

From: Michael Garner

To: Carolyn Koegler, Pat Ryan

Re: #2017-012

Hi Carolyn,

Thank you for the opportunity to review Ms. Marino's submissions under #2017-012. The Circuit Court believes that there is no present occasion for the Advisory Committee on Rules to either consider adopting a new rule or amending an existing Rule, and therefore suggests that the Committee should decline to take any action on Ms. Marino's request. Specifically, I offer as follows.

1. Probate Court Administrative Order 16, governing criteria for Professional Guardians, was adopted in 2009 under the specific authority of the legislature in RSA 464-A:2, XIV-b, which authorized the administrative judge of the Probate Court to adopt criteria for professional guardians. This was consistent with Supreme Court Rule 54 (4), which permits the legislature to confer duties and responsibilities on the administrative judge.
2. Circuit Court Administrative Order 2014-63, governing procedure for appointment of professional guardians, was adopted in 2014 under the same authority as Administrative Order 16 and the Court's inherent authority under RSA 464-A to appoint guardians.

3. Circuit Court Administrative Order 2014-64, governing standards for assessment and approval of professional guardians' fees, was adopted in 2014 under the authority of RSA 464-A:23 and Probate Division Rule 88, both of which authorize the Probate Court to review and approve fees payable to fiduciaries.
4. Thus, the Administrative Orders mentioned in Ms. Marino's submission were within the Court's authority and were consistent with the governing statutes and with existing Rules.
5. The New Hampshire Supreme Court concluded that Ms. Marino's appeal from her removal as a New Hampshire professional guardian was moot in light of her removal as a national certified guardian by the Center for Guardianship Certification; such removal by the CGC was consistent with Administrative Order 16.
6. In 2015, the legislature appointed a study committee to study guardianships in New Hampshire. The study committee concluded that the Circuit Court should continue to have jurisdiction over guardianships under RSA 464-A, and sent a letter to the Circuit Court seeking a response to some areas of concern, to which the Circuit Court has responded. The legislature did not revoke the Circuit Court's statutory authority to establish criteria for appointment of professional guardians.

7. Administrative Orders 2014-63 and 2014-64 have been in effect for three years and were created with the input of the professional guardians who would be subject to the Orders. Based on a recent meeting of those guardians, there is consensus that the Orders are working well. There are currently about twelve professional guardians subject to these Orders.
8. In conclusion, there are currently in place statutes, Rules, and Administrative Orders which create a consistent approach to the practice of professional guardians, and which have recently been reviewed by both our Supreme Court and the legislature, and left in place. There is no present occasion to consider modifying or replacing any component of that structure.
9. I have attached, for the benefit of the members of the Committee, copies of Judge King's testimony in September 2016 before the legislative study committee, and the committee's letter to the Circuit Court and Judge King's response.
10. Given that I believe that the Advisory Committee's review of Ms. Marino's submissions should be limited to the question whether there is currently an occasion to consider modifying or replacing Court Rules, I have not attached information which would supplement and provide context to her submission relating to the proceedings by which she was removed, though I note that her submissions are selective. Should the Committee think it necessary, I will be

able to submit additional specific documents which were part of those proceedings.

I will be grateful if you would circulate this response to the members of the Committee in advance of Friday's meeting.

**Testimony of Judge David D. King**  
**September 21, 2016**

**COMMITTEE TO STUDY GUARDIANSHIP IN NEW HAMPSHIRE**

**SB341 - Chapter 152:2 - Laws of 2016**

On behalf of the Judicial Branch, and more specifically the Circuit Court – Probate Division, I want to thank the Chair and members of the Committee to Study Guardianship in New Hampshire for allowing me the opportunity to present written testimony today as you endeavor to study a most important issue in New Hampshire, guardianships granted over the person and/or estate of incapacitated New Hampshire citizens, some of your most vulnerable constituents.

By way of brief background, I am the Deputy Administrative Judge of the Circuit Court. I recently volunteered to act as Presiding Judge of the Trust Docket due to a shortage of circuit court judges. I was appointed as a Probate Court judge in January 1990 and as Probate Court Administrative Judge in January 2007. As a sitting judge, I have presided over guardianship cases in all ten counties. Shortly after taking over as Administrative Judge of the Probate Court, I formed a committee to study the concept of professional guardians that led to legislative changes and the establishment of the professional guardian program in New Hampshire.

**PURPOSE OF TESTIMONY**

My testimony today on behalf of the Judicial Branch is to give a history of our adult<sup>1</sup> guardianship statutes, our public and professional guardianship programs, and briefly how other states administer and oversee the guardianship systems in their states. I am happy to answer any questions the Committee may have, and provide further written testimony, if requested.

At the outset, I want to emphasize that, as expressed in the guardianship statutes enacted by the Legislature in 1979, the Judicial Branch is first and foremost concerned with the well-being of our state's most vulnerable citizens. By definition, a ward is unable to undertake certain personal and financial acts for themselves and thus become dependent on the good will, competence, and honesty of the individual the court appoints as guardian. It is one of the Court's most important duties to ensure that the ward's assets are not wasted and his or her personal dignity is respected. New Hampshire statutes, Circuit Court rules, Circuit Court administrative orders, and professional standards governing professional actions and ethics all strive to place the interests of the ward first and foremost into consideration.

The governing statute, RSA 464-A:1 eloquently directs that:

It is the purpose of this chapter to promote and protect the well-being of the proposed ward in involuntarily imposed protective proceedings. This chapter is designed to provide procedural and substantive safeguards for civil liberties and property rights of a proposed ward or an individual already under guardianship powers.

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<sup>1</sup> I use the work "adult" loosely, to differentiate these cases from minor guardianships, under RSA Ch. 463. There is no requirement in RSA Ch. 464-A that requires that the ward be an adult.

