BEFORE THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

COMMENTS OF THE SECTION ON COURTS, LAWYERS, AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR REGARDING PROPOSED RULES TO IMPLEMENT THE DISTRICT OF COLUMBIA GUARDIANSHIP, PROTECTIVE PROCEEDINGS, AND DURABLE POWER OF ATTORNEY ACT OF 1986

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"The views expressed herein represent only those of the Section on Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors."

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The Superior Court has recently published for comment a set of proposed rules to implement the D.C. Guardianship, Protective Proceedings, and Durable Power of Attorney Act of 1986, D.C. Code §§ 21-2001 to 21-2085 (1989). The Section on Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar ("the Section") is aware of the care and effort that went into preparing both the underlying legislation and the implementing legislation. We trust that the proposed rules will respond to many of the concerns that the legislation was intended to address.

The Section believes, however, that the proposed rules were largely drafted with a view toward the administration of estates of some substance. While provision must obviously be made for such cases, it appears to us that the proposed rules do not address with equal care those cases in which medical emergencies arise, or health-care decisions must be made with some speed. Recognizing that there are short-term, emergency procedures built into the proposed rules, see Subpart III, the Section nonetheless fears that the overall scheme will in many cases be too cumbersome or involved to permit the prompt reso-

lution of problems arising in a rapidly developing situation. In addition, the Section considers that a number of technical amendments are desirable to clarify the rights of individuals and protect them against persons or institutions that claim an interest but have no personal relationship to a protected person or ward. Accordingly, we respectfully submit the following suggestions for amendments to the proposed rules.

SCR-PD 301 Scope, purpose, and effective date

(a) Scope. These rules apply to intervention proceedings filed under the District of Columbia Guardianship, Protective Proceedings, and Durable Power of Attorney Act of 1986, hereinafter the Guardianship Act of 1986, (D.C. Code §§ 21-2001 to 2085); provided, however, that in cases where a valid, durable power of attorney exists, is in force in accordance with the provisions of the Guardianship Act of 1986, and contains a provision nominating a conservator or guardian, the Court shall make its appointment in accordance with the principal's most recent nomination except for good cause or disqualification. All intervention proceedings shall be filed in the Probate Division of The Superior Court of the District of Columbia.

The Guardianship Act of 1986 expressly recognizes that a durable power of attorney may validly designate a conservator or guardian, and requires the Court to respect the designation except for good cause or disqualification. D.C. Code § 21-2083(b). We propose that the rule explicitly recognize this requirement. Further, it cannot be emphasized strongly enough that, in cases where there is a valid, durable power of attorney in force under the Guardianship Act, or where a surrogate decision-maker has been designated under the Health Care

Decisions Act, D.C. Code §§ 21-2201 through 21-2213 (1989), there should be no need for intervention proceedings at all. The Court should make it clear, at least in a comment to the rule and perhaps in the rule itself, that durable powers of attorney and durable powers of attorney for health care are presumptively to be honored, except where there is a failure to act.

SCR-PD 303 Parties and petition for permission to participate

* * *

(b) Petition for permission to participate. Any person other than a party who wishes to participate in a proceeding pursuant to D.C. Code §§ 21-2041(i) or 21-2054(f), shall file and serve on all parties a petition (Form I-A) and a proposed order (Form I-B) for permission to participate no later than 5 days prior to any hearing. For good cause shown the Court may consider a petition for permission to participate filed after the foregoing deadline. A petition for permission to participate shall contain a statement as to how the best interests of the subject of the proceeding will be served by the grant of permission.

