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ADDENDUM – THE BABY DOE REGS

This addendum is taken largely from an article in the Ochsner Journal by Michael White, MD, in the winter of 2011. The issue of the Baby Doe Regs geared originally to the neonatal side, but the principles apply to developmental disability cases since the terms and conditions in the Baby Doe Regs have largely been replicated in the Idaho DD statute (Senate Bill 1090, 2017 Session) and IDAPA and also to a lesser degree in the Medical Consent and Natural Death Act (title 39, chapter 45) and therefore apply not just to the very young, but also to a vast number of others. Also note that there were two Baby Does - one unidentified in any way, born in 1982, and the other identified as Baby Jane Doe, born in 1983.

An unidentified infant, now known as Baby Doe, was born April 9, 1982, in Bloomington, Indiana. This birth and death has had a major effect in the management of infants born with disabilities. The regulations resulting from this case now insert themselves into all decisions regarding management of newborn infants, particularly those decisions made for infants born at the cusp of viability, and in the treatment of the developmentally disabled under certain circumstances. The following is an exhaustive history of the case both legally and in Congress.

Historically, government authority has avoided intrusion into the sphere of influence surrounding the perceived right of the family in consultation with physicians to make decisions regarding the care of their child. All this changed when the obstetrician delivering a child born with Down syndrome and tracheoesophageal fistula recommended that the family not pursue treatment, citing a 50% chance of surviving surgical repair and bleak prospects if the child survived. Advised of the family's decision not to provide consent for repair of the tracheoesophageal fistula, the family physician and a local pediatrician strongly opposed this plan. Their concern stemmed from their belief that the prognosis for a good medical outcome after surgical repair of an abnormal esophagus based on contemporary management was much more favorable than the family was led to believe. These physicians enrolled several attorneys and enlisted couples willing to adopt the child in an effort to prevent the child's imminent death. The case was presented to local courts, appealing for a declaration of neglect under Indiana's Child in Need of Services statute. The courts chose to follow contemporary precedent, deferring to the parents' decision. The case was then prepared for presentation to U.S. Supreme Court Justice John Paul Stevens. Baby Doe died of dehydration and pneumonia at 6 days of age on April 15, before the case could be heard.

Upon learning of the case of Baby Doe, U.S. Surgeon General C. Everett Koop was outraged. His opinion was driven by conservative Christian ideals and his own experience of nearly 100% success with the repair of tracheoesophageal fistulas while Surgeon in Chief at the Children's Hospital of Philadelphia. He opined that the decision to forego treatment could only be based on discrimination because of the diagnosis of Down syndrome and the family's concern for future disability related to this diagnosis. Koop began a campaign to prevent this perceived discrimination against children with disabilities leading to the withholding of medical intervention. After he enlisted

the resources of the Reagan administration, controversial rules were soon in place, promulgated under the Americans With Disabilities Act to prevent such perceived abuses.

Citing “heightened public concern” in the aftermath of the Baby Doe incident, on May 18, 1982, the director of the Department's Office of Civil Rights, in response to a directive from the President, “remind[ed]” healthcare providers receiving federal financial assistance that newborn infants with handicaps such as Down syndrome were protected by the Americans With Disabilities Act. This notice was followed on March 7, 1983, by an Interim Final Rule contemplating a “vigorous federal role” for the enforcement of these rules.

This initial effort to prevent the perceived withholding of care from handicapped infants solely on the basis of their disability included the creation of Baby Doe Hotlines and federally mandated posting of notices in all hospital nurseries that included the instruction “Any person having knowledge that a handicapped infant is being discriminatorily denied food or customary medical care should immediately contact: Handicapped Infant Hotline” and a telephone number for the US Department of Health and Human Services (HHS).

Surgeon General Koop soon found an appropriate forum for voicing his concerns after the birth of a child diagnosed with spina bifida, microcephaly, and hydrocephalus in Port Jefferson, Long Island, on October, 15, 1983. The infant, known as Baby Jane Doe, was promptly transferred to Stony Brook Medical Center for medical management, where the parents decided against intervention after receiving contradictory medical opinions. HHS became involved in this case after a Baby Doe Hotline call reported concerns regarding the withholding of treatment, spurring Koop into action. Subsequent unsuccessful efforts to subpoena medical records and compel medical intervention through court action are well documented.

