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January 19, 1996

Watson B. Blair, Attorney
Bogle & Gates, P.L.L.C
Two Union Square
601 Union Street
Seattle, WA 98101

Re: Guardianship Legislation

Dear Watson:

This reaffirms my telephonic request of yesterday to work cooperatively and constructively with the new task force of the WSBA Elder Law Section and the Real Property, Probate and Trust Section on guardianship legislative changes that I think we all agree are necessary.

I left a call-back request at Karen Boxx's office yesterday and another message on her voice mail today expressing my willingness to meet any time, anywhere, in person, or by conference telephone call.

As you know, the legislative session is extremely short, so we must provide constructive input by February 1, according to the clear message given by Senator Hargrove at Wednesday's hearing.

I look forward to hearing from you, Ms. Boxx, or any other representative of the new task force or other leaders of the WSBA sections mentioned above. Thank you.

Very truly yours,

Douglas A. Schafer

cc: Senator Jim Hargrove
Bernard Ryan, Counsel II, Sen. Dem. Caucus
Karen Boxx, Attorney
Suzanne Howle, Attorney

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January 29, 1996

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Michael D. Carrico, Attorney
WSBA RPPT Sect. Chairman
c/o Riddell Williams Law Firm
1001 4th Ave. Plaza, Suite 440
Seattle, WA 98154

Re: SB 6257, Washington 1996 Legislature

Dear Senators Hargrove and Franklin, Ms. Boxx, and Mr. Carrico:

This letter is for the purposes of—

- (1) commenting upon the January 25, 1996 draft letter to Senators Hargrove and Franklin from Ms. Boxx on behalf of the Real Property, Probate & Trust Section (hereafter “RPPT Section”) of the Washington State Bar Association (hereafter “Ms. Boxx’s Draft”),
- (2) commenting upon certain provisions of SB 6257, and
- (3) further explaining those amendments to RCW Ch. 11.88 that I proposed at the hearing on SB 6257 and offered in bill language form by my draft dated January 18, 1996 (hereafter “my 1/18 Draft”).

Since the hearing on SB 6257, I appreciated the opportunity to confer for about 20 minutes by phone with Ms. Boxx last Tuesday, the opportunity to review Ms. Boxx’s Draft that she faxed to me last Thursday afternoon, and the opportunity to interrupt the RPPT Section Executive Committee meeting last Friday afternoon and address its members by speaker phone for about 10 minutes. Since I expect the RPPT Section’s leadership will approve Ms. Boxx’s Draft without significant change, I will comment upon the draft, and supplement this letter if the final RPPT Section position letter varies significantly from that draft.

I realize that the RPPT Section leaders feel they have not been given sufficient time to

fully consider my proposed guardianship reform legislation, but I hope they recognize that I have been considering guardianship reform issues for over a year and have been attempting to motivate other responsible professionals to do so since my first mailing to leaders of the state bar (including the Chairs of the RPPT and Elder Law Sections) and other organizations on February 8, 1995. We all have the same amount of time; we simply have differing priorities.

Guardianship Alternatives

Ms. Boxx's Draft acknowledges (on pages 1 and 2) that an alleged incapacitated person's (hereafter "AIP") alternative arrangements (such as powers of attorney and living trusts) are sometimes insufficiently considered by the court before being overridden by its appointment of a guardian. Ms. Boxx's Draft reports (at the foot of page 5) that the RPPT Section generally supports the philosophy of giving great weight to such guardianship alternative arrangements, allowing guardianship only in extreme cases, and states, "Guardianships are expensive and intrusive and therefore should be used only as a last resort, and the alternatives to guardianship should always be explored first." The draft then proceeds (on page 6) to suggest that powers of attorney and living trusts are problems because they are often arranged by family members and friends seeking only to exploit and abuse the AIP.

I submit that cases of exploitation and abuse through guardianship alternatives represent a distinct minority of the cases, and that those cases are best addressed not by guardianship proceedings but by proceedings pursuant to RCW Ch. 70.34 (Abuse of Vulnerable Adults) or pursuant to the court's inherent equity power to remove any fiduciary breaching his or her responsibility to the principal (as I expressly recognize in the last sentence of my proposed amended RCW 11.88.010(6)). I can confidently say, from my 17 years in estate planning, that people who plan their affairs invariably desire to avoid becoming subject to a court-supervised guardianship and always give very careful thought to their choice of agents under durable powers of attorney or successor trustees under living trusts, often choosing one adult child over another or others. It simply is not true to suggest that those instruments are tools of exploitation and abuse, rather than tools used by careful people to choose their own fiduciaries and set the parameters under which they will serve.