(c) Designation of party status. At the initial hearing or at any time thereafter, for good cause shown, the Court may confer the status of party on any person ~~it deems appropriate~~ who has a personal relation to, or a direct and legitimate interest in, the subject of the proceeding. ~~In addition, the Court at any time thereafter may confer the status of party on a person granted permission to participate.~~

~~(d) Rights of parties. A party shall have the rights conferred by D.C. Code § 21-2031(e) and the rules of the Civil Division of this Court to the extent applicable in the Probate Division.~~

In other jurisdictions, there has been a trend in recent years that is of concern to the Section: persons or organizations having no direct, personal connection to the real party in interest in "protected-persons" litigation have participated in the litigation for the purpose of advancing a philosophical or ethical viewpoint that may or may not be in the best interest of the ward or other protected person. "Pro-choice" and "pro-life" groups, associations of elderly people, veterans' groups, or other voluntary associations certainly have a right to advance whatever positions they wish in the public and political arenas; but litigation is designed to determine the rights of individuals in the light of a very specific set of facts. The rules as written would appear to permit such persons or organizations to become parties to proceedings. We also note that, while the rules published by the Court cite D.C. Code § 21-2041(i) for the proposition that the Court may confer party status on such persons, the statute itself contains no such authority, but instead is restrictive in nature:

> Any person may apply for permission to participate in the proceeding, and the court may grant the request, with or without hearing, upon determining that the best interest of the alleged incapacitated individual will be served. The court may attach appropriate conditions to the permission.

D.C. Code § 21-2041(i) (guardianship proceedings); see also D.C. Code § 21-2054(f) (identical provision in respect of protective proceedings). There is no suggestion that such persons

may become parties. On the other hand, the rules make no express provision for persons who are close relatives or close companions of a ward or protected person, or persons with a financial relationship to the subject of the proceedings. See D.C. Code § 21-2034 (any governmental agency paying or planning to pay benefits to the individual to be protected is an interested person in protective proceedings and is entitled to be notified before any order is made). Accordingly, the Section strongly urges an amendment to the rules, to provide that while persons with a general interest may receive permission to participate in some capacity (e.g., as amicus curiae), the only persons who may be granted party status are those who have a demonstrable, legitimate relation to or knowledge of the real party in interest, and not just the subject-matter of the proceedings.

We note that Rule 303(d) grants parties "the rights conferred by D.C. Code § 21-2031(e)." That provision of the statute merely specifies the minimum contents of a notice, which is to be further elaborated by court rule. We find this rule confusing, and recommend that it be eliminated.

SCR-PD 305 Duties of counsel for the subject of an intervention proceeding

> Upon being retained by or appointed to represent the subject of an intervention proceeding, counsel shall:
>
> * * *

> (6) Represent the subject at any hearing pursuant to D.C. Code §§ 22-2041(h), 21-2054(e). To the maximum extent possible the subject of the proceeding shall remain responsible for determining his or her legitimate interest. In cases where a guardian or guardian ad litem has been appointed because the subject is unconscious or otherwise wholly incapable of determining his or her interests, even with assistance, counsel shall follow the guardian's determination of the subject's interests. In all other cases, counsel shall to the maximum extent possible ascertain directly the subject's determination of his or her legitimate interest.

We are troubled by the potential tension between Rules 305 and 306. Rule 305(3)-(6) and D.C. Code § 21-2033(b) implicitly require counsel to ascertain the client's wishes and to pursue them zealously. The comment to Rule 305 requires counsel to follow the wishes of the guardian ad litem, if one is appointed; but this is stated nowhere in the rules. Rule 306(b)(1) provides that a guardian ad litem may be appointed by the Court sua sponte or on the petition of any party, including parties other than the subject of the proceeding. We can readily envision a situation in which counsel has determined that the client is competent to make certain decisions, but another party has procured the appointment of a guardian ad litem whose views conflict with those expressed by the client. In the absence of an amendment to Rule 305(6), given the independent ethical obligations of counsel, there is no requirement that counsel follow the wishes of the guardian. Such a situation would be intolerable. The Section believes that the conflict

should be resolved in favor of letting the client express his or her own wishes directly, to the maximum extent possible.

The Guardianship Act strongly supports this position. The statute authorizes the guardian ad litem to determine the subject's wishes only in cases where "the subject of the proceeding is unconscious or otherwise wholly incapable of determining his or her interests in [the intervention] proceeding even with assistance." D.C. Code § 21-2033(a). In other cases, the guardian's duty is "to assist the subject of an intervention proceeding to determine his or her interests." Id. (emphasis added). Once the subject has, with assistance, made that determination, there is no reason why the subject cannot communicate his or her decision to counsel. Accordingly, the Section recommends that Rule 305(6) be amended to reflect the language of the statute, and strongly urges that the last two sentences of the Comment to Proposed Rule 305 be deleted.