Meanwhile, several professional organizations challenged the regulations mandating the creation of the Baby Doe Hotlines, reaching the courts as *Bowen vs American Hospital Association*. In 1986, the US Supreme Court struck down the first rules establishing the Baby Doe Hotlines under the Americans With Disabilities Act.

Despite the setback of the court decision regarding the initial regulations promulgated under the Americans With Disabilities Act, the efforts of Koop and the Reagan administration continued. The results of these efforts are known as the Baby Doe Rules, which survived congressional review as part of the 1988 Revision of the Child Abuse Prevention and Treatment Act (CAPTA).

This act includes the following provisions:

> The term “withholding of medically indicated treatment” means the failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician's (or physicians') reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions, except that the term does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when, in the treating physician's (or physicians') reasonable medical judgment any of the following circumstances apply:
>
> > (i) The infant is chronically and irreversibly comatose;
> > (ii) The provision of such treatment would merely prolong dying, not be effective in ameliorating or correcting all of the infant's life-threatening conditions, or otherwise

be futile in terms of the survival of the infant; or
(iii) The provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

These rules seem unequivocal, and as recently as 2004, Robertson claimed that any controversy surrounding the Baby Doe rules is dead and that the rules are absolute. He argued that the regulations leave no room for interpretation and include no allowance for parental concerns. He followed by examining the difficulties this interpretation imposes for families and caretakers when faced with the prospect of an infant likely to require lifelong care with little or no meaningful interaction with the environment.

The Baby Doe rules appear to allow little room for interpretation. They seem to unequivocally restrict the ability of families and physicians to incorporate quality-of-life considerations when making decisions for an infant, which most authorities continue to accept as the standard of care. The American Medical Association formally endorsed the quality-of-life standard prior to the Baby Doe case, as summarized by this statement:

In the making of decisions for the treatment of seriously deformed newborns or persons who are severely deteriorated victims of injury, illness, or advanced age, quality of life is a factor to be considered in determining what is best for the individual.

In caring for defective infants the advice and judgment of the physician should be readily available, but the decision as to whether to treat a severely defective infant and exert maximal efforts to sustain life should be the choice of the parents. The parents should be told the options, expected benefits, risks, and limits of any proposed care; how the potential for human relationship is affected by the infant's condition; and relevant information and answers to their questions.

Paradoxically, the position that parents and physicians should make all decisions for infants was also supported by the contemporaneous recommendations of the President's Commission for the Study of Ethical Problems in Medicine, first outlined in its 1982 report “Making Health Care Decisions.” This document from Reagan's own appointees, selected to provide guidance on ethical issues during his tenure, reviewed the process of guidance in making decisions for those unable to speak for themselves. In cases where the patient is unable to participate in the medical decision-making process and there is no previous history to provide insight into how the incapacitated person might wish to proceed, the commission supported the concept of the best interests standard:

Decisionmaking guided by the best interests standard requires a surrogate to do what, from an objective standpoint, appears to promote a patient's good without reference to the patient's actual or supposed preferences. This does not mean the surrogate must choose the means the practitioner thinks is “best” for promoting the patient's well-being, but only a means reasonably likely to achieve that goal.

This concern was addressed specifically for end-of-life decisions the following year in the commission's report “Deciding to Forego Life-Sustaining Treatment.” This report stated that surrogate decisions made when the patient is incapable of making his or her own decisions for any reason should first rely on the concept of substituted judgment where the “standard requires that a surrogate attempt to reach the decision that the incapacitated person would make if he or she were able to choose.” The report noted that the appropriate means of decisionmaking should rely

first on any previously cited preferences of the now-incapacitated patient. The commission considered circumstances in which “some patients have never been competent; thus, their subjective wishes, real or hypothetical, are impossible to discern with any certainty” and invoked the best interests standard for this situation that best describes the circumstance of a parent making decisions for a newborn infant. “In these situations, surrogate decision makers will be unable to make a valid substituted judgment; instead, they must try to make a choice for the patient that seeks to implement what is in that person's best interests by reference to more objective, societally shared criteria.”

The commission specifically cited factors such as “relief of suffering, the preservation or restoration of functioning, and the quality as well as the extent of life sustained” and stated that the “impact of a decision on an incapacitated patient's loved ones may be taken into account in determining someone's best interests, for most people do have an important interest in the well-being of their families or close associates.”

