ILLINOIS GUARDIANSHIP AND ADVOCACY COMMISSION
OFFICE OF STATE GUARDIAN

MIDWEST UNITED STATES
CASE LAW SUMMARY

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October 2004

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Note: This work was prepared as a guide to guardianship practitioners, and is intended as an informational guide, not as a complete listing of all case law. Before relying on any of the information presented in this summary, users are encouraged to consult with counsel familiar with guardianship law and related legal issues. Although this information is in the public domain, we ask that any references to this Summary contain proper attribution.

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Who May Serve As Guardian

In re Guardianship of Schneider, Ohio Appellate Court, 806 N.E.2d 610 (2004). Richard Schneider was the brother of Joseph Schneider, the deceased husband of Laverne Schneider. Richard served as successor agent under a power of attorney for Laverne that named Joseph as primary agent. When a need for guardianship arose, Richard and Elaine Kelley, Laverne's sister, each petitioned. The trial court appointed Elaine, and Richard appealed, claiming that he should have received a preference in the guardianship appointment owing to his status as successor agent. The appellate court noted questionable financial practices by Richard, including the transfer of title of a car belonging to Laverne to Family Center, Inc., a closely held corporation owned by the brother-in-law and his wife; he also gave a big-screen television owned by Laverne to his daughter. He claimed that that both the car and the television were gifts from Joseph Schneider. The court also found that his status as the named successor agent, after Laverne's husband, did not rise to the level of a preference. Ohio law recognizes a preference as a guardianship candidate one who is nominated to serve as an agent in a valid power of attorney, but the appellate court did not extend this preference to a successor agent.

In Re Benson, Missouri Appellate Court, 124 S.W.3d 79 (2004). Wanda Benson's son and daughter filed separate petitions seeking to have guardianships and conservatorships established for their mother. The trial court rejected both petitions and appointed a county public administrator as guardian, after determining that she was disabled and incapacitated. The trial court appointed the public guardian despite a Missouri statute that creates a familial preference in such appointments. The appellate court found that the statutory preference was not absolute and subject to the discretion of the trial court. The appellate court also held that the preference was subordinate to other preferences found in Missouri law. In sorting out the factors, the appellate court held that relatives should be appointed over strangers as a guardian unless the record reveals evidence of dissension in the family, adverse interest of the relatives and the incompetent, the lack of business ability of the relative, or any other reason why the stranger would best serve the interests of the incompetent. In this case, the son indicated a preference to

take Wanda Benson out of Missouri to his home in California, despite the fact that Wanda had never been there and had only sporadic contact with her son. The trial court, with the appellate court's approval, felt that Wanda had stronger ties to Missouri and that this conflict warranted appointment of a neutral party as guardian and conservator. The appellate court also noted that there was "testimony regarding the extensive familial history of finger-pointing, mistrust, alienation, and manipulation, and that it likely was of a continuing and ongoing nature." This evidence supported the Probate Court's belief that there was significant dissension among Wanda's children which was not in her best interest. The appellate court noted that the record reveals that the conflict in this family goes beyond the "typical family differences." Finally, the appellate court rejected the argument that the trial court was required to specifically find a relative to be unsuitable before appointing a public guardian.

In the Matter of Erma Z. Oliva, Incapacitated/Disabled, John Oliva, Jr., R.W. Shakelford and Martha Pollard, Limited Guardian and Conservator for Erma Z. Oliva, Missouri Appellate Court, 2003 Mo. App. LEXIS 1328 (2003). After developing Alzheimer's Disease symptoms, Erma Oliva requested that her son be appointed guardian and conservator for her. After the limited appointment, she wandered away from home and siblings requested a change in the guardianship and conservatorship, which was temporarily suspended. The siblings differed as to the best placement and course of treatment for the woman. The trial court found it appropriate to appoint a public guardian as a successor, due to the family discord, and removed the son as guardian. The public guardian then moved the woman to a nursing home. The appellate court reversed the trial court, giving great weight to the wishes of the woman that her son be appointed as guardian and conservator. The appellate court noted that Missouri law required the appointment desired by an incapacitated person (prior to incapacity) absent substantial evidence establishing good cause. The court also found that a nursing home placement was an overly restrictive placement for the woman, and supported the son's attempt to care for her at home.

In Re Guardianship And Conservatorship Of Irene M. Gorman, Nebraska Appellate Court, 2004 WL 555651 (Neb.App. 2004). Unpublished Decision. On January 27, 2003, Betsy Aschenbach petitioned for guardianship and conservatorship for Ms. Gorman, who was Ms.

Aschenbach's elderly niece. Irene Gorman's brother, Frank Cummings, counter-petitioned, arguing that he had priority over the niece owing to his status as an agent under a power of attorney that was executed by Ms. Gorman seven days before the guardianship case was filed. The trial court rejected Frank Cummings' argument, noting that other family preferred the niece as a candidate for guardian and conservator, that the niece had a long-standing and close relationship and that she proposed to keep Ms. Gorman in Nebraska. Irene Gorman testified that she wanted Cummings as guardian and that she wanted to live in California with him. However, other testimony showed that she was easily influenced by the last person who spoke with her and she frequently changed her mind during the months preceding the filing of the guardianship and the purported execution of the power of attorney. These facts warranted the trial court's finding that Ms. Gorman lacked capacity to execute a power of attorney, excusing the trial court from having to consider the brother as a preferred candidate for guardian. Although the trial court was required by Nebraska statute to consider the wishes of the ward to appoint her brother as guardian, the appellate court found no error by the trial court in rejecting those wishes and appointing the niece.

In the Matter of the Guardianship Of Dessie Borland, Ohio Appellate Court, 2003 WL 22969359 (Ohio App. 5 Dist.) (2003). Unpublished opinion. Where record showed that family members took advantage of proposed ward, an elderly woman, gained advantage from various powers of attorney entered into played favorites within family, were not amicable and had cross agendas, appointment of state Family Services agency as guardian instead of family was appropriate.

In re Guardianship of Simmons, 2003 WL 22319415 (Ohio App. 6 Dist.) (2003). Unpublished opinion. A son, an attorney, served as an agent under a power of attorney executed by his elderly mother. Evidence at trial showed the attorney son to be hostile and non-communicative with his brother and sister concerning their mother's care and finances. He allegedly misused a power of attorney by making loans to himself that suggested self dealing and inappropriately consented to the entry of a 'full code' note on her medical chart in her nursing home, contrary to her wishes. The other son, with the sister's support, petitioned for guardianship and asked the court to compel the agent-attorney son to account for his mother's assets. When the trial court

rejected the son's application and appointed the attorney son as guardian, the applicant appealed. The probate court appointed the attorney son on its own motion, even though he had not sought the guardianship appointment. The appellate court found the appointment to be improper and not in the woman's best interest, and reversed the trial court decision, and remanded the matter for reconsideration consistent with the court's opinion. The court observed that "when family members cannot cooperate the better approach is to consider and appoint a disinterested third party who will relay information and work together with all interested parties. Therefore, in light of the court's recognition of the obvious ill-will between the siblings and because of Donald's own acknowledged unresponsiveness to his brother's and sister's concerns, we conclude that the trial court abused its discretion in appointing Donald as guardian."