All court rules and orders strive to promote this clear directive as should every judge appointed to the bench, because, as Judge Gary Cassavechia recently observed, “[t]he public places its trust in the court system to provide protection for citizens lacking the capacity to make informed decisions in matters related to their personal and/or financial affairs and it needs to have confidence that any individual assigned to make those decisions is held to the highest standards of skill, professionalism, and ethics.” See In re: (Professional Guardian Disciplinary Matter), No. 317-2015-AP-0001 (April 7, 2016).

## **ADULT GUARDIANSHIPS IN NEW HAMPSHIRE**

### **a. Committee Questions**

The Committee requested, through Howard Zibel, counsel to the Judicial Branch, that I provide certain statistics and other information about guardianships in New Hampshire today. Specifically, you provided us with the questions that follow in blue type. Answers to your inquiry are set forth below, or attached as an exhibit to these written comments.

- Current number of adult guardianships - As of 9/1/16, there are **6,973** adult guardianship cases pending. Some of these cases have recently been filed, so a guardian may not have yet been appointed. A few may have been ordered terminated, but the court staff is still processing the order.
- Current number of minor guardianships - As of 9/1/16, there are **5,231** minor guardianship cases pending. Some of these cases have recently been filed, so a guardian may not have yet been appointed. A few may have been ordered terminated, but the court staff is still processing the order.
- Current number of approved “private guardians” and their names – I assume the Committee is asking for information concerning “professional guardian[s]” in RSA 464-A:10 and defined by RSA 464-A:2, XIV-b as “a competent person who provides guardianship services for a fee to a ward and who is not related to the ward by blood, adoption, marriage, or civil union.” There are presently thirteen professional guardians certified to be appointed by the court as guardian. The names of current professional guardians and their contact information are attached as Exhibit 1.
- Current number of guardianships held by private guardians – As of June 30, 2016, there are 200 individuals whose appointed guardian is a professional guardian, or **2% of the total open cases**. The number of cases managed by an individual professional guardian ranges from three to forty-two.<sup>2</sup>
- Current number of guardianships held by Office of Public Guardian – According to information provided to us by the Office of Public Guardian, it is currently appointed in 1,120 matters.
- Current number of guardianships held by Tri County Cap - According to information provided to us by Tri County Cap, it is currently appointed in approximately 415 matters.

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<sup>2</sup> Although Administrative Order 63 caps the number of cases one guardian can manage at 35, the Circuit Court allowed professional guardians to keep current caseloads. However, no new cases will be assigned to guardians over that cap.

- Current number of guardianships held by family and "others" – There are approximately 10,469 individuals (adults and children) whose appointed guardian is a family member or a volunteer guardian. See RSA 464-A:10, I(a).
- Number of guardianships for 2015 – I assume the Committee is looking for guardianship activity in the Probate and Family Divisions in 2015. There were 2,509 guardianship cases filed in 2015, and 2,290 guardianship cases disposed in 2015. The disposition types are outlined below:

• Denied	• 67
• Dismissed	• 335
• Dismissed - Voluntary Non-Suit	• 2
• Dismissed With Prejudice	• 1
• Dismissed without Prejudice	• 10
• Granted	• 1,555
• Order Issued	• 133
• Withdrawn	• 187
• <b>Total</b>	• <b>2,290</b>

- Number of guardianships for 2016 - I assume the Committee is looking for guardianship activity in the Probate and Family Divisions this year. There were 1,259 guardianship cases filed and 1,128 guardianship cases disposed between January 1 and June 30<sup>th</sup>. The disposition types are outlined below:

• Denied	• 31
• Dismissed	• 167
• Dismissed With Prejudice	• 2
• Dismissed without Prejudice	• 1
• Granted	• 774
• Order Issued	• 79
• Withdrawn	• 74
• <b>Total</b>	• <b>1,128</b>

- Number of slots on the state guardianship contract with DHHS – The Office of Public Guardian ("OPG") reported a total of 803 contract slots with DHHS (725), BEAS (42) and the Department of Corrections (36). Tri County Cap reported a total of 288 slots, but it expects contract slots to increase to 290 next year.
- Number of state contracted guardianships and how many were OPG and Tri County appointed to for 2015 & 2016 – OPG reported current totals of 1,120 cases, of which 702 are state contract guardianships and 418 private guardianships. Tri County Cap reported that it has a total of approximately 415 cases.

In 2015, OPG was appointed to 178 cases (of which 67 were under state contracts). Year to date has received 132 appointments (of which 43 were under state contracts).

In 2015, Tri County Cap was appointed to 17 new cases under state contracts. Year to date it has received 7 new appointments under state contracts with 2 appointments pending.

## **b. Applicable Statutes – Adult Guardianships**

“The powers and duties of adult guardians in this state are specified in RSA chapter 464–A.” In re Guardianship of Domey, 157 N.H. 775, 778 (2008). By statute, the probate division has “exclusive jurisdiction over the appointment of a guardian of the person or of the estate or of both of any incapacitated person.” RSA 464-A:3.<sup>3</sup> “The purpose of RSA chapter 464–A is to promote and protect the wellbeing of the proposed ward in involuntarily imposed protective proceedings.” In re Guardianship of Domey, 157 N.H. at 779 (quotations omitted). “[T]he chapter is designed to provide procedural and substantive safeguards for civil liberties and property rights of a proposed ward. These safeguards are needed considering the potentially adversarial nature of guardianship proceedings, and the significance of the liberties and rights at stake.” In re Guardianship of Eaton, 163 N.H. 386, 390 (2012)(quotations and citations omitted).