This same report directly addressed the decision-making process for critically ill neonates. “Parents should be the surrogates for a seriously ill newborn unless they are disqualified by decision-making incapacity, an unresolvable disagreement between them, or their choice of a course of action that is clearly against the infant's best interests.” Recognizing the contemporaneous concern regarding Baby Doe, commission members also noted, “infants should receive all therapies that are clearly beneficial to them. For example, an otherwise healthy Down syndrome child whose life is threatened by a surgically correctable complication should receive the surgery because he or she would clearly benefit from it.”

After identifying the parents as the appropriate surrogate decisionmaker in almost all circumstances, the commission commented on the importance of appropriate information as the basis for making decisions and the responsibility of physicians: “Decisionmakers should have access to the most accurate and up-to-date information as they consider individual cases.” This statement recognizes that controversial decisions sometimes reflect information that is not up to date or complete, as implied in the case of Baby Doe when the information that led to the decision to withhold permission to repair the esophageal atresia was provided by the presumptively less informed obstetrician. To ensure that decisions to forego therapy are approached in a consistent fashion, the commission recommended that a committee be created within each institution providing care for infants and be tasked with the review of all decisions to forego therapy or cases in which opinions regarding appropriate care might diverge. Commissioners emphasized the need for institutional introspection into this process, recommending not only prospective evaluation when issues arise, but also a formal process for “retrospective review of decisions when life-sustaining treatment for an infant might be foregone or when parents and providers disagree about the correct decision for an infant. Certain categories of clearly futile therapies could be explicitly excluded from review.”

The commission also recognized the potential for controversy regarding appropriate care of an ill neonate and suggested the following guidance: “The best interests of an infant should be pursued when those interests are clear. The policies should allow for the exercise of parental discretion when a child's interests are ambiguous.” The commission also acknowledged the necessary roles of the law and judicial intervention: “Decisions should be referred to public agencies (including courts) for review when necessary to determine whether parents should be disqualified as decisionmakers and, if so, who should decide the course of treatment that would be in the best interests of their child.”

Finally, the commission directly addressed the role of government in surrogate decisions for newborns, appearing to rebuke the efforts by the Reagan administration to regulate neonatal decisionmaking. This report specifically stated, “The legal system has various—though limited—roles in ensuring that seriously ill infants receive the correct care.” One such role is served by the civil courts that consider cases in which the parents may not appropriately represent the best interests of the child and appoint an appropriate surrogate. The commission also supported the role of the state for investigation of suspected child neglect or abuse but decried “using financial sanctions against institutions to punish an ‘incorrect’ decision in a particular case,” doubting the usefulness and pointing out that such action might “actually penalize other patients and providers in an unjust way.” This last statement was a direct rebuke of the contemporaneous impending formulation of the Baby Doe rules conceived under CAPTA and enforceable only by withholding federal funding for anti–child abuse programs.

The American Academy of Pediatrics (AAP), which organized the Infant Bioethics Task Force and Consultants to consider the ethics of neonatal care, also supported the tradition of the best interests standard. Recognizing the contemporary controversy and following the arguments from the President's Commission, as well as making an effort to influence the federal regulations still under review, the task force issued the Guidelines for Infant Bioethics Committees. In this document, clearly directed at minimizing the effect of federal regulatory efforts and supporting the President's Commission, the AAP recommended that “each hospital that provides care for infants give serious consideration to the role an Infant Bioethics Committee may play in aiding decisionmaking about the care of seriously ill infants.” Furthermore, the AAP specifically identified one of the functions of the committee as “offering consultation and review on treatment decisions regarding critically ill infants, especially when the foregoing of life sustaining treatment is being considered.” The guidelines promoted both prospective review of all cases in which questions arise and retrospective review of all cases in which a decision is made to withdraw support.

Although most of the AAP statement was simply a proposal for how such committees should function, it was also an effort to document a consistent approach to end-of-life decisions in the withdrawal of support for infants (defined in this document as those under 2 years of age). In a nod to the Reagan administration's then-impending regulatory efforts, the statement emphasized the legal responsibilities for reporting suspected instances of child neglect or abuse. Recognizing the volatile contemporaneous legal environment, the statement also pointed out the importance of indemnification for committee members to protect them from potential legal action.

