservatorship and guardianship. The emphasis of the changes has been to provide increased protection to the elderly (and others who are the subject of such actions, normally because of disabilities). Most of these changes have not been based on proposals from the Uniform Code Commissioners; instead, they have been crafted in Idaho to deal with specific problems in the setting of a State that has few public protections for the elderly and extremely limited budgets for any public protections that do exist.

The primary impetus for the changes has come from the Taxation, Probate & Trust Section of the Idaho State Bar, often in partnership with other interest groups such as AARP. At the time of the commencement of the changes in 1989, I was the chairman of the Section, and I have been the Legislative Committee Chairman for the Section for the last sixteen years. The Legislative Committee now consists of approximately thirty-two members, from a wide range of interests, including law, bank trust departments, governmental and quasi-governmental agencies, social workers, accountants, AARP representatives, and others, depending on the exact issue. All participation is voluntary and without pay of any nature, other than one hired law clerk. Funding for expenses, and the law clerk, is provided by the Bar Section.

The Idaho legislature meets annually for approximately sixty days, commencing in the first week of January. The legislature itself has very limited expertise, and no professional staff, in areas relating to the protection of the elderly. The administrative agencies charged with such protection (primarily the Idaho Commission on Aging and the Adult Abuse section of the Department of Health & Welfare) have severely limited budgets and personnel.

The Idaho judicial system hears cases regarding the elderly almost exclusively at the Magistrate level. Only one Magistrate in the entire State of Idaho, in Ada County, works primarily in the probate/protective proceedings area, and even that Magistrate is also assigned other cases. In all other counties in the State, assignment of protective proceeding cases is random rotated among all available Magistrates. Magistrates have, at most, one staff member.

2. Oversight of Conservators and Guardians in Idaho: Pre-appointment

For clarity, it should be noted that Idaho calls those who deal with the financial affairs of the protected person a “conservator” and those who deal with the health and personal care of the protected person a “guardian”, unlike many States which refer to those categories, respectively, as “guardian of the estate” and “guardian of the person”, or similar titles. Oversight of Conservators and Guardians is provided by a series of methods. The procedures in this section are not technically “oversight” because they occur prior to appointment, but they are important because they give protection to the Ward and tend to result in appointment of qualified conservators and guardians. Additionally, these procedures identify the needs of the Ward for protection, and the assets of the Ward, independently from the allegations of the petitioning party.

a. Initial Proceedings Protection of a ward begins with the initial requirements for petitions and proceedings. The statutes themselves spell out, in detail, all requirements, providing a primer for the Court and attorneys, especially those who are not experts in protective proceedings. Additionally, our Bar Section has prepared a detailed Forms book for protective proceedings, with checklists and procedure charts, to guide practitioners, and courts, through the process. This Forms book is provided free of charge to all courts in the state. This promotes uniformity in proceedings throughout the State.

b. Requirements for Court Visitors and Guardians ad Litem

i. Court Visitor The statutes require that every proceeding commence with the appointment of a Court Visitor. The Court Visitor must be “trained in law, nursing, psychology, social work, or counseling” and is deemed to “an officer, employee or special appointee of the Court” and must have “no personal interest in the proceeding”. The statute spells out in great detail the required contents of the Court Visitor’s report, which must be furnished to the Court and all interested persons. As part of the required contents of the report, the Court Visitor must assess the financial assets of the Ward.

ii. Guardian ad Litem The Guardian ad Litem must be an attorney. The statute requires the Guardian ad Litem to act solely in the best interests of the Ward. The Guardian ad Litem also submits a report to the Court and appears at the hearing on behalf of the Ward. Like the Court Visitor, the Guardian ad Litem must interview all interested persons in the case, as well as meet with all medical, nursing home, or care providers involved with the Ward.

c. Independent Appointment of Court Visitor and Guardian ad Litem The court appoints the Court Visitor and the Guardian ad Litem. In larger counties, revolving lists of qualified persons or entities are used. This ensures the independence of both.

d. Right to Hire Independent Counsel The Ward has the right to retain independent counsel in addition to the Guardian ad Litem.

e. Priority of Appointment The Idaho priority list for appointment has been substantially

changed from the Uniform Probate Code. Under our current Code, the protected person can nominate his or her choice as conservator or guardian orally or in writing during the proceedings, if capable of doing so. If no such nomination is made, then the person or entity that the protected person had previously named to fulfill similar roles (the agent named in a financial powers of attorney as to conservatorship, and the agent named in a medical directives or medical powers of attorney as to guardianship) is the first priority for appointment. Only if none of those choices had been expressed by the protected person will the standard listings in the Uniform Probate Code (based on relationships such as spouse, then adult children) be used. The Court Visitor and the Guardian ad Litem are required to ascertain and report these choices to the court.