Given the significance of the rights at stake, RSA 464-A strictly sets forth a procedure for appointment of a guardian. “Any relative, public official, or interested person, or any individual in his or her own behalf” are empowered to petition “for finding of incapacity and appointment of a guardian of a person and estate, or the person, or estate.” RSA 464-A:4. The proposed ward has an “absolute right” to have counsel to represent his or her interests, RSA 464-A:6, and, if able, attend the hearing to determine whether a guardianship is appropriate. RSA 464-A:8. The statute directs the Probate Division Judge to carefully evaluate the “nature and extent of the functional limitations of the ward,” RSA 464-A:9, I, in order to ascertain his or her capacity and carefully tailor the contours of guardianship imposed to the individual’s needs. Importantly, the Probate Division judge must find, beyond a reasonable doubt, that:

- (a) The person for whom a guardian is to be appointed is incapacitated;
- and (b) The guardianship is necessary as a means of providing continuing care, supervision, and rehabilitation of the individual, or the management of the property and financial affairs of the incapacitated person; and (c) There are no available alternative resources which are suitable with respect to the incapacitated person's welfare, safety, and rehabilitation or the prudent management of his or her property and financial affairs; and (d) The guardianship is appropriate as the least restrictive form of intervention consistent with the preservation of the civil rights and liberties of the proposed ward.

RSA 464-A:9, III. Incapacity has been defined by the Legislature very specifically, namely that it is “a legal, not a medical, disability and shall be measured by functional limitations. It shall be construed to mean or refer to any person who has suffered, is suffering or is likely to suffer substantial harm due to an inability to provide for his personal needs for food, clothing, shelter, health care or safety or an inability to manage his or her property or financial affairs.” RSA 464-A:2, XI.

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<sup>3</sup> Minor guardianships are governed by RSA chapter 463. Although at one time the Probate Division had jurisdiction over minor guardianships, see RSA 463:4, I, the Circuit Court-Family Division currently has jurisdiction over minor guardianships. See RSA 490-D:2, VIII. My comments today are limited to adult guardianships unless otherwise indicated.



Courts, upon rendering a decision that a guardianship is necessary, provide the ward, his or her counsel, and the guardian with specific letters of appointment containing; (1) the “nature and scope of the guardianship” and (2) limits placed on a guardian’s authority. RSA 464-A:11. The court determines the amount and type of bond that must be posted by a guardian. RSA 464-A:21.

During the course of the guardianship, the courts maintain supervisory responsibilities over the guardian and the ward. See RSA 464-A:22, :35-:38. It includes review of an inventory, accounts and annual reports filed by a guardian, RSA 464-A:22, :35-:36, and the authority to revisit imposition of the estate as necessary. Cf. RSA 464-A:38. Guardians are expected to conform to strict reporting standards. Cir. Ct.-Prob. Div. R. 108.

As discussed in greater detail below, fees and expenses charged for services provided the ward by a professional must be “reasonable” and are subject to court approval. RSA 464-A:23; Cir. Ct. Prob. Div. R. 88.<sup>4</sup> Family members and “volunteers” serving as guardians may be allowed a stipend and reimbursement of costs as approved by the courts. RSA 464-A:2, VI-b, XV-a.

Courts may remove a guardian if it finds removal in the ward’s best interest, and guardians may only resign with court approval and in accordance with a court’s instruction. RSA 464-A:39. Consequently, if a professional guardian was to retire, he or she may resign only with prior court approval and instruction concerning his or her replacement. RSA 464-A:39, I.

A guardianship may be terminated upon application by the ward, or “any person interested in the ward’s welfare,” demonstrating “that the ward is no longer incapacitated.” 464-A:40. Probate courts, in meritorious cases, are required to hold hearings on the capacity of the ward, and it is the guardian who is “required to prove that the grounds for appointment of a guardian . . . continue to exist.” Id. “Accordingly, the guardian must prove beyond a reasonable doubt the existence of each factor delineated by RSA 464-A:9, III; namely, that: (1) the ward remains incapacitated; (2) guardianship is necessary; (3) no suitable alternative resources exist; and (4) guardianship is the least restrictive form of intervention.” In re Guardianship of E.L., 154 N.H. 292, 295 (2006).

### **c. Types of Adult Guardianships –**

There are two types of adult guardianships, namely, a guardianship over the estate, RSA 464-A:26, and a guardianship over person. See RSA 464-A:25.<sup>5</sup> Guardianships may also be specifically temporary, RSA 464-A:12; however, it is my experience that those petitions are rare.

The statute directs guardians over an estate to, inter alia: (1) take possession of all of the ward’s real and personal property, rents and other income streams, RSA 464-A:26; (2) prudently protect, preserve, retain, sell, and invest the ward’s assets, id.; (3) “prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of the estate’s assets,” id.; and (4) faithfully account for those assets. Id. Upon approval by the court, a guardian over an estate may petition to make

<sup>4</sup> Determination of what constitutes “reasonable compensation for all proper expenses and services” of a fiduciary includes consideration of “the size of the estate, the complexity of the estate, and the fiduciary’s responsibilities in light of the services rendered, with the amount dependent upon the labor, risk, responsibility and trouble of each particular case.” In re Estate of Rolfe, 136 N.H. 294, 298 (1992)(the “Rolfe factors”). Probate Division Rule 88 similarly provides for court approval of all fees and directs that: “[i]n all cases, fees and expenses shall be reasonable for the work, responsibility, and risk. Factors used to determine the reasonableness of a fee may include the time and labor required, the size of the estate, the requisite skill, the customary fee, a fee agreement, the results obtained, time limitations, and the length of the professional relationship.”

<sup>5</sup> RSA chapter 464-A also allows for a voluntary petition for conservatorship in which a ward petitions for appointment of a person to assist in the management of his or her personal affairs. RSA 464-A:13 - :19.

gifts, engage in estate planning, and sell assets. RSA 464-A:26-a - :27. The guardian of the estate is required to apply the money and property for the support, care, and education of the ward, and moreover, act, with respect to the ward's assets and income, as would "persons of prudence, discretion and intelligence and exercising judgment and care as in the management of their own affairs." RSA 464-A:26. In sum, "[t]he primary duty of the guardian [over an estate] is to protect the estate's assets in order to apply them for the support and care of the ward." Guardianship of Domey, 157 N.H. at 779.