Residential Placement Decisions Made by a Guardian

O'Bannon v. Schindler, Indiana Appellate Court, 796 N.E.2d 335 (2003). Rehearing Granted 801 N.E.2d 189; transfer to Indiana Supreme Court Dismissed 812 N.E.2d 802. In class-action litigation related to the closure of two large, state-operated facilities for persons with developmental disabilities called Muscatatuck State Development Center ("MSDC") and Fort Wayne Development Center ("FWDC"). The two facilities were the subjects of investigations by the United States Department of Justice, and the State of Indiana ultimately decided to close the facilities and transition the residents into community-based settings. The case illustrates the dilemma that follows such closures. As the court noted, the amended complaint described the Class members as "medically frail" and "at risk" individuals and alleged that "large institutions" such as MSDC are currently the only appropriate residences for the Class members. The complaint also alleged that the State has failed to develop or identify any community-based facilities that provide suitable care for the Class members, and that members of the Class who had moved from MSDC were residing in "inadequate facilities as a result of [the State's] '*rush to closure*. The Court found that an injunction that barred the State from "[p]ressuring in any way any parent or guardian to transfer their son, daughter or ward into transferring from [MSDC] to another facility" was too vague and overturned the trial court on this point. The appellate court

also noted that "staffing decisions (at the facilities undergoing closure) are the responsibility of the legislative department and that department answers to the citizens of this state, not to Indiana courts." However, the appellate court upheld the trial court's injunction barring the state from summarily transferring class members to alternative placements.

Marriage and Divorce

Jon Houghton, Guardian/Conservator of Joann Houghton Johnson v. Ronald Paul Keller, Michigan Supreme Court, 671 N.W.2d 45 (2003). The State Supreme Court affirmed an appellate court decision upholding the right of a conservator/guardian to pursue a divorce action on behalf of a ward. The appellate court noted that "nothing in the language of (the Michigan guardianship law) expressly prohibits guardians from filing a complaint for divorce on behalf of a party to the marriage." **Houghton v. Keller**, 256 Mich.App.336, at 339; 662 N.W.2d 854.

End of Life Decision Making

Matthew Woods, Deceased, By His Guardian Ad Litem, T. Bruce Simpson, Jr. v. Commonwealth Of Kentucky, Cabinet for Human Resources, Kentucky Supreme Court, 2004 WL 1906431 (2004). After nine years of litigation, a significant ruling relating to end of life decision-making was rendered by a 5-2 decision of the Kentucky Supreme Court. The guardian ad litem on the losing side of the case has stated an interest in appealing to the United States Supreme Court. In an August 2004 decision, the Kentucky Supreme Court ruled on the constitutionality of the state's Living Will Directive Act (LWDA.) That statute allowed a court appointed guardian to make health care decisions on behalf of a ward who lacks decisional capacity, including the withdrawal of artificial life-support systems, so long as the guardian acts in good faith and in the best interests of the ward. In this case, the Commonwealth of Kentucky, through the state's Cabinet for Human Resources, was the legal guardian for Mr. Woods, a 53

year old man with developmental disabilities who had suffered a heart attack in April of 1995. He was diagnosed by his attending physician as being in a 'permanently unconscious' state, said to be more severe than a persistent vegetative state. A hospital ethics committee endorsed the doctor's view and recommended withdrawal of treatment, but a guardian ad litem appointed by the trial court disagreed. The GAL argued that the state had a conflict of interest in advocating for the withdrawal of treatment as the state also paid for the medical treatment that was maintaining the ward in his condition, and that the LDWA was unconstitutional. After the ward died 'of natural causes' more than a year after his heart attack, the trial court dismissed the matter as moot, but the case was re-instated by an appellate court that found the issue to be capable of repetition. On remand, the trial court rejected the challenge of the guardian ad litem and found the LDWA to be constitutional. The appellate court then affirmed the trial court's finding of constitutionality and the matter was appealed to the Kentucky Supreme Court. The Supreme Court held that the LDWA was constitutional, but that a stronger standard of proof (clear and convincing) should be applied than the one articulated in the statute. The Court also found that the statute should be construed to permit withdrawal of life-support systems only in limited circumstances; a patient-ward's liberty interest in being free from artificially life-prolonging medical treatment outweighed the Commonwealth's interests in the patient's continued existence.

Collins v. Lake Forest Hosp., Illinois Appellate Court, 798 N.E.2d 143, 343 Ill.App.3d 353, 278 Ill.Dec. 296 (2003). The Health Care Surrogate Act authorizes as surrogate to make health care decisions for an incapacitated person after a finding by a doctor that the patient lacks decisional capacity. The Act also requires a doctor to note his finding in the patient's medical chart. Dr. Osher, a physician at Lake Forest Hospital, treated Joseph Collins for severe head injuries sustained in a fall. After treatment, he recommended to Andrea Collins, Joseph's wife, that the ventilator be disconnected, but the Andrea asked that the matter be delayed to allow time for their children to visit before death. Dr. Osher did not note Collins' incapacity as per the statute and an unidentified hospital agent disconnected the ventilator against the wishes of the wife. When Andrea sued the hospital and doctor for negligent acts for failing to comply with the HCSA, the hospital argued that no duty existed because the doctor had not noted the fact of incapacity in Joseph Collins' medical chart, thus calling into question his incapacity and whether

the law would therefore apply. The trial court agreed with the hospital, but the Illinois Appellate Court reversed that ruling. The appellate court found that the lack of a written finding by the attending physician did not absolve the Hospital of its duty under the Act to make a reasonable inquiry as to the availability and authority of a surrogate to make decisions with respect to Joseph's medical care.

Carpenter v. Mason, Ohio Court of Common Pleas, 800 N.E.2d 404, Ohio Com.Pl.,2003 (2003.) Gerald Carpenter was an 82-year old hermit who accumulated an estate worth nearly $300,000 but lived in a residence valued at $5,000 with an outhouse, no running water and no phone. He was admitted to a hospital on an emergency basis in a nonresponsive state after suffering a brain hemorrhage, and was placed on a ventilator and a feeding tube. His doctor felt that he was in a permanently unconscious state and would not be able to survive outside the hospital. An attorney was appointed emergency guardian after no family could be found. The attorney refused to agree to withdraw the recommendation of both the attending doctor and a hospital ethics committee to withdraw treatment. The guardian relied on a prior directive that the ward signed earlier in the year where he requested ‘full code’ status and wrote "Don't let me die, do everything you can." Subsequently, the ward’s family found out about the matter and advocated for his humane death. The trial court found that the guardian could consent and the appellate court affirmed. The court found the prior writing to be unpersuasive when considered in context. At the time, the ward was being admitted for arthritis treatment, and there was no discussion of terminal illness or permanently unconscious states. There was also other clear and convincing evidence that showed that the ward did not want to be kept alive in such a state. The court felt that any further life-prolonging procedures would be futile and cruel under these circumstances.

Right of Ward To Contract – Settlement of Cause of Action

Sovak v. Spivey, Ohio Appellate Court, 801 N.E.2d 896 (2003.) As a follow-up to a case reported last year, an Ohio Appellate Court again considered litigation related to an incarcerated ward. In this installment, the court was asked to consider the legitimacy of an 'agreed judgment entry' rendered in favor of William Sovak, who had filed a personal injury complaint against James Goins, the incarcerated ward, alleging the he had been attacked by Goins prior to his incarceration. In the personal injury litigation, the ward and Sovak signed (by counsel) a $1,000,000 settlement agreement and the arrangement was approved by the trial court judge. The settlement arrangement was subsequently challenged by Butler Wick Trust Company, as guardian of the estate of James Goins. The appellate court found that an incarcerated individual is generally permitted to enter into contracts or transfer title to property while incarcerated; it was Goins' status as a ward, rather than his status as an inmate, that limited his ability to sign the agreed judgment entry without the consent of his guardian. Last year's case was **In the Matter of the Guardianship of James E. Goins, Jr.**, Ohio Appellate Court, 2003 Ohio 931, 2003 Ohio App. LEXIS 868 (2003). A prison inmate was the beneficiary of a structured settlement established when his father died. The proceeds were managed by a trust company while the inmate was a minor. The probate court responsible for overseeing the settlement recommended an adult guardianship for the duration of the now-adult inmate's sentence, which the trust company pursued. After the probate court established the adult guardianship, the inmate appealed. The appellate court upheld the lower court action, finding no error in the probate court's recommendation of adult guardianship to the trust company. In addition, the court found as a matter of law that an incarcerated inmate may be considered an incompetent person for the purposes of a guardianship adjudication.