Recommendations for making surrogate decisions using the best interests standard are clearly outside the realm of considerations acceptable under the 3 specific guidelines in the Baby Doe rules. The rule utilitarian approach advanced by the Baby Doe rules—driven by the belief that life is preeminent and no other considerations are pertinent—conflicts directly with the approach of the best interests standard cited by the President's Commission and endorsed by the AAP. This conflict has placed pediatricians, neonatologists, and others providing care for newborn infants in the position of choosing to follow either federal rules that appear unequivocal or the guidance of the AAP and tradition in upholding the best interests standard.

The conflict is further complicated by the stand of the AAP, which maintains that the best interests standard can be reconciled with the Baby Doe rules based on a very liberal and, most would argue, incorrect interpretation of the phrase “…when, in the treating physician's (or physicians') reasonable medical judgment….” The AAP contends that this phrase allows broad discretion in deciding which infants might fall into the 3 categories exempted from the rules, thus supporting the best interests

standard as the basis for decisionmaking in almost all circumstances. This debate fills the literature because the rules were promulgated primarily by federal guidance documents interpreting the rules. In addition, a large body of literature attempts to reconcile the apparent inflexibility of the Baby Doe rules with the widely held tradition of acting in the best interests of the infant based on careful consideration by the family and other caretakers.

Continuing to support the best interests standard and maintaining that it does not conflict with the Baby Doe rules, the AAP again addressed end-of-life issues for children in “Guidelines on Foregoing Life-Sustaining Medical Treatment,” reiterating the general views about parental decisionmaking outlined by the President's Commission. This statement addressed the unique constraints imposed by the Baby Doe rules but deferred discussion of decisions made for neonates to a later document, “The Initiation or Withdrawal of Treatment for High Risk Newborns,” written by the Committee on the Fetus and Newborn. This distinction reflects the unique approach to decisionmaking necessitated in this population by the special nature of Baby Doe rules that only apply to infants under 1 year of age. The opening statement confirmed the AAP's position: “Medical treatment of infants should be based on what is in their best interest.” But the document acknowledged that infants' best interests may be difficult to discern. The paper noted that the particular dilemma posed by this age group probably led to the schism between the rule utilitarian approach of the Baby Doe rules and guidelines supporting the best interests of the child. The paradox is that without support, many of the infants would die or suffer significant morbidity, but with support many would suffer catastrophic disabilities or a prolonged death. “The overall outcomes of either approach are disappointing.”

Following the Baby Doe rules means that all except those imminently faced with death will be supported, thus assuring that no child who potentially could survive would die as the result of a decisionmaker's choice for no intervention. The cost of this utilitarian stand is that many infants could die slowly or suffer what many would feel to be unbearable disabilities to assure that no potential survivor dies because parental decisionmaking was allowed. Those supporting the best interests standard suggest that the family is best able to make choices for the infant, taking into account their family values and which set of risks is most appropriate for their child. The report emphasized the importance of communication with decisionmakers, supporting the concept of complete and accurate information as essential elements for good decisions, as suggested by the President's Commission.

The AAP policy was updated in 2007 after new members reviewed the previous recommendations. This new committee reaffirmed the best interests standard as the appropriate basis for neonatal decisions. The document reviewed the difficulty of providing an accurate prognosis for critically ill infants, and the policy supported the role of parents in decisionmaking. Further clarifying this position and paraphrasing the recommendations from the President's Commission in 1983, this policy statement supported foregoing intensive care in cases that are likely fatal or have a high risk for severe morbidity and always providing intensive care when the outcome is very likely to be survival with low risk for severe morbidity. The policy deferred to parental decisionmaking based on the best interests standard only in cases where “the prognosis is uncertain but likely to be very poor and survival may be associated with a diminished quality of life for the child.” These standards should apply throughout the treatment of the infant with a recommendation for constant reappraisal of the infant's status.