Guardians over a person may be appointed broad authority to: (1) decide a ward's abode<sup>6</sup>; (2) provide for "the care, comfort and maintenance of the ward," including maintenance of a ward's clothing and possessions; and (3) "arrange for the ward's training, education or rehabilitation." RSA 464-A:25. The guardian can make certain medical decisions for a ward, including mental health counseling. Id.

#### **d.) Types of Guardians**

There are four categories of persons or institutions that may be a guardian. RSA 464-A:10. Most are family members or friends, however, professionals may provide guardianship services either as a certified professional guardian, see 464-A:10(b), or as an employee of one of the state's two public guardian providers, the Office of Public Guardian or Tri County Cap. RSA 464-A:10(c). It is notable that in defining "Who May be Guardian," the Legislature was careful to make clear that the best interest of the ward is paramount. By directing that "[t]his paragraph shall not be construed to limit the ability of the court to remove any guardian appointed under this chapter," RSA 464-A:10(f), it implied that no person possess a right or special entitlement to be appointed as guardian.

##### **(1) Family and Volunteer Guardians**

Most guardians are family guardians defined as a person "who is related to the ward by blood, adoption, marriage, or civil union." RSA 464-A:2, VI-b. Less frequently, the courts appoint "volunteer guardians" who are non-family members, usually a friend or neighbor, who acts as guardian and can be a guardian over no more than two wards. RSA 464-A:2, XV-a.

There are a number of free resources available to family or volunteer guardians who need guidance. The Probate Division has produced a video that carefully explains the guardianship process. See "*What to Expect at an Incapacitated Guardianship Hearing*" available at: <http://www.courts.state.nh.us/videos/circuit.htm>. In addition, OPG is required, pursuant to the terms of its contract with the state, to provide assistance to family guardians who may have questions or concerns. The Circuit Court's own website contains a significant amount of useful information about guardianships, our information center is available to answer family guardians' questions and family guardians frequently come to the courts where court staff is always available to offer assistance.

Finally, petitions for guardianship may now be filed electronically. Through September 9, 2016, a total of 778 petitions for guardianship over an incapacitated person have been filed electronically. The vast majority have been filed by unrepresented persons who follow a guided interview when filling out the electronic petition, making the process significantly easier for non-lawyers to navigate.

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<sup>6</sup> With specific limitations on admissions to mental institutions and certain other decisions concerning aggressive mental health treatments.

## (2) Professional Guardians

Professional guardians are defined by the Legislature as “a competent person who provides guardianship services for a fee to a ward and who is not related to the ward by blood, adoption, marriage, or civil union.” RSA 464-A:2, XIV-b. New Hampshire established its professional guardian program in 2009 following study and consideration by a specially appointed “Professional Guardian Task Force. See *New Task Force on Professional Guardians Established* (June 24, 2008)(Exhibit 2). The Task Force was established given concerns that the state’s aging population may create a greater need for alternative nominees for guardians other than family of public guardians. The Task Force also “recogniz[ed] the need to insure that the guardians serving this vulnerable population are held to high professional and ethical standards and that they have adequate education, training and experience.” Id. As a result, the Legislature included professional guardians as possible appointees in RSA 464-A. See 2009 Laws 132:4.

The authority to establish a process for certification as a professional guardian and who is entitled to be appointed as a professional guardian is granted by the Legislature to the Circuit Court. RSA 464-A:2, XIV-b provides that “[t]o be eligible for appointment, a professional guardian shall meet criteria established by the administrative judge of the probate court.” Pursuant to that authority, Probate Court Administrative Order 16 (2009), see Exhibit 3, sets forth the process and requirements for certification of a professional guardian eligible for appointment by the courts. To qualify for appointment, guardians are expected, among other things, to be nationally certified as a guardian or master guardian, and maintain that certification, by the Center for Guardianship Certification. See Prob. Ct. Admin. Order 16 ¶1. Guardians are expected to maintain proper records and file proper annual reports and accountings. Id. ¶¶10, 12. They must “comply with all requirements of applicable statutes, regulations, and court rules and orders.” ¶7. Guardians are required to “[s]ubmit proposed fees . . . for review and approval by the court” and all “[f]ees and expenses charged, whether taken or not, must be reasonable [and] related only to guardianship duties.” Id. ¶11.

Of particular importance is the requirement that guardians adhere to both the *Standards of Practice* and *Model Code of Ethics*, see Prob. Ct. Admin. Order 16 ¶¶ 3 & 4, as published by the National Guardianship Association (“NGA”). See *National Guardianship Association, A Model Code of Ethics for Guardians; National Guardianship Association Standards of Practice*. (Exhibit 4). These standards and ethical rules set forth the duties and responsibilities of each guardian based upon industry standards of competence and a respect for each ward’s personal dignity. The *Preamble* to the *National Standards of Practice* notes that although restrictions on guardians may make their work more difficult, “little is gained by simply accepting a substandard or unacceptable state of affairs,” and therefore the NGA adopted rules that “reflect as realistically as possible the best or highest quality of practice.” Id. at 1. The *Preamble* to the *Model Code of Ethics* recognizes, like the preamble to RSA 464-A, the vast authority granted guardians and the deep responsibility to guard against abuse or lack of professional competence. It is instructive for this Committee to consider, as it fashions conclusions and recommendation, this *Preamble’s* observation that:

[i]n its widest application, the imposition of guardianship bestows grave and far-reaching authority upon the person appointed as guardian. The authority of the guardian may encompass the control of the ward’s bodily integrity, place of residence and personal finances. The potential scope of this authority is vast and requires the guardian to act with the greatest degree of care and circumspection. The potential for abuse of this power, whether deliberate or well-meaning, must be appreciated, acknowledged and guarded against. The guardian is in all cases a representative of the interests of the ward and shall represent only the interests of the ward.