Right of Ward To Contract – Pre-Adjudication Nursing Home Contracts

Christian Health Care Of Springfield West Park, Inc. V. Carolyn V. Little, As Guardian And Conservator For Mabel Young And George Young, Missouri Appellate Court 2004 WL 1908788 (Mo.App.S.D.) (2004). Not Published. A nursing home sued a public guardian and her ward for unpaid nursing home costs related to care provided to Mabel Young, the ward. The trial court entered judgment in favor of the nursing home and ordered the judgment against the guardianship estate to be enforced by execution issued from the circuit court. The public guardian argued that the ward lacked capacity to contract and questioned the validity of her

signature on a purported contract, raised other challenges under the 'best evidence' rule and with respect to the trial court's reliance on a *quantum meruit* theory in support of its verdict. The appellate court rejected these claims as either improperly plead at trial and not preserved for appellate review or moot. The appellate court upheld the trial court judgment but considered another issue not raised by the parties and sua sponte found that the trial court lacked jurisdiction to order enforcement of the judgment. The appellate court held that the trial court could properly adjudicate the nursing home claim, but once it found the claim to be proper the correct procedure would be to submit the claim to the jurisdiction of the probate court for payment from estate assets in accordance with probate procedures. The appellate court found that the trial court's judgment would have improperly allowed the nursing home to "circumvent this statutory enforcement mechanism and directly collect its judgment from assets of Mabel's conservatorship estate by execution."

Right of Ward to To Contract – Executing Mortgage Agreements to Improve Realty

City of Mishawaka v. Kvale, Indiana Appellate Court, 810 N.E.2d 1129 (2004.) Gordon Barclay was adjudicated as a protected person and First Source Bank was appointed his guardian. After the adjudication, Barclay entered into mortgages with the City of Mishawaka, Indiana in the amount of $18,681.00 for the construction of a new garage on his property. Barclay then died and the representative of his decedent's estate denied the city's claim to enforce their mortgage, after selling the realty in question. In its opinion, the appellate court noted that statutes governing Indiana guardianships do not provide a legal remedy to third parties that contract with protected persons; rather, such statutes merely provide relief to third parties, who in good faith, contract with guardians or persons acting under a protective order that improperly exercise their legal powers. In the absence of a clear legal remedy, the court had to determine whether a third party that contracts with a protected person may recover in equity on a *quantum meruit* theory from the protected person or the estate of the protected person. The appellate court found that material issues of fact existed as to whether the mortgage arrangement conferred a benefit--e.g., an increase in the value of the property or the ability to sell the

property--upon the estate, such that retention of the benefit without payment would be unjust enrichment.

Douglas Weems v. Mary Jean Montgomery, Missouri Appellate Court, 126 S.W.3d 479 (2004). Mr. Weems bought improved real estate from Mary Jean Montgomery, as conservator of her mother's estate. After the sale, Weems discovered an underground heating oil tank, which complicated his ability to sell the property. Montgomery had not disclosed the existence of the tank at the time of sale to Weems. Weems sued Montgomery personally, in her capacity as conservator and as administrator for her deceased mother. The trial court rejected Weems claims, finding that the conservator could not be held responsible. The appellate court overturned the trial court and found that the conservator could be sued for alleged misrepresentations made in the sale of the realty. However, the appellate court also found that the trial court properly dismissed the claim brought against the conservator in the decedent's estate because a conservator's authority terminates upon the death of her ward. In discussing the potential liability of a conservator, the appellate court noted with approval Uniform Probate Code provisions that say "the conservator is personally liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if personally at fault," Uniform Probate Code § 5-428(b), 8 U.L.A. 415 (1998); and "a personal representative is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if he is personally at fault." Uniform Probate Code § 3-808(b), 8 U.L.A. 258 (1998).

Initiation of Cause of Action Against Or On Behalf of Estate

St. Paul Fire & Marine Ins. Co. v. Keltgen, Wisconsin Appellate Court, 659 N.W.2d 906, 260 Wis.2d 523, (2003); affirmed by Wisconsin Supreme Court in 677 N.W.2d 297, 270 Wis.2d 315, 2004 WI 37 (2004). Kurtis Keltgen is a developmentally disabled adult with autism and mild mental retardation; he was not under guardianship. He worked at CDC, a non-profit corporation that operates a sheltered workshop under a contract with Eau Claire County, Wisconsin. During

his employment at CDC, another sheltered employee repeatedly sexually assaulted Keltgen in a work restroom. The assailant had a history of sexually aggressive behavior of which CDC was aware. After the assault, Keltgen sued the facility for negligence, citing a Wisconsin patients rights law and also pursued a claim for workers compensation benefits. At issue in the case is the conflict between the two remedies. The appellate court found that the only available remedy was under the workers compensation theory. The Wisconsin Supreme Court, in a three-three divided decision with one justice abstaining, affirmed the appellate court. The appellate court found that the Keltgen's post-traumatic stress injuries met the definition of mental harm under the state's workers compensation law. The court also found that the sheltered workshop did not have a dual persona in its relationship with Keltgen and the court properly dismissed his negligence claim. Although the appellate court held that a claim could conceivably be brought under the patient's rights theory, it found the facts in this case to be lacking when measured against the language of the statute. Specifically, the court found Keltgen failed to state an actionable claim when he alleged that the facility violated his privacy as contemplated in the statute. The court found that the "assaults did not occur because CDC failed to protect Keltgen's privacy in the restroom; they occurred because CDC failed to protect his *safety* in the restroom." The court also devoted a portion of the opinion to the distinction between the provision of rehabilitation and habilitation services; in Wisconsin, the rights statute was applicable in the context of a rehabilitation facility, but not the other, which was closer to the one that served Keltgen. In a clear message to Keltgen and those who would bring similar actions, the appellate court said that "While we acknowledge Keltgen's argument that the WCA recovery has not made him whole, we must reject this claim because Keltgen agreed to the settlement. This recovery compensated him for the pain and suffering that arose as the result of the attacks, and any further claim would lead to a double recovery."

Penalties for Breach of Fiduciary Duties – Allegations of Guardian or Attorney Misconduct

Office of Disciplinary Counsel v. Smith, Ohio Supreme Court, 101 Ohio St.3d 27, 800 N.E.2d 1129 (2003). In reviewing the recommendation of the state's attorney discipline agency, the Ohio Supreme Court found that an indefinite suspension, rather than disbarment, was the

appropriate sanction for an attorney who failed to account for over $25,000 in client funds while serving as the guardian for the estate of an incompetent; more than $10,000 were not accounted for, and were apparently converted. The Court found as a mitigating factor that the attorney had been licensed to practice for approximately 45 years without any previous ethical infraction.

Office Of Disciplinary Counsel V. Shaffer, Ohio Supreme Court, 9 Ohio St.3d 342, 785 N.E.2d 429 (2003). An attorney and his client visited the client's grandmother so that the attorney could assess her competence to execute a valid power of attorney to authorize the client to sell the woman's real estate interest. When it became clear that the grandmother could not execute a new power of attorney, the attorney provided a power of attorney that he had recently prepared that was back-dated before the grandmother's stroke and her resultant incapacity. The attorney then advised his client to sign his grandmother's name on the signature line, and the client did so. The Ohio Supreme Court found that "in advising his client to sign for the client's grandmother, who may have been incapacitated but had not been declared legally incompetent, respondent counseled his client to commit forgery on the new power of attorney. Respondent went on to fraudulently authenticate the signature by signing as a witness, notarizing it, and backdating the jurat. Later at his office, respondent also instructed his secretary to sign the power of attorney as a second witness to the forged signature. Respondent then helped his client close on the property, including representing that the title was marketable. On July 22, 1999, respondent filed the new power of attorney in the county recorder's office, along with the deed evidencing the sale." The Supreme Court found that these actions warranted a one-year suspension from the practice of law, with another six months stayed on the condition of good conduct.