Also in 2007, the AAP awarded the William G. Bartholome Award for Ethical Excellence to Loretta Kopelman, PhD, for her work in pediatric ethical issues. A vocal advocate of the best interests

standard throughout her career, she chose a defense of the best interests standard for neonatal care as the topic of her acceptance speech. Kopelman called on the AAP to withdraw its conflicted support of the Baby Doe rules in favor of fully supporting the best interests standard. Her argument included the observation that the official stance of the AAP—that the Baby Doe rules are compatible with the best interests standard—sprang from the misconception that the inclusion of reasonable medical judgment in the regulations can be interpreted as it was by the president of the AAP at the time the rules were promulgated. While the rules were in formulation, the AAP president stated: “It would appear that the final rule reaffirms the role of reasonable medical judgment and that decisions should be made in the best interests of infants.” This interpretation is clearly not the intent of the statement in the Baby Doe rules that allows the exercise of “reasonable medical judgment” only in the 3 explicit circumstances when lifesaving treatment is not required.

Kopelman reviewed the medical tradition of supporting the best interests standard, as well as the powerful arguments in support of this concept from bioethics panels appointed by Reagan and later by George W. Bush (both presidents advocated support of the Baby Doe rules). She argued that standing by the best interests standard for surrogate decisionmaking for everyone except children under the age of 1 year as specified in the Baby Doe rules is unwarranted. Kopelman said she could find no moral difference between the aged who may be unable to make their own decisions and newborn infants. If the best interests standard fulfills “three necessary and jointly sufficient conditions,” she noted, “the Best Interests Standard should be adopted as the only guidance principle for minors and incapacitated and incompetent adults without preferences or advance directives.”

Throughout the history of this conflict, there has been little examination of the extent to which society supports the Baby Doe rules. The ethics literature and the legal literature have most often argued against the rigidity of the Baby Doe rules as written. On the opposite side of the argument, attempts have been made, particularly during conservative administrations, to strengthen the regulatory applicability of the Baby Doe rules and generalize them from just those infants with handicaps to infants born at the threshold of viability.

Most recently, this goal has been supported by an interpretation that would apply the provisions of the Born Alive Infant Protection Act and the Emergency Medical Treatment and Labor Act (EMTALA) as means of more punitive enforcement. Dr Sadeth Sayeed summarized these efforts, reviewed the directives from various arms of HHS in 2005, and presented concerns that the normative ethical practices of decisionmaking following the best interests standard endorsed by the AAP were at risk by HHS's interpretation at that time. Specifically, Sayeed cited guidance documents interpreting the delivery room as a potential emergency department with the threat of legal action by federal agencies and by any individual who might be harmed under the EMTALA regulations. To date, no such allegations have been investigated, but the documents and directives survive.

During all these deliberations to decide how best to make decisions for infants, the overwhelming normative practice in neonatal medicine has been to follow the best interests standard, but the legality of this practice looms over the neonatal intensive care unit. However, in nearly 30 years of deliberations about the Baby Doe case and the legal activity prompted by the medical decisions made for that infant, only one case cites the Baby Doe rules.

In a letter to the editor of Pediatrics, Clark reviewed the case of Montalvo v Borkovec, in which a family brought action alleging that their very premature infant was resuscitated against their wishes.

They claimed that discussion of the prognosis was inadequate and that they did not consent to any treatment that would allow the physicians to proceed with resuscitation. The court ruled that under Wisconsin law informed consent was not necessary in this circumstance. The court supported this ruling by citing the Baby Doe regulations, with the opinion that withholding life-sustaining efforts was not a legal alternative because the child was not in a persistent vegetative state. Because the state of Wisconsin accepts federal funds for CAPTA, the Baby Doe regulations must be followed, the court noted. It is noteworthy that this case presents the only citation of the Baby Doe rules as legal precedent, before or since. Additionally, the case was not brought under the intended application of the Baby Doe rules as an action of child protective services. The Baby Doe rules were used to support a court decision that could stand on its own merits under Wisconsin law. Clark concluded that “discussion of Baby Doe was gratuitous and not necessary to the decision in the case.”

All of this history simply outlines the dilemma faced by those providing care for neonatal patients. It is clear that the Baby Doe rules and normative ethics do not concur regarding decisionmaking. Must one follow the law, which is very specific but has no history of enforcement and, by inference, is not the standard of care? The possibility that these rules would be legally problematic was foreshadowed by remarks early in the history of this debate. A review of the Baby Doe rulings in 1986 presented the controversy as it existed when the rules were formulated. The authors made the case that controversial laws created without widespread acceptance have an unpredictable course and “citizens will find other ways to preserve choices they think they ought to have.” Citing the likely unintended consequences of these rules, which include survival of infants with marginal health, Huefner concluded: “If the government demonstrates its genuine concern for the early and continuing stimulation of the infant's development, perhaps a more integrated government role can emerge—one that will better balance the legitimate interests of the child, the parents, the medical community, and society.”