*Model Code of Ethics at 9-10.*

Pursuant to RSA 464-A:23, guardians may recover payment of “reasonable compensation” from the guardianship estate. Fees must be approved by the supervising probate court. See Cir. Ct. Prob. Div. R. 88; *National Guardianship Association Standards of Practice 22*. RSA 464-A:23 provides:

Every guardian shall be allowed a reasonable compensation for all proper expenses and services in the discharge of the guardianship. Administrative expenses approved by the court, including but not limited to guardianship fees, legal fees, and appraisal costs shall be paid out of the estate of the ward as a priority over other debts and obligations of the ward to the extent that funds are available and the needs of the ward are being met . . . .

Determination of what constitutes “reasonable compensation for all proper expenses and services” of a fiduciary includes consideration of “the size of the estate, the complexity of the estate, and the fiduciary’s responsibilities in light of the services rendered, with the amount dependent upon the labor, risk, responsibility and trouble of each particular case. In re Estate of Rolfe, 136 N.H. 294, 298 (1992)(the “Rolfe factors”). Probate Division Rule 88 similarly provides for court approval of all fees and directs that: “[i]n all cases, fees and expenses shall be reasonable for the work, responsibility, and risk. Factors used to determine the reasonableness of a fee may include the time and labor required, the size of the estate, the requisite skill, the customary fee, a fee agreement, the results obtained, time limitations, and the length of the professional relationship.” See also *National Guardianship Association Standards of Practice 22*.

Of course, what constitutes a reasonable fee must be informed by the professional and ethical obligations of a professional guardian. NGA Standard of Professional Conduct 22 directs all guardians that they “shall bear in mind at all times the responsibility to conserve the person’s estate when making decisions regarding providing guardianship services and charging a fee for those services.” In reviewing fee requests, courts also have a responsibility to protect wards from unnecessary waste of their assets. Although many professional guardians complain that courts often find that their fees are unreasonable, unlike other professions where the consumer can choose to fire a provider if rates are unduly high, a ward, by definition, does not have the capacity to question the rate charged by a professional guardian. The Legislature, by granting the courts the obligation to ensure that professional guardians charge “reasonable fees,” makes it our duty to speak for the ward so that his or her assets are not wasted.

Over time, many judges in the Circuit Court became concerned about the fees charged by professional guardians, some which nearly, or in fact did, impoverish wards. Courts observed that across the state many wards’ life savings were being quickly depleted, and others on public assistance were paying large portions of their income to guardians. Although recognizing that individuals should be paid for valid work undertaken for a ward, bills were submitted for approval that included hourly fees of up to \$147 per hour for ministerial tasks like bill paying or picking up mail or prescriptions from a drug store. See Exhibit 5. Judges found it was becoming necessary to schedule additional hearings to determine whether a bill was “reasonable” and this was creating a strain on already scarce court resources. Professional guardians were concerned about the length of time it took to receive payment, and sought consistency in application of court rules. The guardians would state that they were just “spending down” the ward’s assets to make them eligible for benefits sooner, hence no one was getting hurt. This ignores the fact that the Department of Health and Human Services would then just start paying nursing home bills sooner out of the state coffers.

The Administrative Judges of the Circuit Court scheduled a meeting on August 29, 2014 with the certified professional guardians in order to seek a solution to the problem of excessive fees. At that meeting, after a lengthy discussion, a guardian suggested a court-mandated fee structure that we believed satisfied the Circuit Court's desire to protect wards from the burden of unreasonable fees, and provided professional guardians with fee standards that are fair and consistent and provide a mechanism for the upward adjustment of fees in certain circumstances. Thereafter, the Circuit Court issued Administrative Order 64, see Exhibit 6, that allowed guardians to charge a \$300 fee per-month with limited court oversight, and provided them with the opportunity to petition the Circuit Court for additional compensation at an hourly rate of \$60 per hour for "good cause" and under "exceptional circumstances" outlined in the order that conform to court rules, industry standards and case law. Id. The \$300 monthly fee is based on an average monthly commitment of five hours multiplied by a \$60 hourly fee. The \$60 hourly rate was chosen as it corresponds to the rate allowed attorneys in indigent criminal cases and to guardians ad litem in marital and other cases under Supreme Court Rules 48 and 48-A. The five hour average is grounded in the observation that over the course of a guardianship, five hours per-month is the "average" time spent when a client is "stable." Guardians can collect additional fees, for example, if there is an unusual mental or physical health emergency or the service provided requires special skills or training on the part of the guardian.<sup>7</sup> I have approved additional fees above the \$300 per month minimum when they were reasonably charged by the guardian. And, nothing prevents these individuals from engaging in other employment.

Professional guardians may be appointed by a Probate Court as part of the statutory process discussed above. See RSA 464-A:10. In 2015, the Circuit Court, out of concern for the quality of services provided wards in light of ever increasing caseloads held by some professional guardians, instituted a new process for referral of a professional guardian for appointment.<sup>8</sup> See Cir. Ct. Admin. Order 2014-63 (Exhibit 7). The order recognized that "industry best practices provide that professional guardians: shall limit each caseload to a size that allows a minimum of one visit per month with each person, and that allows regular contact with all service providers." Id. (quotations and ellipses omitted); see *NGA Standards of Practice* 23.1; N.H. Prob. Ct. Admin. Order 16 ¶ 3 (9/10/2009). Consequently, the Circuit Court created the position of "Professional Guardian Coordinator" to track the number of open cases assigned each professional guardian. The Court also discerned that in order to ensure that a professional guardian was able to competently provide services to his or her wards, each guardian would be limited to a 35 ward<sup>9</sup> caseload.

The Professional Guardian Coordinator refers candidates based upon a rotating list of guardians available to provide services in a particular geographic area. Although some guardians were unhappy with this limitation, the Circuit Court has a responsibility to vulnerable wards, many who are unable to speak for themselves, to create an environment that best maximizes proper care. When an inquiry is received by the Coordinator, she refers two-to-three guardians to the person seeking a guardian. Sometimes, professional guardians decline the referral. It should be noted, however, that even if the Judicial Branch caps maximum caseloads at 35, it still allows a professional guardian, if

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<sup>7</sup> Guardians often hire accountants or lawyers to provide additional services to the ward. Thus, the court may not allow for extra fees so that a ward is not charged twice for the same service.