In re Discipline of Laprath, South Dakota Supreme Court, 670 N.W.2d 41 (2003). A South Dakota attorney was disbarred after the state Supreme Court found that "her inability to comprehend the professional rules as to when she is entitled to other peoples money for fees for legal work competently done is most troubling." 670 N.W.2d 41, at 83. Among other things, Ms. Laprath was disbarred for her representation of her ex-husband Tom in a Social Security

disability claims matter after Tom was injured in a plane crash. As the Supreme Court said, “Upon receipt of Tom's lump sum (Social Security) benefits Laprath, as representative payee, paid herself a quarter of the benefits as attorney fees. She had no fee agreement or approval with Tom to do so and no authorization from the Social Security Administration. In the course of the next month, she advanced attorneys fees to herself from Tom's benefits for a guardianship proceeding for Tom that she planned on pursuing. Tom had never asked her to be his guardian nor had he approved the attorney fees. She then, as representative payee, retained herself, as attorney, to "prosecute" a guardianship proceeding for Tom. She represented herself and her son in securing an ex parte order appointing themselves temporary guardians over Tom, who was given no notice. After Tom objected and secured his own attorney, Laprath continued to pursue the guardianship and pay herself attorney fees from Tom's benefits. She represented that she had incurred "more than $20,000" in legal fees for the guardianship. In the three month period following receipt of the $11,304 in social security benefits Laprath paid herself $4,883 in attorney fees from these benefits.”

Estate of Elliott Rogers, Donna Gardner, Conservator v. Lynne Battista and Christine Rogers, Missouri Appellate Court, 125 S.W.3d 334 (2004). After the death of a protectee (ward) Elliott Rogers, his daughters (Battista and Rogers) sued the ward’s stepdaughter, Donna Gardner, who had served as his limited conservator after he became incapacitated after a stroke. At the time of her appointment as limited conservator, the probate court failed to list any financial duties assigned to her, but did specify non-financial powers assisting Rogers with respect to transportation, shopping for food and clothing, housekeeping, and the like. The decedent’s estate court hearing the matter found the limited guardian to be liable for improper purchases and transfers from the bank account of her deceased stepfather, Elliott Scott Rogers, and for failing to fulfill her duties as conservator of his estate. The trial court accepted the daughters’ assertions that the stepdaughter had complete decisional and custodial care over Rogers’ assets and held her personally liable for Rogers purchase of an $85,000 annuity for her benefit, the deposit of social security checks into a joint checking account, and the transfer of $35,000 from Rogers’ savings account to the checking account. The trial court in the decedent’s estate matter found that the probate court’s failure to set forth the powers and duties of the limited conservator showed the probate courts’ intent to transfer complete control to the limited conservator. The trial court’s

judgment was overturned by the appellate court, which based its ruling on the fact that the probate court had found that Rogers retained decision-making ability with respect to financial matters. Since no mention was made of any financial powers or duties granted to Ms. Gardner as conservator, the appellate court found it would have been inconsistent with the probate court's oral comments that "Mr. Rogers seems capable of making his own financial decisions" to impute otherwise. The appellate court reversed the trial court, exonerating the limited conservator.

Douglas Weems v. Mary Jean Montgomery, Missouri Appellate Court, 126 S.W.3d 479 (2004). Mr. Weems bought improved real estate from Mary Jean Montgomery, as conservator of her mother's estate. After the sale, Weems discovered an underground heating oil tank, which complicated his ability to sell the property. Montgomery had not disclosed the existence of the tank at the time of sale to Weems. Weems sued Montgomery personally, in her capacity as conservator and as administrator for her deceased mother. The trial court rejected Weems claims, finding that the conservator could not be held responsible. The appellate court overturned the trial court and found that the conservator could be sued for alleged misrepresentations made in the sale of the realty. However, the appellate court also found that the trial court properly dismissed the claim brought against the conservator in the decedent's estate because a conservator's authority terminates upon the death of her ward. In discussing the potential liability of a conservator, the appellate court noted with approval Uniform Probate Code provisions that say "the conservator is personally liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if personally at fault," Uniform Probate Code § 5-428(b), 8 U.L.A. 415 (1998); and "a personal representative is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if he is personally at fault." Uniform Probate Code § 3-808(b), 8 U.L.A. 258 (1998).

In re Petition for Disciplinary Action Against Ernest E. Cutting, Minnesota Supreme Court, 671 N.W.2d 173 (2003). A Minnesota attorney who had previously received discipline for mismanaging and mishandling an estate and failing to cooperate with disciplinary process was indefinitely suspended from the practice of law. Among other things, the Supreme Court found

that the lawyer's neglect in 14 separate probate matters, including his failure on numerous occasions to timely file Annual Accounts and Final Accounts in guardianship and conservatorship proceedings, warranted indefinite suspension. The Court found that although the lawyer did not harm his clients financially, his attorney's neglect led to waste of judicial resources and his misconduct was exacerbated by fact that he did not cooperate with investigation into his misconduct.

In re Douglas S. Wright, Attorney, Respondent, Kansas Supreme Court, 76 P.3d 1018, 276 Kan. 357 (2003). The Kansas Supreme Court disbarred an attorney who, among other things, acted as an agent under a power of attorney for his great aunt. The court held that attorney demonstrated repeated misconduct, in intentionally and without authorization writing checks from his great aunt's checking account for his personal use. The court rejected the Board of Discipline of Attorneys recommendation of suspension, finding disbarment to be warranted. The attorney admitted that he intentionally deprived his aunt and others by writing checks from their accounts for his personal use. While he represented to the court that he repaid the funds borrowed, with interest, his admission was sufficient to find clear and convincing evidence of temporary deprivations of property that constitute multiple violations Kansas laws relating to the criminal deprivation of property. These criminal acts reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer.

Guardianship of Katherine A. Guzay, (Ohio Casualty Insurance Co.), Ohio Appellate Court, 2003 WL 22177106 (Ohio App. 10 Dist.) (2003). Unpublished Decision. On October 11, 1997, Katherine Guzay suffered traumatic brain injury from a car accident. A month later, her daughter Davis Erwin filed an application with the probate court for appointment of a guardian. A magistrate recommended that Erwin be appointed guardian of the person and estate of Guzay, and set bond at $400,000, twice the value of the estate. On December 12, 1997, the trial court adopted the magistrate's decision and Ohio Casualty filed a $400,000 bond. On March 17, 1999, Erwin filed a first account with the court. On May 27, 1999, W. Sean Kelleher filed an application to be appointed successor guardian of the ward and her estate, and the court set a hearing on the application. On August 3, 1999, Erwin resigned as guardian of the estate, and a magistrate of the court subsequently appointed Kelleher as successor guardian of the estate. On

September 28, 1999, Erwin filed a second and final account with the court. On August 30, 2000, the successor guardian of the estate filed a first account. On October 20, 2000, Andrew J. Art filed an application for appointment as successor guardian over the person and estate of Guzay. On October 27, 2000, a magistrate conducted a hearing on the application. At that hearing, successor guardian Kelleher expressed concern regarding one of the ward's accounts that she held with Eisner Securities, Inc. ("Eisner Securities"). Kelleher stated that a representative from Eisner Securities had informed him that Erwin's husband, Joseph Erwin, an employee at that firm, had been fired from his job and that he was under investigation by the firm and by the Federal Bureau of Investigation. During the hearing, the magistrate accepted the resignations of both Erwin, as guardian of the person, and Kelleher, as guardian of the estate. The magistrate rendered a decision appointing Art as successor guardian of the person and estate of Guzay, with bond set at $272,000. The trial court adopted the magistrate's decision by entry filed October 27, 2000. On January 8, 2001, Art filed exceptions to the accounts, claiming a $83,762.98 discrepancy in one of the Eisner Securities accounts. The court found that the prior guardian had committed constructive fraud and surcharged the bond company, who objected. In contrast to actual fraud, constructive fraud "generally involves a mistake of fact," and "requires neither actual dishonesty nor intent to deceive, being a breach of legal or equitable duty which, irrespective of the moral guilty of the wrongdoer, the law declares fraudulent because of its tendency to deceive others, to injure public interests, or to violate public or private confidence." *(Citations* omitted) As noted in the decision, “constructive fraud is presumed from the relation of the parties to a transaction or from the circumstances under which it takes place.” Erwin signed a "fiduciary's acceptance," accepting "the fiduciary duties which are required of me by law, and such additional duties as are ordered by the Court having jurisdiction," including the duty to expend funds only as authorized by the court. The relationship between a guardian and a ward is fiduciary in nature, and in discharging the duties of a guardian, the law requires fiduciaries "to act in good faith and primarily for the benefit of the ward in matters connected with his well-being." (A guardian is required) to "make and file within three months after his appointment a full inventory of the real and personal property of the ward; to manage the estate for the best interest of the ward." The appellate court noted that the trial court found that the documents Erwin signed and submitted to the court in her capacity as guardian contained false information regarding relevant assets. It is equally clear that the court acted in reliance upon such

misinformation in approving the accounts, and would not have done so had it been aware of the true nature of the assets.