Ms. Boxx's Draft notes that guardianships are expensive and intrusive so should be used only as a last resort, but concludes that every guardianship petition should result in a full-term guardianship initiation proceeding, after which the court may well leave in place an adequate alternative arrangement. That conclusion fails to recognize that the greatest expense and greatest intrusion occur during the guardianship initiation proceeding, when the AIP often pays \$3,000 or much more for three or more lawyers (the AIP's own, the petitioner's, and the guardian ad litem), a physician or psychologist, and other evaluators. The horrendous intrusion from that process includes the public reporting to all who are curious of all the AIP's financial affairs and detailed public reporting of all the AIP's health and personal problems. My common sense tells me that AIPs who have planned carefully to avoid that process should not be forced to endure it, simply because some party is unaware that a guardianship alternative exists or else objects to it because they were not the AIP's chosen fiduciary.

The Vulnerability Problem

Ms. Boxx's Draft recognizes (at the foot of page 6) that guardianship alternatives such as powers of attorney unfortunately leave incapacitated persons vulnerable, because their civil rights are not revoked through guardianship proceedings, to third parties who may prey on them by means of imprudent transactions or undue influence. I addressed that problem in my 1/18 Draft (proposed new RCW 11.88.010(6)) by a procedure whereby the court, upon a showing of probable cause that an AIP is incapacitated, could shift the burden of proof on the issue of the AIP's capacity to any third parties subsequently entering into transactions with the AIP. Ms. Boxx's Draft condemns my solution to the recognized problem, saying it likely is unconstitutional and would burden the business community. I dispute the suggested constitutional flaw, for no civil rights are being revoked; and even if they were, civil rights are routinely abridged in criminal cases when search and arrest warrants are issued based upon a "probable cause" degree of evidence. Certainly, the proposed simple procedure could be made as formal and complex as the legislature wishes it to be, but I trust the courts themselves will add sufficient formality and complexity to satisfy any reasonable concerns.

I dispute the suggested burden upon the business community that the burden-of-proof-shifting order would impose. I submit that businesses routinely sell everyday consumer goods and services to minors and clearly impaired adults, though they certainly or likely lack legal capacity, but prudently balk at extraordinary transactions. That is the likely consequence of the burden-of-proof-shifting order.

The Third Party Reliance Problem

Ms. Boxx's Draft fails to address what is, in my experience, the greatest problem with powers of attorney—that third parties too often refuse to recognize the agent's legal authority to act on behalf of the AIP. I address that by providing (in proposed new RCW 11.88.010(4) and (5)) that agents acting under durable powers of attorney for financial matters and health care have the powers of court-appointed guardians of the principal's estate and person, respectively. I further address it by urging courts (in proposed new RCW 11.88.005(2)) to creatively exercise their inherent equity powers to facilitate the use of guardianship alternatives, such as by entering an order declaring an AIP's power of attorney to be a valid instrument upon which third parties may rely.

The Unknown (therefor suspect) Lawyer Problem

Ms. Boxx's Draft fails to adequately address the recognized problem, recently experienced in Pierce County by King County lawyer Mike Longyear, that when a local court is given the unrestricted power to approve or reject any lawyer chosen by an AIP or incapacitated person in a guardianship proceedings, the AIP's or other person's right to choose their attorney is abridged. That right has been expressed, since the 1990 guardianship legislation, by the statement in the conspicuous notice given AIPs pursuant to RCW 11.88.030(4) that, "YOU HAVE THE RIGHT TO BE REPRESENTED BY A LAWYER OF YOUR OWN CHOOSING." The almost hidden suggestion in Ms. Boxx's Draft is to insert "of their choosing" in RCW 11.88.045(1)(a). That is not enough.

I suggest (see my amendment to RCW 11.88.045(2)) that local courts no longer should pre-approve licensed lawyers claiming to represent AIPs and incapacitated persons, and that the courts should address any unprofessional conduct by lawyers in the tradition ways prescribed by Canon 3(B)(3) of the Code of Judicial Conduct.

I further suggest that courts ought not become involved in scrutinizing the services provided by lawyers, and fees therefore, in representing AIPs and incapacitated persons unless the independent fiduciaries responsible for managing the represented person's finances request court review and approval. Otherwise, they should be permitted to pay a lawyer the same as they pay any other person providing goods or services to the represented person.