<sup>8</sup> It should be noted that even if a professional guardian is nominated by our professional guardian coordinator, it is up to the individual judge to decide whether appointment is appropriate pursuant to RSA 464-A.

<sup>9</sup> This limit was premised on information provided by the professional guardians themselves that on average they spend approximately five hours per-month managing each ward's affairs and that a single guardian can only competently manage approximately thirty cases. The Circuit Court decided to allow up to thirty-five cases, calculating that if a guardian managed thirty-five cases, with no emergency incidents arising, in an average month a guardian would spend 175 hours, or approximately 40 hours per week on their cases.

they choose to provide services to 35 wards, the opportunity to earn a *minimum* of \$126,000 per year (under the new fee structure) with potentially more compensation for exceptional circumstances.

As is the case with any fiduciary, professional guardians may be removed from individual cases if it is in the ward's best interests to do so. In addition, Administrative Order 16, see Exhibit 3, provides that a professional guardian may be "[s]ubject to removal from the list of approved guardians for non-compliance with any criteria for professional guardians or for good cause as determined by the Probate Court Administrative Judge." Id. ¶ 16. Until recently, the Circuit Court had not found it necessary to remove a professional guardian from the approved list. We had no formal procedures or disciplinary board in place, in part because there are so few professional guardians and total guardianships managed by them are only 2% of total adult guardianships in the state.

Unfortunately, Administrative Judge Kelly was required to begin disciplinary proceedings against a guardian earlier this year after she was found to have violated eight separate professional standards in one case. I presided over another case in which the same guardian engaged in financial impropriety. After the findings in the first matter were affirmed on appeal, and the appeal in the case before me was withdrawn, Judge Kelly contacted the guardian and requested that she show cause why she should not be sanctioned for misconduct.

Upon consideration of concerns raised by her attorney, the matter was referred to Judge Gary Cassavechia for a hearing and disciplinary recommendation. It should be noted that because the Circuit Court had no formal procedures in place, Judge Cassavechia carefully considered, and attended to, the guardian's due process concerns. He issued preliminary structuring orders carefully outlining her due process rights, explaining the process he intended to follow, making clear the standards of review adopted by him, and allowing her counsel to comment and make suggestions.<sup>10</sup> After a hearing, which was remarkable in that the guardian was allowed to testify without being subjected to cross-examination, Judge Cassavechia issued a recommendation that she be suspended for two years. Compare that process with the attorney discipline procedure where the Attorney Discipline Office has a full time attorney prosecutor who prosecutes their cases.

Judge Kelly made an independent review of Judge Cassavechia's findings and determined that, given the number and severity of violations of the professional standards, the only proper course was to remove the guardian from the list of approved professional guardians. After her removal from the list, Judge Kelly, as required by the statute which defines a "professional guardian" as one who meets the eligibility criteria for appointment, RSA 464-A:2, XIV-b, and out of concern for her wards, replaced the guardian on all cases effective immediately. The matter is currently on appeal to the New Hampshire Supreme Court. The Supreme Court, however, did not stay removal of the guardian pending consideration of the appeal. In addition, the Center for Guardianship Certification, after conducting its own independent disciplinary review, including appellate review, revoked that guardian's certification due to multiple violations of the professional standards of conduct.

Unfortunately, New Hampshire is not alone in its recent experience with professional guardian misconduct, and the heightened necessity to more carefully monitor fees in order to protect the assets of vulnerable wards. Many states are grappling with how the best manage their professional guardian programs in light of an unfortunate increase in abusive behavior. See Exhibit 8 (collection of news reports); see General Accounting Office, *Guardianships – Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (2010)(Exhibit 9). Officials from the National Center for State Courts

<sup>10</sup> Judge Cassavechia adopted or incorporated almost all her suggestions. He did not, however, keep the matter fully confidential out of deference to New Hampshire's well-established principle of state constitutional law that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. CONST. Pt. I, art. 8; see, e.g., Petition of Union Leader Corp., 147 N.H. 603, 604 (2002).

report that state courts and state legislatures have been actively responding to concerns arising from problematic behavior by some professional guardians. One trend that appears to be emerging, however, and it is toward greater oversight rather than less.

Finally, this summer the Circuit Court had an intern from the University of New Hampshire School of Law, Garrett Beaulieu, conduct a survey of state professional guardian programs nationwide. His research revealed that there is wide variety in the appointment and governance of professional guardians. In general, a minority of states have formal programs like New Hampshire. Disciplinary boards and “corporate” guardians exist mostly in highly populated states, while less populated states employ sole practitioners and have a less formal disciplinary process. For example, Washington and Florida have administrative boards governing certification, standards of practice, and complaints. They each allow corporations to be appointed as a guardian. These states, however, are significantly more populous than New Hampshire and therefore certify hundreds more professional guardians (approximately 326 in Washington and over a 1,500 in Florida). By contrast, New Hampshire currently has thirteen professional guardians serving a population of 1.3 million, and Alaska, with a population of approximately 737,625 residents, certifies approximately eight professional guardians. Notably, however, each state’s judiciary exercises control over appointment and discipline of guardians.

#### (4) Public Guardians

Finally, public guardian agencies may also be appointed by the courts. See RSA 464-A:10(c). Currently, New Hampshire has two public guardian agencies, the Office of Public Guardian (“OPG”) and Tri County Cap. Public guardians were created in the late Seventies as a need for non-family guardians was recognized when the Laconia State School was closed. Because these organizations are designated by the New Hampshire Supreme Court as an approved organization for the purpose of providing guardianship services, RSA 547-B, they are required to accept all referrals and cannot refuse appointment absent a conflict of interest or other disqualifying factor.