Removal of Guardian

In re Estate of Kelton, Missouri Appellate Court, 2004 WL 1398564 (Mo.App. S.D.,2004.) A brother sought removal of his sisters as co-guardians and co-conservators of their mother. The sisters, on the advice of a physician who advised that the mother required placement in a "lock-down" facility, had denied the brother contact with the mother in a secure Alzheimer unit of a nursing center, after transfer from a mental health facility. The appellate court affirmed the trial court's denial of the brother's request to remove the sisters, noting that Missouri law allowed for removal only for misconduct, failure to discharge statutory duties or inability to perform duties. Recognizing the underlying sibling dispute, the appellate court noted that the brother had been denied access only for a short time, that the basis for denial was explained to him, and that the basis for the denial could not be construed by the trial court as demonstrating any misconduct.

In the Matter of the Guardianship OF Matthew Monus, an Incompetent, In the Matter of the Guardianship of Larry Roth, an Incompetent, In the Matter of the Special Needs Trust of Jeffrey Mandel, In the Matter of the Conservatorship of Aaron Dimont, In the Matter of the Guardianship of Sylvia Estulin, an Incompetent, In the Matter of the Guardianship of Lillian Seif, an Incompetent, Alvin J. Weisberg, Appellant, Ohio Appellate Court, 2004 WL 1194070 (Ohio App. 7 Dist.) (2004). Unpublished Decision. Alvin Weisberg served in a fiduciary capacity for a number of persons, as guardian, trustee or conservator. A trial court removed Weisberg from these positions and the appellate court affirmed the removal, noting that it was appropriate since Weisberg had failed to properly account for funds, and in some cases, to file accounts or inventories at all. He also failed to follow court procedures and orders, failed to keep proper receipts to document expenditures, and spent protected funds with no court approval.

In re Guardianship of Walther, Ohio Appellate Court, 2004 WL 1454464 (Ohio App. 2 Dist.) (2004). Unpublished Decision. F. Alberta Walther, an eighty-nine year old woman was the subject of a guardianship appointment involving attorney William R. Coen as estate guardian and Tracie Candela, Mrs. Walther's granddaughter, as person. Candella was also the personal caretaker for her grandmother-ward. After Coen objected to the payment of fees for Candela, the court determined that she was entitled to an additional $4,000 in fees on top of $4,000 already paid by the estate. The appellate court supported the ruling of the trial court who had adopted the finding of a court magistrate. The magistrate noted, "at the time that Candela cared for Mrs. Walther she had 24-hour-per-day responsibility. Mr. Coen was paying her for her responsibility of the care of F. Alberta Walther, the preparation of meals, cleaning up after (her) incontinence, laundry, (and) seeing to her daily needs, at $1.39 per hour. In addition thereto, Tracie Candela had additional expenses of food, housing and utilities as a result of caring for the ward." The court also removed Coen as guardian, finding a conflict of interest based on these facts: 1) Coen had represented the ward's son, who had been guardian of the ward's person, in a divorce, 2) he had advised the son to transfer title of his property to his mother to avoid execution of judgment liens, and 3) he had applied to the probate court for authority to release estate funds to the son to pay off a lease on a truck that the son was obligated to pay to his former spouse in a divorce.

In re Guardianship of Ferranti, Ohio Appellate Court, 2003 WL 22382568 (Ohio App. 7 Dist.,2003.) (2003.) Unpublished Decision. Debra Ferranti was injured in a motorcycle accident and her daughter Amanda was appointed guardian of Debra's person and estate. Amanda retained Maureen Sweeney as attorney to assist with the administration of the guardianship estate. When Amanda failed to file an accounting, the trial court issued a citation against both guardian and attorney. Amanda said she could no longer serve but that she would file an accounting, if Sweeney would help. No account was filed, Amanda was held in contempt and the court appointed Help Hotline Crisis Center as successor guardian. Help Hotline then failed to file a bond and submit to the court and ultimately declared the case to be outside their acceptance guidelines. The court then lost all patience and replaced Sweeney as well and denied her fee. The court found that Sweeney had done nothing to move the guardianship forward, and in particular, had not cooperated with Amanda, making it impossible to file an accounting. Both the trial court and the appellate court found that this justified the fee denial.

In the Matter of Erma Z. Oliva, Incapacitated/Disabled. John Oliva, Jr., R.W. Shakelford and Martha pollard, Limited Guardian and Conservator for Erma Z. Oliva, Missouri Appellate Court, 2003 Mo. App. LEXIS 1328 (2003). After developing Alzheimer's disease symptoms, Erma Oliva requested that her son be appointed guardian and conservator for her. After the limited appointment, she wandered away from home and siblings requested a change in the guardianship and conservatorship, which was temporarily suspended. The siblings differed as to the best placement and course of treatment for the woman. The trial court found it appropriate to appoint a public guardian as a successor, due to the family discord, and removed the son as guardian. The public guardian then moved the woman to a nursing home. The appellate court reversed the trial court, giving great weight to the wishes of the woman that her son be appointed as guardian and conservator. The appellate court noted that Missouri law required the appointment desired by an incapacitated person (prior to incapacity) absent substantial evidence establishing good cause. The court also found that a nursing home placement was an overly restrictive placement for the woman, and supported the son's attempt to care for her at home.

Restoration of Legal Rights

In re Estate of Werner, Missouri Appellate Court, 133 S.W.3d 108 (2004). In 1999, Linda Werner was adjudicated totally incapacitated and totally disabled, and a county public administrator was named as her conservator and guardian. Three years later, the ward sought termination of the guardianship and conservatorship. The Public Administrator recommended revocation of the conservatorship and modification of the guardianship to restore the ward's rights to vote and drive, and the trial court agreed with the recommendation. The ward appealed, desiring a full restoration of her rights. In reviewing the issues, the appellate court noted that the ward had the burden of establishing by a preponderance of evidence that her capacity to meet essential requirements had been restored, and that the burden was not met by arguing that the public guardian failed to prove the lack of that capacity. The appellate court also found no inconsistency in continuing to subject the ward to guardianship but not conservatorship.

See also: Washington Post article on voting and incapacity, end of section.

Power of Attorney-Guardian Conflicts

Guardianship of Vasko v. Brown, Ohio Appellate Court, 2003 WL 22966198 (Ohio App. 8 Dist.) (2003). Unpublished Decision. Kim and Michael Brown held a durable power of attorney for ninety-seven-year-old Andrew Vasko. When the Browns used that power of attorney to withdraw more than $28,000 from Vasko's accounts, his had him made a ward of the court. The court then scheduled a hearing to determine the Brown's liability, but Kim's attorney withdrew shortly before the hearing. The court proceeded anyway, and held them liable, in a summary proceeding. The court's action was found to be improper by the appellate court, noting that the court should have continued the hearing to allow Kim an opportunity to secure counsel.