f. Limitations on Temporary and Special Appointments The prior Code allowed ex parte temporary appointments of conservators or guardians for up to six months (but with unlimited renewals) without any hearing, without any notice to the protected person, without appointment of a Guardian ad Litem, without appointment of a Court Visitor, and without any required reporting or notices to the protected person or any other “interested persons” under the Code. This allowed tremendous abuse without any protection. The Code was revised dramatically to severely limit the ability to obtain temporary appointments without showing of extreme emergency and to require notice within forty-eight hours to the protected person and others, and with an extensive listing of the rights of the protected person to obtain immediate hearings and other protections. The maximum time limit for appointment was decreased to sixty days. Only the limited powers absolutely necessary to protect the immediate health and safety of the protected person could be granted. A Guardian ad Litem was required to be appointed and the protected person additionally had the right to independent counsel. On request of any interested person, a hearing must be held within five days and a Court Visitor appointed. Temporary appointments could not be renewed. Conservatorship powers are limited to preservation and protection of the assets, and maintenance of the Ward. Any petition for a temporary appointment of a conservator must be accompanied by a petition for a permanent conservator.

g. Felons as Guardians or Conservators Idaho law now requires that if a felon petitions to be conservator or guardian, the court must find by clear and convincing evidence that the appointment is in the best interests of the Ward. This is true even if the felon has priority for appointment under the Code.

h. Required Submission of Financial and Care Plans Petitioning conservators and guardians must submit written detailed plans for management of the assets and of the welfare of the Ward. These plans are reviewed by the Court and the Guardian ad Litem and any interested person.

i. Requirement of Limited Appointment Unless the need is shown for a general appointment, the Court is to make only a limited appointment, covering the exact needs of the Ward by detailing the specific limited powers of the conservator or guardian. These needs are identified in the reports of the Court Visitor and the Guardian ad Litem and by testimony at hearing.

3. Oversight of Conservators and Guardians in Idaho: Post-appointment

a. Fiduciary Review Committee, Guardianship Monitoring, Legislative Oversight Committee Initial attempts were made by the Bar Section to determine whether required reporting by guardians and conservators were being filed, and if filed, were being reviewed by the Court. Incredibly, the case computer listing system of the State could not even identify which cases were conservatorship/guardianship cases, much less whether reports had been filed. After prolonged work with the Idaho Supreme Court to revamp the system, an analysis was made of existing cases in Ada County, Idaho. The vast majority had no initial inventories or any annual reports. A volunteer Fiduciary Review Committee was established, composed of several attorneys (including myself) and a trust officer and an accountant. The Committee attempted to track down non-reporters and then obtain reports. Then, the reports which showed serious violations on their face were assigned to a committee member who pursued correction of the violations, including court action if necessary. All participation was on a pro bono basis, with expenses provided by the Bar Section. In a three year period, in just Ada County, literally millions of dollars were recovered. There is now a pilot program through the Idaho Department of Finance, the Idaho Office of the Attorney General, and the Idaho court system, to extend this program Statewide and to institutionalize the process, rather than relying on volunteers. There is also a Guardianship Monitoring program in Ada County which provides permanent staff to coordinate training and monitoring of guardians and conservators. This program reviews every inventory, accounting, and status report submitted to the court and takes any followup proceedings necessary. The program also provides training and ongoing monitoring of guardians after appointment, with substantial help from AARP and other volunteers. Finally, the Idaho Legislature this session created a Legislative Oversight Committee, of which I am a member, to propose ongoing legislation and funding for protection of the elderly, including independent review of all conservator and guardian reports in the entire State.

b. Continued Guardian ad Litem Participation After Appointment Legislative changes, and increased judicial enforcement, are now ensuring that Guardians ad Litem remain active in protective cases, unless the Court finds that such additional protection is not needed – for example, if the Guardian/Conservator is a long term spouse and the assets are all community and limited in size. The Guardian ad Litem reviews all reports submitted by the Guardian and Conservator and monitors the status of the Ward independently. The Guardian ad Litem can bring motions before the Court at any time to protect the Ward, including challenging actions of the guardian or conservator, challenging the accuracy of reports or the failure to submit reports, challenging the appropriateness of expenditures or fees and costs, and so forth.