Pursuant to RSA 547-B:4, “[t]he department of health and human services, with the approval of the governor and council, shall contract with one or more organizations approved by the New Hampshire supreme court which shall be designated the public guardianship and protection program and which shall provide guardianship services pursuant to RSA 464-A, . . .” They enter into contracts with the Department of Health and Human Services, the Bureau of Elderly and Adult Services, and the Department of Corrections. They also may accept appointments of wards that are not referred by a state agency (“private cases”).

The statute directs that the public guardians are compensated under state contracts at a per diem rate, RSA 547-B:4, although it does permit the agencies to subcontract for “consulting services as may be necessary to carry out the program’s guardianship responsibilities.” Id. Fees for appointments of private individuals are assessed at a higher rate. Those fees, however, are still subject to court oversight, and it has been my experience that those bills do not include charges for minor or ministerial tasks to the extent charged by the professional guardians. In addition, the public guardians are willing to take pro bono cases and have sometimes been the only guardians willing to take cases where no family member was available of suitable for the appointment.

Finally, the staff at the public providers are generally more educated and have more professional training than the professional guardians. The primary guardians usually have advanced degrees and extensive work histories in the legal field, mental health field or individuals with disabilities. Accounts are prepared by staff who specialize in accounting. Their salaries range from \$44,000-\$55,000 per year.

## **CONCLUDING REMARKS**

Thank you for your consideration and time. The Judicial Branch values the opportunity to offer information about guardianships in New Hampshire and I am hopeful that my presentation today will assist lawmakers in their difficult task of studying current legislation. Given the state's aging population, guardianships are growing in importance and number. It is critical, in my view, that any new legislation place the rights, dignity, and needs of vulnerable wards first – as has been the tradition in this state since inception of the guardianship statutes. As Judge Cassavechia observed: “[s]ociety can sometimes be dismissive of the retained individuality of incapacitated persons as they often struggle to fully communicate with the outside world. As such, they are particularly dependent upon care-givers and guardians not to treat them as an impoverished shell of a being devoid of personal integrity.” See In re: (Professional Guardian Disciplinary Matter), No. 317-2015-AP-0001 (April 7, 2016). They are also dependent upon elected representatives and the courts for concern, protection, and well-considered statutes, guidelines, and rules that seek to, “to promote and protect the well-being of the proposed ward in involuntarily imposed protective proceedings.” RSA 464-A:1.

It is my hope that the committee will focus on what is best for the wards, some of the most vulnerable citizens in this state, and not on the business enterprise of the professional guardians.

I stand willing to offer such further assistance as you may deem appropriate.





# The Senate of the State of New Hampshire

107 North Main Street, Room 302, Concord, N.H. 03301-1951

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DEC 08 2016

SHARON M. CARSON  
District 14

Office 271-2674

TTY/TDD  
1-800-735-2964

December 6, 2016

The Honorable David D. King, Deputy Administrative Judge  
The Honorable Edwin W. Kelly, Administrative Judge  
The State of New Hampshire Circuit Court  
45 Chenell Drive, Suite 2  
Concord, New Hampshire 03301-8541

The Honorable King and Kelly:

This letter is a follow up to the "Committee to Study Guardianship in New Hampshire", SB 341, established by Chapter 152:2, Laws of 2016.

At the end of October, I sent out a copy of the study committees' "Findings and Recommendations" for SB 341, study on guardianship in New Hampshire. It was noted that a follow-up letter would be sent to the Circuit Court laying out all issues brought to the attention of the committee members and for the Circuit Court to address. Thus, the following is an outline of the issues brought to the Committee's attention and we ask that the Circuit Court address them through written response outlining your comments and recommendations to these concerns.

We appreciate your time in responding to the committees' concerns.

#### OUTLINE OF ISSUES REQUESTED TO BE ADDRESSED:

1. How would the Circuit Court system create comparable standards for public and private guardians, which should include educational standards?
2. Committee members would like the Court to look back into the "pay cap and number of cases" which a private guardian can carry at any given time. (Presently, pay cap is \$60 per hour/5 hours per month/\$300 total per month per ward.)
3. Does the court agree with requesting public and private guardians to be subject to a mandatory annual credit check at their own expense?
4. How, when and where would the court create a registration of guardians with the Administrative Office of the Courts?

The Honorable David D. King  
The Honorable Edwin W. Kelly  
December 6, 2016  
Page 2

5. Can, and where would the Court make available to the public, a complete guardianship list, both with private and public guardians listed.

The study committee members thank the Circuit Court for your time and consideration to this request.

Sincerely,



Senator Sharon M. Carson  
SB 341 Committee Chair  
New Hampshire State Senate

SMC/DAC

cc/SB 341 Committee Members  
Howie Zibel, Judicial Branch, Supreme Court  
SB 341 Study File

SenStudy/SB 341 Guardianship

# The State of New Hampshire Circuit Court



Edwin W. Kelly  
*Administrative Judge*

David D. King  
*Deputy Administrative Judge*

*Circuit Court Administrators*  
Gina Belmont, Esq., *Sr. Administrator*  
Paula Hurley, Esq.  
Patrick W. Ryan, Esq.  
Brigette Siff Holmes, Esq.