Recovery of Estate Assets

In re Estate of Ramlose, Illinois Appellate Court, 344 Ill.App.3d 564, 801 N.E.2d 76, 279 Ill.Dec. 784 (2003). Several appeals were consolidated and heard after four orders of the circuit court of Cook County freezing defendant Elmer Haneberg's assets and accounts and various real estate properties, defaulting him as a discovery sanction pursuant to Supreme Court Rule and transferring all pending matters to the decedent's estate after closure of the guardianship estate. This summary focuses on the freeze order, obtained by a public guardian seeking to protect estate assets. In February 2001, Alexander Ramlose, filed a complaint in chancery for accounting and injunctive relief alleging, among other things, that defendant Elmer Haneberg, as trustee of the Alexander O. Ramlose Trust (Ramlose Trust), had breached his fiduciary duties by engaging in a pattern of "manipulation, self-dealing and deceit" with respect to the corpus of the trust by using it to satisfy personal and family debts. The complaint demanded an accounting of the Ramlose Trust and all of Haneberg's financial activity; an order that Haneberg be required to produce all trust documents relating to plaintiff, including bank books, bank records, checkbook

records, securities, bonds, promissory notes, mortgages, trust deeds, real estate records, income records, property deeds, and all other documents executed by him as trustee for plaintiff, injunctive relief enjoining Haneberg from "altering, creating destroying, changing, modifying or amending" any of these documents; and a constructive trust for several real estate properties allegedly purchased by Haneberg with funds from the Ramlose Trust. On March 13, 2001, Patrick Murphy[1], the Cook County public guardian, filed a guardianship petition requesting that Ramlose be adjudicated a disabled person and that the office of the Public Guardian be appointed as plenary guardian of his estate and person. The court appointed the Public Guardian temporary guardian on the grounds that Ramlose was a 95-year-old man who appeared to be suffering from dementia, and that a temporary guardian was needed in order to safeguard his assets and ensure that his estate was being protected in the chancery court matter. Ramlose was also ordered to submit to a mental examination on or before March 30, 2001. Murphy then obtained an injunction against Haneberg that froze bank accounts, assets and real estate properties and those of his family. The appellate court, in its discussion of the procedures used in issuing the freeze order, described in detail the reasons why the procedure was lacking. As the court wrote, “in the case at bar, we are unclear as to whether the freeze order was a preliminary injunction or a permanent injunction since the trial court never designated it as such or reflected it in its order. What is clear, however, is that by entering the freeze order, the trial judge made a factual determination that the funds, assets, accounts and property belonging to Haneberg had been illegally acquired through funds from the Ramlose Trust and were in danger of dissipation as alleged in the Public Guardian's petitions. What is woefully lacking from this record, however, is any evidentiary or testimonial proof supporting that determination. A careful reading of the freeze order shows that it included assets and property that were not even listed in the Public Guardian's petition for a citation to recover assets. In other words, some of Haneberg's property was seized although the Public Guardian was not even requesting that it be seized. For example, the time share in Park City, Utah, and the property in Harshaw, Wisconsin, were never listed in the petition for a citation to recover assets as property illegally and fraudulently acquired with

[1] Patrick Murphy has served with distinction as Cook County Public Guardian for twenty-five years. In that time, his office has protected the rights of countless incapacitated persons and has been responsible for a considerable number of important guardianship decisions. This case illustrates a particular specialty of that office – the protection and recovery of estate assets. Mr. Murphy will leave the office by the fall of this year to serve as a Cook County Circuit Court Judge. However, he leaves behind an impressive legacy as a zealous and professional advocate for the vulnerable and disadvantaged.

funds from the Ramlose Trust. Additionally, the order included all property, assets and accounts of Haneberg, his wife, mother and children without conducting even a semblance of a hearing to attempt to trace those Ramlose Trust funds to the various assets, accounts and properties owned by Haneberg. In other words, no nexus was ever established between the Ramlose Trust funds and Haneberg's bank accounts, assets and real estate properties and those of his family, who are not and have never been parties to these proceedings. Under the Illinois and United States Constitutions, no person shall be deprived of property without due process of law. U.S. Const. amend XIV; Ill. Const.1970, art. I, § 2. In the case at bar, due process dictated that, at a bare minimum, the trial court was obligated to conduct a hearing allowing both sides to present testimonial and documentary evidence either proving or negating the allegations that Haneberg illegally and fraudulently, in his capacity as trustee, obtained funds from the Ramlose Trust which, in turn, were deposited in his numerous bank accounts and used to purchase the various real estate properties located through the country." The appellate court reversed the freeze order and remanded.

Applications for Public Benefits; Medicaid and Special Needs Trusts

Linser v. Office of Attorney General, Department of Human Services, et al., North Dakota Supreme Court, 672 N.W.2d 643 (2003). Howard Linser was guardian and conservator for his son, Jay Linser, a developmentally disabled person. Romeo H. Chaput was Jay Linser's grandfather. In 1972 Romeo Chaput established the Romeo Chaput Trust, for Jay Linser's benefit. In 1990, Romeo Chaput executed his last will and testament and devised the bulk of his estate equally among his four grandchildren, including Jay Linser. The will provided that Jay Linser's devise would be placed in trust with First Trust Company of North Dakota. Romeo Chaput died on August 2, 1991. Between September 1993 and May 1995 approximately $65,000 was distributed from the estate into the Romeo Chaput Trust. On August 18, 1997, Howard Linser, as Jay Linser's guardian, established the Jay Linser Special Needs Trust. After this trust was established, the funds in the Romeo Chaput Trust were transferred to it and additional amounts from the Romeo Chaput estate were distributed and placed into the special needs trust.

A total of $181,135.92 was distributed from the Romeo Chaput estate to the Jay Linser Special Needs Trust. The Department concluded that Jay Linser's Medicaid benefits would be discontinued because his assets exceeded the $3,000 maximum allowed for Medicaid beneficiaries. The Department's position was that distributions from the Romeo Chaput estate were improperly placed into the Jay Linser Special Needs Trust, a discretionary trust, instead of being distributed to the Romeo Chaput Trust, a support trust; therefore, the assets in the Jay Linser Special Needs Trust were actually available to Jay Linser for purposes of disqualifying him from receiving further Medicaid benefits. The administrative order was rejected by a district court judgment and the state appealed. The Supreme Court reversed and reinstated the administrative order, agreeing with the Department's position that recognized the Jay Linser Special Needs Trust was a discretionary trust and the undistributed assets therein are not actually available to Jay Linser. The Department argued that assets from the Romeo Chaput estate should never have been distributed from the estate or transferred from the Romeo Chaput Trust to the Jay Linser Special Needs Trust. Instead, the assets should have been placed in the Romeo Chaput Trust, which is a support trust whose assets would be considered available to Jay Linser for determining Medicaid eligibility. The Department asserts that because Jay Linser has a legal entitlement to have the funds which are currently in the Jay Linser Special Needs Trust placed in the Romeo Chaput support trust, the assets should be deemed actually available to Jay Linser. The Supreme Court found that the (father) guardian's failure to attempt to recover the trust assets should have no bearing on whether the assets are "actually available" for purposes of Medicaid eligibility.

Use of Jointly Held and Totten Trust Funds

Estate of Elliott Rogers, Donna Gardner, Conservator v. Lynne Battista and Christine Rogers, Missouri Appellate Court**,** 125 S.W.3d 334 (2004). In this case, a limited conservator had been a joint owner of a checking account and had been for a considerable period predating her appointment as limited conservator. The appellate court ruled that the limited conservator, who had been given no financial powers by the probate court, was not liable for her use of joint funds that derived from the account. A joint account is the property of those persons so named as

joint tenants and may be paid to any one of such persons during his lifetime or to any of the survivors of them after the death of any one or more of them. Even the adjudication of incompetency of any one of the joint tenants does not operate to sever the joint tenancy or alter the rights of the other joint tenant or tenants.