The Requisite Capacity for Guardianship Alternatives

Ms. Boxx's Draft fails to address my proposal to solve (in proposed new RCW 11.88.010(8)) the often debated question of what degree of mental capacity must an AIP have to validly execute a power of attorney or other guardianship alternative instrument. Though many lawyers mistakenly view mental capacity as an all-or-nothing condition, all lawyers knowledgeable in estate planning know that the degree of mental capacity required to execute valid wills and other estate planning instruments is much less than that degree of mental capacity necessary to adequately manage their property and financial affairs. Since the decisions inherent in setting up a guardianship alternative arrangement ("What are my resources?" and "Whom do I like and trust?") are so similar to those made in estate planning, the same level of capacity should be sufficient for both settings.

The Unregulated Guardianship Industry

Ms. Boxx's Draft fails to address my proposal to bring about some responsible degree of state-wide supervision over the presently completely unregulated private guardianship businesses. My solution (in proposed new RCW 11.88.020) forces that industry, represented by the Washington Professional Guardians Association, to proposed to the 1997 legislature a reasonable licensing or regulatory structure. My proposal would bar, after January 1, 1998, corporations except charitable "public benefit nonprofit corporations" from engaging in the guardianship business. Absent action by the 1997 legislature, guardianship entrepreneurs beginning in 1998 could only operate in proprietorship form, exposed to personal liability for their mistakes in handling guardianship cases. The Arizona legislature addressed this problem in 1994, and I have suggested it as a model. Responsible guardianship professionals recognize the need for a licensing or regulatory structure to enable them to close down problem guardianship businesses, not just expel them from a single county.

Giving the GAL a More Descriptive Title

Ms. Boxx's Draft fails to address my proposal that the title for the individual who investigates and reports the AIP's capacity, now called "guardian ad litem" ("GAL"), be changed to "Court Observer." I could readily also accept "Court Visitor" as used in California or "Court Evaluator" as used in New York. The important point is that such individual should not be called "guardian ad litem," because it that overused title misleads both the individual and third parties inside and outside the judicial system concerning their role and authority.

SB 6257 Section-by-Section Comments

The following are my comments about specific sections of SB 6257, including my concurrence or disagreement with Ms. Boxx's Draft comments on specific sections.

Section 1. No comment.

Sections 2 through 4. Training and studies make sense, but may not be performed well unless adequately funded.

Sections 5 through 10 and 26 through 28. I suggest these sections be stricken, as they distract from the important provisions and represent merely technical "clean-up" provisions that nobody is really concerned about. At such time that the scattered references to the "insane" or "incompetent" throughout RCW sections are addressed, thoughtful consideration should be given to what showing must be made of incapacity (*e.g.*, probable cause or something more) to trigger court appointment of a guardian ad litem who overrides the individual's self-determination rights in a the various types of legal proceedings. Please note, also, that those RCW sections illustrate the usual role played by a "guardian ad litem," that being to actively represent, usually as counsel, an incapacitated person in a judicial proceeding. That is quite different from the non-lawyer role of a "court observer" directed to evaluate an AIP's functional capacity and report it to the court.

Section 11. I will address the proposed amendments to monstrous RCW 11.88.090 subsection by subsection. Ms. Boxx's Draft proposed a revised versions of it, as did I in my 1/18 Draft. My proposal to re-title the GAL position as "court observer" is discussed above, but I will refer to that position as the GAL hereafter simply to facilitate discussing the three drafts.

Subsection (1). Recognize that the reference here to "guardian ad litem" here should remain, even if the title "Court Observer" is adopted for use elsewhere in the section.

Subsection (2). The proposed appended sentence concerns me because it will be misinterpreted as permitting courts to revoke, by a specific order, a health care directive, and misinterpreted as invalidating any health care directive or power of attorney executed after the appointment of a GAL. I will comment upon the insertion proposed here by Ms. Boxx's Draft in my discussion of Section 12 (Affidavit of Prejudice) below.

Subsection (3). I prefer my approach to the training, selection, and qualifications disclosure concerning GALs in guardianship initiation proceedings. I think the problems of GAL shopping and inbreeding in the selection of GALs are appropriately addressed by my language directing that GALs be selected from the registry in an objective, sequential manner, and I think courts should be (and will be regardless of whatever the legislative branch of government says) free to subjectively choose a specific GAL in extraordinary circumstances.

I share the concerns expressed in Ms. Boxx's Draft about requiring background

statements of GALs *in guardianship proceedings* (my comments should *not* be assumed to apply to Title 13 and 26 proceedings where the duration of appointment and other factors are quite different than in guardianship proceedings). I suggest, as noted in Paragraph (3)(a) of my 1/18 Draft, that an elected judge actually review an applicant's qualifications and expressly determine their adequacy before he or she is added to the GAL registry. Such screening should not be left to a docket clerk, as is presently the case in Pierce County.