December 28, 2016

Sen. Sharon M. Carson  
107 North Main Street, Room 302  
Concord, N.H. 03301-1951

Re: Committee to Study Guardianship in New Hampshire  
SB341

Dear Senator Carson:

Thank you for forwarding the list of issues and concerns that came out of the hearings that your committee conducted pursuant to SB 341. I appreciate the time and effort that the committee members spent in looking at these very important issues, involving some of your most vulnerable constituents. I also appreciated the opportunity to appear before your committee and offer my thoughts. I will try and address each of the issues you have raised:

1. ***Comparable standards for public and private guardians, including educational standards:*** It is somewhat difficult to compare public guardians and private guardians as in many ways it is comparing apples to oranges. The two public guardians, the Office of Public Guardian and Tri-County Cap Guardianship Services, are both large non-profit agencies. Each of these public guardianship agencies has been approved by the New Hampshire Supreme Court, OPG in 1979 and Tri-County in 1986. See RSA Chapter 547-B. As private agencies, the public guardians have their own internal standards for hiring and training the guardians and other staff members who are assigned to each of their ward's case. The legislature created a different structure for oversight of professional guardians, putting the burden on the administrative judge of the probate court to establish criteria for appointment of this class of guardians. See RSA 464-A:2 XIV-b. In fact,

a comprehensive set of criteria was established in 2009 and was provided to your committee as part of the materials submitted with my testimony (Probate Court Administrative Order 16-Exhibit 3). The standards of the Public Guardians are at least as rigorous as those in AO-16. I know that one of the issues that the professional guardians seemed to be concerned about is the fact that the public guardian agencies have a higher per hour billing rate for some work performed. While I agree that this is the case, judges look to the total amount billed as well as a number of other factors in determining whether fees are reasonable. Professional guardians, who bill hourly, generally bill for every minute of time spent. After all, unlike non-profit agencies, they are in business to make a profit. You were provided with examples of bills which showed hourly rates between \$125 and \$147 per hour for ministerial tasks (before fees were regulated by administrative order). In my experience the public guardians do not charge for every ministerial task, and while some charges are billed at higher rates than are allowed for professional guardians, the overall bills are not unreasonable. In addition, the public guardians do *pro bono* cases and take cases that are paid for by the state at rates that do not cover their costs. Professional guardians take only cases for which they know they will be paid. As for educational standards, while it would be nice to see all guardians have advanced degrees, it probably is not feasible to have this as a requirement. We do rely on the National Guardianship Association to certify professional guardians. So far, we have had only one instance where a certification was revoked by the NGA, and that individual was also removed from our list of eligible guardians.

- 2. Pay cap and number of cases allowed for private guardians:** As I explained in my testimony on September 21, 2016, the courts in this state have spent extensive time with these issues. Because the fees had spiraled out of control, with some guardians charging as much as \$147.00/hour for ministerial tasks, the decision was made to reach out to the relatively small group of guardians and attempt to come to some mutual understanding about what would be considered reasonable. The hourly rate was easy. No one could make a case that a professional guardian, who need not even have a college degree, should be compensated more per hour than attorneys doing appointed work in criminal cases, cases involving juveniles, appointed counsel in guardianship cases, and guardian ad litem working in marital cases. The number of cases allowed by a professional guardian at one time is 35. Again, this was arrived at by agreement with the professional guardians, but the mechanics of the calculation were quite simple: the guardians agreed that, on average, they spend 5 hours per month on a guardianship matter. The calculation of 5 (hours) X 35 (cases) = 175 hours which divided by 4.33 weeks/month comes out to 40 hours per week. The NGA Standards require caseloads that will allow

guardians to support and protect the wards. While 35 cases represents an average, it is based on data provided by the guardians and allows a guardian with a full caseload a "base salary" of \$126,000 per year. The rule also allows a guardian to request additional fees if the circumstances of a given case warrant the additional billing.

3. ***Mandatory annual credit checks for public and private guardians:*** This is not something that had previously been contemplated, mainly because in cases where a guardian is appointed over the estate of a ward, and has access to the ward's money, a corporate bond is required. The bonding company does its own diligence before issuing the bond, including any credit checks it might think is appropriate. Proposed guardians with poor credit are not able to obtain a bond. Once the corporate bond is issued (which must be filed with the court before the appointment is issued), the ward's funds are protected by the bond. In the event of a defalcation, the bonding company is then on the hook to make the guardianship estate whole.
4. ***Registration of guardians with the Administrative Office of the Courts:*** I am not quite certain what is meant by this question. The Administrative Office of the Courts (AOC) is the support structure for the court system and provides such services as budgeting, human resources, IT, and security. The AOC doesn't generally get involved in the processing or adjudication of cases and would not be an appropriate entity to be given the task of registering guardians. Instead, I believe that the Legislature got it right when it placed the burden on certifying guardians with the probate court, which is now of course absorbed into the circuit court by the passage of Chapter RSA 490-F. Professional guardians are now approved by, and in essence registered with, this office. We would be open to consideration of making a list of professional guardians, registered with this office, available to the public as discussed in #5 below.
5. ***Private and Public guardianship list available to the public:*** The list of professional, and public, guardians was posted on the Judicial Branch website for a period of time. After we implemented Administrative Order 2014-63 which capped the number of open guardianship cases that a professional guardian would be allowed to carry, we removed the list from the website. The main reason for taking the list down was to eliminate requests for appointment of guardians who already had met or exceeded the maximum number of open cases. At the same time, we implemented a procedure for appointment of professional guardians on a rotating basis to try and spread the work around. Some professional guardians complained that they weren't getting cases so we attempted to spread out the appointments.

Even with this system we have had instances where a professional guardian has been called to take a case and has refused because it wasn't clear that there would be enough money to cover fees. We could certainly put the list back on our website if you think it is an important thing to do.

I hope this letter has been responsive to your questions. We will continue our efforts to make resources available to family guardians, who have been, and will continue to be, the vast majority of individuals appointed as guardians in New Hampshire. Our e-court efforts have gone a long way toward simplifying the appointment process for these individuals, most of whom are not represented by counsel. We continuously look for ways to improve access to justice but in guardianship matters the well-being, safety, and civil liberties of the ward are always the primary focus. If you, or any member of your committee, would like more information, I would be happy to provide it, or sit down with any of you to discuss these important issues further.

Best wishes for a happy and healthy New Year.

Very truly yours,

A handwritten signature in black ink, appearing to read "David D. King". The signature is written in a cursive style with a large, stylized "D" and "K".

David D. King

cc: Hon. Edwin W. Kelly  
Howard Zibel, Esq.