In re Estate of Steward, Kansas Appellate Court, 79 P.3d 791, 32 Kan.App.2d 134 (2003). In 1987 Sandra Jo Steward was placed under guardianship and conservatorship, with Mary Huggins as her guardian (responsible for personal affairs) and Denny Steward as her conservator (responsible for her financial affairs.) She was found to be totally incapable of handling her financial affairs. With assistance from Huggins, Sandra Steward created a number of payable on death accounts. The accounts were for the benefit of Mary Huggins and included income that accrued after the adjudication, but was not reported to the conservator. All accounts were established without Denny's knowledge or approval or that of the supervising probate court. Denny discovered the accounts after Sandra's death in 2000, and challenged their legitimacy in a probate court proceeding. In approving of the setting aside of these POD transfers, the appellate court found that Kansas statutes gave probate courts the authority to do so, even when setting aside accounts that are testamentary in nature. The court found thatsince the POD account was established by an incompetent ward, for the benefit of a guardian, from income during a guardianship and conservatorship, without the knowledge of the conservator, and absent any approval of the conservatorship court, it was improper. The court ruled that "The nature or type of instrument or account chosen by a guardian or conservator to perpetrate fiduciary misconduct, even though a payable-on-death nontestamentary account, will not divest the probate court's jurisdiction to remedy such misconduct."

Ferguson v. Walsh, Ohio Appellate Court, 2003 WL 22006833 App. 10 Dist.,2003. Unpublished Decision. As the appellate court wrote, "A court appointed guardian acting as a fiduciary, exercise[s] all rights of ownership which the ward could have exercised during her lifetime had she not been declared legally incompetent. *(*citations omitted*)*. This power includes the rights to withdraw funds from a P.O.D. account and thereby delete the beneficiary if it is in the best interest of the ward. *Id.* Indeed, the guardian of a person and an estate has a duty to

provide for maintenance for the ward, as paid out of the ward's estate, which includes health care, debts and other affairs relating to the management of the estate. (citations omitted). Therefore, during the lifetime of the ward-owner, a guardian acts in the best interest of the ward when the withdrawal of proceeds from a POD certificate is related to the management of the ward's estate or maintenance of the ward."

Death of Ward: Discharge of Guardian & Probating of Ward's Decedent's Estate

In re Guardianship and Conservatorship of Trobough, Nebraska Supreme Court, 676 N.W.2d 364 (2004). A ward's granddaughter objected to the final accounting of grandmother's conservator (her daughter) and requested that the conservator be discharged and relieved of her duties, based on alleged financial impropriety and failure to account for personal property and certificates of deposit worth more than $90,000. The granddaughter argued in the appellate court that the trial court erred by: (1) discharging the daughter from her responsibilities as conservator; (2) approving the final accounting in the conservatorship, even though it did not account for all of the grandmother's assets; (3) transferring conservatorship assets to the probate estate without addressing the issues surrounding those assets; (4) not voiding the daughter's purchase of estate assets; (5) not appointing a successor conservator; (6) failing to surcharge the daughter for the value of the estate assets she unlawfully purchased or failed to account for; and (7) failing to award attorney fees to an interested person whose actions preserved assets of the estate. The Nebraska Supreme Court agreed with the granddaughter, remanding the matter to the trial court to have an evidentiary hearing on the issues raised.

Estate of Lofton Croom, Deceased, v. Opal Bailey, et al., Missouri Appellate Court, 107 S.W.3d 457 (2003). After the death of a ward, a public guardian applied for probate of the ward's decedent's estate. The ward's niece opposed the petition, and the trial court dismissed the public guardian's application. The will beneficiaries filed an appeal. The appellate court, applying Missouri law, found that a Public Administrator had no specific authority to seek decedent's administration, although she did have the authority to seek admission of a purported

will and other testamentary documents to probate. The court noted that the death of a ward does not serve to convert the conservatorship estate into a decedent's estate.

Fees for Guardians, Guardians ad Litem, and Attorneys

In re Guardianship of Fraser, Ohio Appellate Court, 2003 WL 22956024 (Ohio App. 9 Dist.), 2003-Ohio-6808 (2003). Unreported decision. Myles Fraser was under guardianship, with his daughter Laura serving as guardian. Before the adjudication, Myles and Laura jointly owned some realty, but then the father transferred full ownership to the daughter. After the appointment, a brother objected to the realty transfer, and the court ordered the property transferred back into joint tenancy. Then, Laura petitioned the probate court to award her with the real estate interest as a fee for guardianship services. The probate magistrate denied the request and recommended that Laura be replaced as guardian. The trial court then adopted the magistrate's recommendation, removed Laura as guardian and appointed a successor. The appellate court affirmed the trial court on technical grounds unrelated to the merits of the appeal.

In re the Guardianship Of Rita Melton, Ohio Appellate Court, 2004 WL 473640 (Ohio App. 11 Dist.) Unpublished Decision. The trial record showed that the attorney in a guardianship estate needed 31 hours to file a rather complicated first accounting, but only 3.5 hours for the second account. The attorney's time and labor were reduced during the second accounting period. Since the lawyer worked less in the second instance, was not precluded from other employment during the case and there was no novel question or extraordinary skill required, the trial court considered it appropriate to reduce the attorney fee award. The appellate court agreed, noting that the trial court properly considered factors outlined in professional responsibility code such as the attorney's experience and reputation.

In re Guardianship of Walther, Ohio Appellate Court, 2004 WL 1454464 (Ohio App. 2 Dist.) (2004). Unpublished Decision. F. Alberta Walther, an eighty-nine year old woman was the

subject of a guardianship appointment involving attorney William R. Coen as estate guardian and Tracie Candela, Mrs. Walther's granddaughter, as person. Candella was also the personal caretaker for her grandmother-ward. After Coen objected to the payment of fees for Candela, the court determined that she was entitled to an additional $4,000 in fees on top of $4,000 already paid by the estate. The appellate court supported the ruling of the trial court that had adopted the finding of a court magistrate. The magistrate noted, "at the time that Candela cared for Mrs. Walther she had 24-hour-per-day responsibility. Mr. Coen was paying her for her responsibility of the care of F. Alberta Walther, the preparation of meals, cleaning up after (her) incontinence, laundry, (and) seeing to her daily needs, at $1.39 per hour. In addition thereto, Tracie Candela had additional expenses of food, housing and utilities as a result of caring for the ward." The court also removed Coen as guardian, finding a conflict of interest based on these facts: 1) Coen had represented the ward's son, who had been guardian of the ward's person, in a divorce, 2) he had advised the son to transfer title of his property to his mother to avoid execution of judgment liens, and 3) he had applied to the probate court for authority to release estate funds to the son to pay off a lease on a truck that the son was obligated to pay to his former spouse in a divorce.

In re Conservatorship of Hanson, Nebraska Appellate Court, 670 N.W.2d 460 (2003). Margaret Hanson served as conservator for her husband, H. Cooper Hanson III, for about nine months prior to his death. Before the ward's death, the husband and wife had a financial arrangement in which Cooper would give Margaret money for monthly household expenses, and the arrangement continued during the term of the conservatorship. Margaret paid herself a total of nearly $25,000 from conservatorship funds pursuant to this marital understanding, but the court supervising the conservatorship did not approve the arrangement. After the ward's death, Margaret accounted for the funds to the court, which ordered her to re-pay said funds to the estate, because she had failed to seek court approval for what the trial court termed as 'compensation.' She appealed and the appellate court reversed. Although the arrangement was not approved, the appellate court noted that the trial court found nothing improper about the payments themselves and that the arrangement had existed before the adjudication of incapacity. As opposed to compensation or fees for conservatorship services, the reviewing court found the

funds to be legitimate household expenses that were consistent with the agreement that she had made with her deceased husband before his incapacity.