c. Court Enforcement A new section of the Code was created to give the Court clear ability to enforce reporting and proper actions by conservators and guardians on its own initiative. The Court could impose fines and could surcharge the conservator/guardian for misapplied funds.

d. Required Reports An initial inventory of the asset and debts of the Ward must be filed within 90 days of appointment and served on all interested persons, including the Guardian ad Litem. Accounting reports must be submitted at least annually, or more often if required by the Court. Mandatory reporting forms for the inventory, accountings,

and status reports are provided to the conservator and guardian by the Court at the time of appointment. These forms are also available in the Forms Book and online. Substantive proof of the contents of the reports must accompany the reports. We are currently expanding the description of the required substantiation for enactment in our next legislative session.

e. Handbooks for Conservators and Guardians The Bar Section has written and published, without charge, separate detailed handbooks for the Conservator and for the Guardian. These are given out at the time of appointment. The Conservator or Guardian must verify in writing to the Court that the handbook has been read and understood. Additional training is available, both by video and through the Guardianship Monitoring program.

f. Training Financial Institutions and Law Enforcement to Recognize Fiscal Abuse by Conservators and Other Fiduciaries Idaho has implemented, by statute, training of financial institutions in the recognition of fiscal abuse, including by Conservators, Trustees, Powers of Attorney, and other fiduciaries. The statute also provides legal immunity to the financial institution for good faith reporting of such apparent fiscal abuse. Programs are in place to train law enforcement personnel in how to recognize and investigate fiscal abuse, and to train prosecutors how to prosecute fiscal abuse cases. New statutes are being enacted to expand the definition of, and punishment for, fiscal abuse of the elderly, with enhanced penalties when the fiscal abuse involves retirement funds, housing, and so forth.

g. Clear Procedures For Transfer of Guardianships Idaho has implemented procedures required for transfer of a Ward out of or into the State of Idaho. These procedures include direct coordination of the original appointing court and the Idaho court if the transfer is into the State of Idaho, or the Idaho appointing court and the proposed new court of jurisdiction if the transfer is out of the State of Idaho. This coordination is judge to judge. This eliminates jurisdictional problems and ensures that a Ward does not lose the protection of law during or after a transfer.

h. Clear Tracking of Protective Cases The Court computer tracking system has been substantially modified to clearly identify and track all protective proceedings. The system can distinguish adult and minor cases, as well as developmentally disabled cases. The system can identify whether proper reports have been filed and whether the case is active or closed.

4. REMAINING NEEDS, PROBLEMS

a. Grants for State or Private Programs Idaho, like many States, is experiencing severe budget deficits. There are, therefore, few sources for funds for innovative programs. Existing state programs protecting the elderly are being slashed or eliminated. State legislators are reluctant to fund programs until they are proven. Federal grants to establish pilot programs for innovative methods to protect the elderly would enable local volunteers to establish the programs and then, when the worth of the programs is documented, lobby them into existence as State programs.

b. Establishment of Basic Rights of the Elderly as Fundamental Due Process The fundamental right of the elderly to self-determination, to make their own decisions, must be protected. These rights must be enumerated and made a part of the very fabric of all protective proceedings. Such rights must be removed from the elderly only as a last resort, and only to the extent absolutely necessary, and then only after full due process, and with careful examination of all available alternatives. The emphasis must be on protection of the elderly, not the convenience of others, including the convenience of the judicial system. The dignity of the elderly must be preserved at all costs, in the face of a system which creates justifiable fear in the elderly and which is often indifferent to, or even contemptuous of, the emotional needs of the elderly when that justifiable fear is expressed. That justifiable fear by the elderly is sometimes even characterized as paranoia and used as proof of the need for protective proceedings. Far too often, the system strips the elderly of their assets, their comforts, and, ultimately, their human dignity.

c. Training of Judges and Other Court Personnel and Creation of Central Resources Because of the limited number of protective proceeding cases that magistrates in smaller counties handle, more training of the magistrates and their support personnel is needed. Additionally, the smaller courts need access to expertise, resources, and statistics.

d. Recognition by Social Security and Other Agencies of Protective Appointments As noted in the GAO Report, Social Security procedures for representative payees allows fiscal abuse of the elderly even when a conservator has been appointed.

e. Creation of State and National Databases on Abuse of the Elderly, Including Fiscal Abuse This should not only include raw numbers, but names, so that local courts can ascertain if a proposed conservator or guardian has committed fiscal or other abuse of the elderly in other states. Currently, it is far too easy for an abuser to simply move across a state line and file a petition for conservatorship or guardianship in the new state.