I agree with the suggestion in Ms. Boxx's Draft that a sentence be added to Paragraph (3)(a) directing courts to develop procedures to monitor the performance of GAL registrants and to address identified problems. If courts develop and employ such procedures, then I think the disclosure proposed in Ms. Boxx's Draft as a new Subsection (3)(b)(iii) will be unnecessary.

Concerning the training of GALs, I prefer my approach to Paragraphs (3)(d), (e) and (f), namely, that the required training in the evaluation of an AIP's capacity should be uniform throughout the state, the program should be updated periodically, and registrants should be required to re-take it periodically. Also, the background qualifications of GALs should be more specific than "legal professionals" and "human services professionals" because the latter term (and possibly the former) is too vague.

Subsection (4). Concerning the prompt disclosure to parties of the GAL's qualifications, I prefer the language of Ms. Boxx's Draft that she inserted in Subsection (2), though I suggest its insertion in Subsection (4).

Subsection (5). This subsection prescribes the duties of the GAL. I agree with the suggestion in Ms. Boxx's Draft that a new Paragraph (e) be added directing the GAL to investigate guardianship alternatives and that a new subparagraph be added to the written report contents list (old Paragraph (e); new (f)) requiring the report to describe guardianship alternatives that previously were made or still could be made by the AIP.

The SB 6257 version of Subsection (5) adds Paragraphs (g) and (h) which, while probably necessary in Title 13 and 26 proceedings, are not needed in guardianship initiation proceedings because of the normally brief duration of such proceedings. If the guardianship hearing is delayed beyond 60 days (I suggest it be 70 days), the interim reporting concerns should be addressed by* language such as is appended in Ms. Boxx's Draft to the last paragraph of RCW 11.88.090(5)(f) [which in that draft was renumbered Paragraph (4)(f)].

Ms. Boxx's Draft appears to share my concern that the present 10-day period for the AIP's counsel to digest the GAL's report and adequately prepare for the hearing is insufficient. I suggested (see proposed amendment to the last paragraph of Paragraph (5)(f)) that the GAL's report be due 21 days (3 weeks) before the hearing, and that the 60-day period from petition to hearing prescribed in RCW 11.88.030(5) be extended to

70 days (10 weeks). Since 1990, RCW 11.88.045(1)(a) has recognized that attorneys for AIPs should have at least three weeks to prepare for guardianship hearings. Under current practices, the AIP's attorney does not know what issues are seriously being presented at the hearing until the GAL's report is received.

Subsection (6). This directs the GAL to attempt to find a suitable guardian in certain cases. Though I had not previously suggested it, I now suggest that the subsection have a sentence added such as, "Whenever a guardian or limited guardian is needed for an incapacitated person, the guardian ad litem and the court should give preference to persons previously selected by the AIP to positions of trust and confidence, then to family members in the order listed in RCW 7.70.065 (family members who may give informed consent) unless convincing evidence indicates that such persons would not adequately perform the responsibilities of a guardian or limited guardian."

Subsection (7). This presently authorizes a GAL to consent to emergency life-saving medical services. I suggest replacing that provision with language authorizing the GAL to initiate an emergency appointment of a temporary full or limited guardian. The present language is read by some GALs and judicial officers as authorizing a GAL to make all an AIP's health care decisions (presumably on the belief that all health care decision ultimately affect one's life). I submit that under well-established case law and RCW 7.70.050(4), consent is always implied (absent a known health care directive) to emergency life-saving medical services. Lastly, there should be some reference in RCW Chapter 11.88 to the legitimate, emergency appointment of a temporary guardian with some thought given to the due process issues of notice, hearing, and proof. Otherwise, GALs may continue to believe that they are temporary guardians whenever they perceive an emergency.

Subsection (8). This addresses the GAL's fees. I prefer my language suggesting that a GAL's fee be commensurate with the qualifications of that position, since I believe guardianship GALs should most often be persons with social services or nursing backgrounds and, by definition, the statutory duties of a GAL are not "the practice of law" requiring the fees normally charged by lawyers. I will comment upon the proposed statutory fee schedule while discussing Section 29, below.

I strongly urge my amendatory language in Subsection (8), permitting courts to charge all or part of a GAL's fee to the petitioner whenever the court considers that just. The present language authorizing courts to assess that fee to the petitioner only when no guardian is appointed sometimes results in unnecessary guardianship appointments motivated in part simply to avoid the "messy" fight that otherwise would occur over assessing GAL fees to the petitioner.

Subsection (9). This should be amended to add a sentence (see my 1/18 Draft) which relocates and clarifies the puzzling last sentence presently in RCW 11.88.040 concerning attendance by the GAL at the guardianship hearing.