SCR-PD 306 Guardian ad litem; duties and appointment

~~(a) Guardian ad litem; Members of the bar to be appointed. Except for special cause shown, no person other than a member of the District of Columbia Bar shall be appointed guardian ad litem.~~

The Section is aware of no statutory support for proposed Rule 306(a). The proposed rule marginally cites D.C. Code §§ 21-2011(a) [sic], 2033(a) in support. However, D.C. Code § 21-2011 (definitions) seems to imply that persons other than attorneys may hold the position of guardian ad litem:

> (4) "Counsel" means an attorney admitted to the practice of law in the District [of Columbia].
>
> * * *
>
> (9) "Guardian ad litem" means an individual appointed by the court to assist the subject of an intervention proceeding to determine his or her interests in regard to the guardianship or protective proceeding or to make that determination if the subject of the intervention proceeding is unconscious or otherwise wholly incapable of determining his or her interest in the proceeding even with assistance.

By omitting the word "counsel" from the definition, the statute seems to imply strongly that any suitable individual could serve as a guardian ad litem, including a close relative, a companion, or a social worker. There is certainly nothing in the definition to suggest that it need be a member of the D.C. Bar.

Likewise, D.C. Code § 21-2033 seems to distinguish between the duties of the guardian ad litem and counsel. The catchline for the section is "Guardian ad litem; counsel; visitor." The duties of the guardian ad litem are set out in § 21-2033(a); the duties of counsel are separately outlined in § 21-2033(b). Compare SCR-PD 305 (proposed), outlining the duties of counsel for the subject of an intervention proceeding, with SCR-PD 306 (proposed), outlining the duties of a guardian ad litem. While the guardian ad litem has the statutory duty "to prosecute or defend the interest of individuals in any legal proceeding if the court determines that representation of the interest otherwise would be inadequate," that language does not necessarily

require that the guardian ad litem literally perform those duties in open court. A guardian ad litem may satisfactorily discharge those obligations by retaining counsel, as in the case where a parent is guardian ad litem of a minor child.

Given the fact that the statute and rules clearly contemplate the appointment of counsel in appropriate cases, the clear distinction between the duties of counsel and those of a guardian, and the absence of a clear statutory mandate, there is no compelling reason for enforcing a lawyers' monopoly over guardianships ad litem. Rule 306(a) should be eliminated.

SCR-PD 308 Compensation of guardians, conservators, counsel, guardians ad litem, examiners, and visitors

* * *

(d) Statements of examiner, visitor and guardian ad litem. The examiner, visitor, and guardian ad litem shall send their statements of services to the conservator, if appointed, or, to the guardian, if appointed, who shall submit them to the Court, with any comment of the conservator or guardian, for an order authorizing payment. If no conservator or guardian is appointed, the examiner, visitor, and guardian ad litem shall submit their statements directly to the petitioner to seek an order authorizing payment; provided, however, that if the petitioner is a health-care provider, the examiner, visitor, and guardian ad litem shall submit their statements directly to the Court. If the conservator, guardian, or petitioner, as the case may be, fails to submit the statements to the Court, the examiner, visitor, and guardian ad litem shall submit their statements directly to the Court.

The proposal published by the Court seems to be geared to situations where the petitioner is an individual with some personal

relationship to the protected person or ward; but not infrequently there are cases where the petitioner will be a health-care provider, such as a hospital or nursing home, that requires the appointment of a conservator, guardian, or guardian ad litem so that decisions concerning the course of treatment can be promptly and competently made. In such cases, the Section believes it is inappropriate to burden the formal petitioner with the administrative functions that would otherwise be imposed. Accordingly, we recommend that the rule be amended so that, where the petitioner is a health-care provider, statements will be sent directly to the Court.