In re of Guardianship and Conservatorship of Miller, Kansas Appellate Court, 79 P.3d 1093 (Table) 2003 WL 22902640 Kan.App.,2003. Unpublished Decision. This case presents a tutorial on how not to challenge a fee award. Marian F. Miller challenged a trial court's order appointing her stepdaughters as conservators and guardians of her husband, Eilt A. Miller, despite the fact that she served as agent under a power of attorney executed by Eilt. Marian also appealed an order awarding attorney fees to the attorney representing the stepdaughters and from the district court's decision refusing to order the conservatorship estate to pay her support. The appellate court affirmed the trial court on all matters. The appellate court side-stepped the issue about who should properly serve as guardian, noting Marian's failure to file a record that would have supported her argument. As to the fees issue, the appellate court found that the "the trial court found good reason existed for the creation of the conservatorship (and that the) $4,200 in fees allowed…arose after Shelly and Coleen's appointment; these fees were associated with the fiduciaries' attempt to obtain an accounting from Marian of Eilt's assets and proceeds from those assets. The fees were also incurred in responding to Marian's various motions seeking to set aside the appointment and in defending the estate against Marian's claims for spousal support. The trial court found these expenses necessary. Based on the record of Marian's payment of her expenses out of Eilt's assets, both before and after the petition for appointment was filed, there is no basis to find the trial court's determination was an abuse of discretion. Moreover, Marian does not take issue with the hourly rate or time spent by the fiduciaries' attorney; she merely attacks the necessity of a conservatorship in the first place."

In re Guardianship of Hickman, Indiana Appellate Court, 811 N.E.2d 843 (2004). As the decision noted, "This is the third of what now appears to be four appeals stemming from a family dispute over the guardianship of Josephine. The Hickman family owns Hoosier Outdoor Advertising Corporation ("Hoosier Outdoor"). Leo's father was the president of Hoosier Outdoor from the 1950's until his death in 1977. After his father's death, Leo's mother, Josephine, became the president. Over the years, Leo and his six siblings have been involved in Hoosier Outdoor in various capacities. Leo was the vice-president from 1975 until 2001. Before July 2001, the

remaining siblings were shareholders and officers or directors of Hoosier Outdoor. Joseph and Jamie Hickman were also employees of Hoosier Outdoor. On February 14, 1988, Josephine fell and hit her head. Josephine was severely injured and never fully recovered from the fall, and was placed in a nursing home. Despite her condition, Josephine retained her position as president of Hoosier Outdoor. Before her accident, Josephine gave gifts of stock to her children. Leo received gifts of voting stock, and his siblings received gifts of non-voting stock. This gift-giving continued after her accident but ended in 1997, before Leo could receive a controlling share of Hoosier Outdoor. By all accounts, Leo will receive a controlling share of Hoosier Outdoor upon Josephine's death. However, if Leo predeceases Josephine, his wife and children will not receive anything under Josephine's will. On July 19, 2001, Leo and his wife visited Josephine in the nursing home. Leo presented Josephine with a document prepared by his attorney, which Josephine signed. The document evidenced a gift of 120 shares of voting stock to Leo and 124 shares of non-voting stock to each of his siblings. This gift of stock was sufficient to give Leo control over the corporation. Josephine consulted neither her attorney nor any other family members before signing the document. That same day, Leo removed his siblings from their positions as officers and directors and replaced them with his wife and daughter. Leo also named himself as president of Hoosier Outdoor. Leo eventually terminated Joseph's and Jamie's employment with the corporation and attempted to terminate the health insurance provided by Hoosier Outdoor to his siblings and Josephine. Since then, almost continuous litigation has ensued." Leo's brother Joseph obtained an injunction staying the insurance terminations and asked for guardianship for Josephine, beginning a four-day trial with an advisory jury. As the trial court noted, "At the outset of the trial, the Court limited the matters to be heard on whether Josephine is incapacitated and whether a guardian is necessary for her estate and her person." The trial court concluded that Josephine was incapacitated because she was under the *undue influence of Leo*. The trial court removed Leo as guardian and awarded over $367,000 in attorney fees. Leo argued, among other things, that Joseph employed too many attorneys and questioned the involvement of multiple attorneys in "virtually every facet of this case." The appellate court agreed that this was a highly litigious matter, but found the fee award acceptable, albeit considerable. Joseph justified the high fee award because "the guardianship proceeding was a particularly labor intensive task; that Josephine's estate is quite large; that there were many

difficulties involved in prosecuting the case because it was very adversarial; that his attorneys were highly qualified; and that his attorneys worked faithfully on the case."

In re Guardianship of Ferranti, Ohio Appellate Court, 2003 WL 22382568 (Ohio App. 7 Dist.,2003.) (2003.) Unpublished Decision. Debra Ferranti was injured in a motorcycle accident and her daughter Amanda was appointed guardian of Debra's person and estate. Amanda retained Maureen Sweeney as attorney to assist with the administration of the guardianship estate. When Amanda failed to file an accounting, the trial court issued a citation against both guardian and attorney. Amanda said she could no longer serve but that she would file an accounting, if Sweeney would help. No account was filed, Amanda was held in contempt and the court appointed Help Hotline Crisis Center as successor guardian. Help Hotline then failed to file a bond and submit to the court and ultimately declared the case to be outside their acceptance guidelines. The court then lost all patience and replaced Sweeney as well and denied her fee. The court found that Sweeney had done nothing to move the guardianship forward, and in particular, had not cooperated with Amanda, making it impossible to file an accounting. Both the trial court and the appellate court found that this justified the fee denial.

Guardianship Administration Issues: Adjudication of Claims Against Estate of Ward

Christian Health Care Of Springfield West Park, Inc. V. Carolyn V. Little, As Guardian And Conservator For Mabel Young And George Young, Missouri Appellate Court 2004 WL 1908788 (Mo.App.S.D.) (2004). Not Published Yet. A nursing home sued a public guardian and her ward for unpaid nursing home costs related to care provided to Mabel Young, the ward. The trial court entered judgment in favor of the nursing home and ordered the judgment against the guardianship estate to be enforced by execution issued from the circuit court. The public guardian argued that the ward lacked capacity to contract and questioned the validity of her signature on a purported contract, raised other challenges under the 'best evidence' rule and with respect to the trial court's reliance on a *quantum meruit* theory in support of its verdict. The appellate court rejected these claims as either improperly plead at trial and not preserved for appellate review or moot. The appellate court upheld the trial court judgment but considered

another issue not raised by the parties and sua sponte found that the trial court lacked jurisdiction to order enforcement of the judgment. The appellate court held that the trial court could properly adjudicate the nursing home claim, but once it found the claim to be proper the correct procedure would be to submit the claim to the jurisdiction of the probate court for payment from estate assets in accordance with probate procedures. The appellate court found that the trial court's judgment would have improperly allowed the nursing home to "circumvent this statutory enforcement mechanism and directly collect its judgment from assets of Mabel's conservatorship estate by execution."

Protection and Advocacy Issues

Equip For Equality, Inc. v. Ingalls Memorial Hosp., U.S. District Court for the Northern District of Illinois, 2004 WL 1775932, N.D.Ill.,2004. After prior litigation in which the U.S. District Court ordered the parties to design a mutually agreeable protocol to allow the state's Protection and Advocacy provider access to hospital premises, the court issued its own protocol. The Court found that Equip for Equality, as the governor-designated, federally-funded Protection and Advocacy System for persons with mental illnesses in Illinois, was entitled to reasonable unaccompanied access to facilities, patients, and programs within mental health facilities. The federal magistrate held that: (1) EFE was entitled to initiate contact with patients at mental health facility in a casual and natural manner while it was performing its monitoring and educating functions; (2) EFE was entitled to access to facility outside scheduled business or visiting hours; (3) EFE was entitled to access to nursing stations; and (4) common law governed whether EFE assumed the risks inherent in unaccompanied access to inpatient facility and had a duty of care to the patients there, a point that had been a stumbling block in court-ordered negotiations between EFE and the hospital.