Subsection (10). This proposed new subsection in SB 6257 (concerning revisions of interim actions by a GAL) should be stricken as inapplicable to guardianship initiation proceedings. Such language may be very important concerning GAL actions in proceedings under Titles 13 and 26, however.

Section 12. This section of SB 6257 proposes use of an affidavit of prejudice procedure whereby “any party” may reject the first appointed GAL. While such procedure may be important in proceedings under Titles 13 and 26, I share the concerns expressed in Ms. Boxx’s Draft about its application to guardianship proceedings. I think my own concerns about guardianship cases will be better addressed by the objective, sequential selection of GALs from the registry and by procedures discussed above whereby courts monitor individual problem GAL registrants.

Section 13. My comments about Sections 4 through 10 apply also to Section 13.

Section 14. This section would amend RCW 11.96.180 to require appointment from the guardianship GAL registry of all guardians ad litem representing all “minor, incapacitated unborn, or unascertained person[s]” in all trust and estate judicial proceedings under Title 11. This proposal illustrates why the functional capacity evaluators/reporters in guardianship initiation proceedings should be called “Court Observers,” “Court Evaluators,” “Court Visitors,” or virtually anything but “guardians ad litem.” In the proceedings referred to in RCW 11.96.180, the guardian ad litem normally is an attorney, or person authorized to engage an attorney, whose role it is to protect the represented person’s economic interests in a trust or estate related judicial proceeding. That role is completely different from the role of a functional capacity evaluator/reporter in a guardianship initiation proceedings. I agree with the comment in Ms. Boxx’s Draft that Section 14 should be stricken.

Sections 15 through 25. These sections amend provisions in Titles 13 and 26, with which I have no experience. I comment only that the volume of calls and letters that I have received (as public critic of guardianship practices), and horror stories that I’ve been told, about problems with GALs in proceedings under those titles make me most supportive of any and all efforts to legislatively address those problems.

Sections 26 through 28. See my comments relating to Sections 5 through 10, above.

Section 29. This proposes a statutorily prescribed, but locally fixed, hourly fee schedule for GALs in proceedings under all RCW titles in which, I suspect, a computer word-search located the phrase “guardian ad litem.” I doubt the wisdom of that shotgun approach.

While I defer to others concerning the use of such a GAL fee schedule in proceedings under Titles 13 and 26 (where statutory child support schedules exist), I do not think it is necessary or wise in guardianship proceedings, and certainly not in proceedings where the GAL serves the traditional role as a lawyer representing the economic interests of a client in a possibly very complex case.

I personally fear that statutory maximum rates become *de facto* standard rates, whether or not justified by the qualifications and performance of the individual actor, and lead to greater abuses than case by case determinations by judicial officials or other involved in the case. Additionally, statutory rates rarely keep pace with market-driven rates, and often result in qualified parties abandoning the underpaid work for work that pays market rates.

Section 30. This bars GALs from forcing AIPs to endure medical evaluations by professionals against their will absent a court order. While I am not sure that even a court order, other than in a mental commitment proceeding, can properly compel an unwilling party to cooperate with an undesired medical or psychological examination, I prefer my approach (see my proposed amendment to RCW 11.88.045(4)). My approach would give the AIP and his or her attorney 14 days to choose a qualified medical or psychological professional who will commit to completing the required medical report on time, otherwise the GAL can select the professional and obtain whatever assistance from the court is appropriate to obtain the medical report.

Sections 31 and 32. My only comment is that, from what I have heard and read, GALs under Title 13 and 26 proceedings should also be barred from compelling, absent court order, any form of counseling, therapy, training, or testing (including polygraph testing), as well as any health care services or evaluations.

Miscellaneous Other Substantive Amendments

My 1/18 Draft suggests several other substantive amendments to RCW Chapter 11.88, the purposes of which will be obvious, particularly to any persons who have taken the time to read my materials about problems with guardianship practices that I have published over the last year.

As I do not know whether Senators Hargrove and Franklin have yet received Ms. Boxx's Draft or its final version, I enclose for you a copy of what I received. Should you have any questions about any of those suggestions, or about any of my comments in this letter, please call me at my office (206) 383-2167 or home (206) 564-4188. Thank you for considering these important matters.

Very truly yours,

Douglas A. Schafer

Enclosure

cc: Bernard Ryan, Counsel II, Sen. Dem. Caucus
Richard G. Roger, Senior Counsel, Sen. HS&C Comm.
David Knutson, Sr. Res. Analyst, Hse. C&FS Comm.
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