SCR-PD 309 Irregularities, delinquencies, insufficiencies, defaults, and orders to show cause

(a) Removal after warning. Whenever the Register of Wills finds an irregularity or default in the administration of an intervention proceeding, and whenever the Register of Wills finds that there has been a failure to perform the duties of a conservator or guardian, the Register of Wills shall promptly notify the fiduciary responsible that unless the irregularity, ~~or~~ default, or failure is corrected forthwith, the fiduciary may be removed from office. If the irregularity, ~~or~~ default, or failure is not remedied, the Register of Wills shall report it to the Court which, after notice to the person and a hearing, may ~~either~~ remove the fiduciary and appoint a successor pursuant to D.C. Code § 21-2049(c), or excuse the irregularity, ~~or~~ default, or failure, or take other appropriate action.

(b) Removal without warning. In extraordinary cases, the Court, either sua sponte or at the request of the Register of Wills, may order a summary hearing without giving the fiduciary prior notice or opportunity to correct an irregularity, ~~or~~ de-

> fault, or failure. After such hearing, the Court may take any appropriate action including excusing the irregularity or default.

This provision appears to be geared to the administration of substantial estates. The Section notes, however, that problems may also arise in the health-care setting when a guardian fails for some reason to exercise the duties of a guardian and make the often-difficult decisions involved in determining the course of treatment. Indeed, in such cases, there is no administration of estates to be done. Accordingly, we recommend that the rules be amended to permit the Court to act where the guardian has failed to perform his or her duties.

SCR-PD 310 Court costs

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> (e) Assessment and collection. All costs shall be tendered to and collected by the Register of Wills at such time as the Register of Will shall direct, except as otherwise specified in this Rule; provided, however, that no costs or miscellaneous charges shall be collected in any case in which the ward, protected person, or person in respect of whom it is to be certified that no protective proceedings are pending, is indigent.

The Section is confident that the added proviso is consistent with the Court's intent. Proposed Rule 310(a) provides that no costs based on the value of the conservatorship estate shall be imposed if the amount of the estate is less than $2,500. We presume that, in cases where the subject of the proceedings is indigent, it is equally inappropriate to impose other costs.

SCR-PD 311 Notice of hearing on petition

(a) Applicability of Rule. Notice of a hearing on any petition for which a specific procedure is not otherwise prescribed shall be given in accordance with this Rule. The procedures for expedited guardianship hearings are contained in Rule 341.

* * *

SCR-PD 321 Initial procedures in general intervention proceedings

(a) Petition. A general proceeding is initiated by filing a petition on Form II-A. The procedures for expedited guardianship hearings are contained in Rule 341. The acceptance of the duties of the office of guardian and/or conservator shall be indicated in the petition (paragraph 14, Form IIa). An acceptance of duty form (IIA-1) shall accompany the petition unless a volunteer is sought. A notice of hearing (Form II-J or II-J1) and proposed orders appointing counsel (Form I-E), and, if sought, an examiner (Form II-D), a visitor (Form II-E), and/or, if sought, a guardian ad litem (Form I-F), shall also be filed, together with any filing fee. Each proposed order shall list the names and addresses of all parties and their counsel.

The Section believes that cases arise more or less frequently, in which immediate action is required. Typically, these will be cases in which a guardian must be appointed to give or withhold informed consent to a proposed course of medical treatment. While the proposed rules contain procedures for dealing with such cases on a temporary basis, we think it prudent that the existence of such procedures be expressly recognized, and their location stated, in the general rule. For the same reason, we propose an identical addition to Rule 321.

SCR-PD 326 Examiner, duties and appointment

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(b) Contents of report. In the report, the examiner shall make findings indicating whether the individual's ability to receive and evaluate information is impaired to such an extent that he or she lacks the capacity:

1. To take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income~~.~~; or

2. To take those actions necessary to provide health care, food, shelter, clothing, personal hygiene, and other care for himself or herself so that serious ~~serious~~ physical illness is more likely than not to occur~~.~~; or

3. To meet all or some essential requirements for his or her habilitation, or therapeutic needs~~.~~; or

4. To make decisions concerning his or her own health care.

The Section recommends two amendments to Rule 326. First, we take it that the appointment of a conservator or guardian could be appropriate if any of the criteria set forth in the rule were met. We propose that each clause by followed by the disjunctive "or," to make that clear. Otherwise, an argument could be made that all of these criteria must be satisfied. Second, we recommend that the examiner inquire into, and make a discrete finding as to, the question whether the subject of a proceeding is capable of making personal health-care decisions. Much of the litigation surrounding the appointment of a guardian has arisen in the health-care setting. While it may be argued that such an inquiry would naturally fall within the

criterion of subsection (2), the Section suggests that the ability to take action necessary to provide health care is very different from the ability to make rational, informed decisions concerning health care.

SCR-PD 328 Guardianship reports

(a) Filing. A limited or general guardian shall submit a written report to the Court at least semi-annually on the condition of the ward and the ward's estate that has been subject to the guardian's possession or control. The first report shall be due six months from the date of appointment of the guardian, or earlier as the Court may direct, with each succeeding report due at six month intervals thereafter. The guardian shall also submit a report upon order of the Court, which may order a report sua sponte or on petition of any person interested in the ward's welfare. The guardian shall submit a report within 45 days after the death of the ward. Guardianship reports shall be prepared on Form II-M and signed under oath.

The Section is concerned that the rule as proposed lacks the flexibility necessary to insure adequate review of a guardianship under all circumstances. In order to add the requisite flexibility, we propose these changes, which clarify the Court's broad authority to set the time for submitting reports and require the submission of a report promptly after the death of the ward.

SCR-PD 341 Procedures in proceedings for appointment of 15-day temporary guardians

* * *

(e) Request for extraordinary powers. Upon the filing of a petition pursuant to D.C. Code § 21-2046(a) which requests the grant of any extra-

> ordinary powers listed in D.C. Code § 21-2047(~~a~~c), the Clerk shall schedule a hearing before the Judge in Chambers, ~~to be~~ which shall be held within 48 hours and which may be held in a hospital or other health-care facility, as appropriate; provided, however, that in cases of medical emergency, the hearing shall be held forthwith. The Clerk shall notify all parties or their counsel, if any, by telephone of the hearing. Upon notification by the Clerk of the hearing, the petitioner shall immediately cause notice (Form II-J or II-J1) to be personally served upon the subject of the petition and all persons to whom D.C. Code § 21-2042(a) requires notice if they can be found within the District of Columbia or, if they cannot be found within the District of Columbia, the petitioner may cause the substance of such notice to be communicated to them by any method of telecommunications reasonably calculated to result in immediate notification to them.

The Section believes that the reference to D.C. Code § 21-2047(a) is erroneous; that section lists the general duties of a guardian. We presume that the correct reference is § 21-2047(c), which lists those powers that a guardian may not exercise unless expressly set forth in the order of appointment or after subsequent hearing and order of the Court. While these prohibitions are qualified in cases of medical emergency, the Section thinks it prudent to provide for extremely expedited consideration of a petition in cases where a medical emergency is involved.

Finally, the Section notes that many of the proposed rules require the use of Forms (there appear to be Forms I-A [petition], I-B [proposed order], I-C [request for notice], I-D [notice of appearance], I-E [order appointing counsel], I-F

[order appointing guardian ad litem], I-I [petition for determination of claim], I-J [notice of hearing], I-K [proof of service of notice], I-L [waiver of notice], IIa [appears to be the same as II-A], II-A [petition for general intervention proceeding], IIA-1 [acceptance of duty by guardian or conservator], II-C [petition for appointment of temporary (six months) guardian], II-D [order appointing examiner], II-E [order appointing visitor], II-F [report of examiner], II-G [report of visitor], II-I [pretrial statement], II-J [notice of hearing], II-J1 [notice of hearing], II-M [report of guardian], II-N [individual conservatorship plan and inventory], II-P [notice of appointment of temporary (six months) guardian], IIQ [petition for proceeding subsequent to appointment of guardian or conservator], II-R [report of conservator], III [petition for appointment of temporary (15 days) guardian], III-A-4 [order appointing counsel], III-C [request for hearing], III-D [order appointing temporary (15 days) guardian], IV-A [petition for appointment of conservator for missing, disappeared, or detained person], IV-B [notice of hearing], and V-A [foreign conservator's appointment of D.C. agent for service of process]). None of these forms is published with the proposed rules. We would appreciate the opportunity to review and comment on the proposed forms, and suggest that other members of the Bar may feel the same way.