The predicted unintended results were borne out in a later review that cited many of the historically difficult positions brought about by concern that the Baby Doe rules might be enforced. This critique formulated three arguments opposing these rules. First, the rules address a problem that does not exist except in exceptional circumstances (a position frequently encountered in discussion of the Baby Doe rules). Second, a uniform federal standard oversimplifies the complex moral and ethical decisions presented by critically ill neonates. Third, the policy simply fails to follow intuition by excluding parents from any decision-making capacity in contrast to well-established legal tradition. The policy erroneously assumes that a decision in favor of life is always in the infant's best interest, the critique noted, and this assumption conflicts with the normative ethic that quality of life contributes significantly to ethical decisionmaking. The article pointed out the general acceptance of quality of life as a factor: “The truth is that nearly all of us, the proponents of the federal policy included, hold such issues to be important in our daily lives.” After presenting the case against the Baby Doe rules, the authors called to eliminate the federal role in treatment decisions and to support decisionmaking by parents in consultation with the physicians caring for the child. The authors concluded that the approach “should not be swept aside with simplistic social policy that overlooks the profound ethical, medical, and legal questions that such situations pose.”

Where does all of this controversy leave those who daily make decisions for critically ill newborns? The AAP guidance is clear in its recommendation that the day-to-day decision-making process in almost all circumstances remains in the domain of the family and caretakers, with the normative practice to follow the best interests standard. The AAP acknowledges that the Baby Doe rules exist but maintains that the inclusion of “in the treating physician's (or physicians') reasonable medical

judgment” accommodates the normative practice. When law and practice conflict, actions in the courts usually provide guidance. The lack of legal case history to dispel the interpretation of the AAP might be viewed as tacit approval for this interpretation, but the possibility of enforcement continues to exist as long as the rules remain in place.

This long history of controversy begs for resolution, and when questions arise, the role of the hospital ethics committee is critical to the appropriate resolution. Few hospitals providing neonatal intensive care and fewer community hospitals have active infant ethics committees as proposed in the 1984 recommendations of the AAP. The Joint Commission on Accreditation of Healthcare Organizations (now known as The Joint Commission) mandates a process for addressing ethical concerns with wide latitude regarding the mechanism for meeting this requirement. Little evidence suggests that reviewing neonatal decisionmaking, as envisioned by the AAP and the President's Commission, is commonly considered part of this process. Furthermore, no evidence demonstrates that a standard of care or consensus exists for the ongoing review of decisions made to forego life-sustaining treatment for neonates in any forum.

How then should we proceed to ensure that appropriate decisions are made for these vulnerable patients? We might ask, despite all the controversy in the literature, if the problem really exists. Although a great deal of literature discusses the disparate viewpoints of the Baby Doe rules and the best interests alternative, cases questioning the decisions made are quite rare. This fact is supported by the dearth of legal cases citing the Baby Doe regulations; also, no state has lost federal funds for failure to comply with CAPTA. Infant ethics committees are not readily apparent, and no literature documents regular review of decisions to withhold life-sustaining treatment.

It seems that the best approach is to be prepared to address concerns as they arise. When questions are posed concerning the management of a newborn infant, the questions should be addressed through the process mandated by The Joint Commission. In most instances, this process entails a hospital ethics committee. It is incumbent on those serving in this advisory capacity to understand both the history and the controversy surrounding neonatal decisions for life-sustaining treatments. Any recommendations must consider the specific requirements of the Baby Doe regulations and, according to what appears to be the de facto standard of care, the requirements for the best interests standard. This process should begin by considering the goals of infant ethics committee reviews suggested by the President's Commission in 1983:

> First, verify that the best information available is being used.
>
> Second, confirm the propriety of a decision that providers and parents have reached or confirm that the range of discretion accorded to the parents is appropriate.
>
> Third, resolve disputes among those involved in a decision, by improving communication and understanding among them and, if necessary, by siding with one party or another in a dispute.
>
> Finally, refer cases to public agencies (child protection services, probate courts, or prosecuting attorneys) when appropriate.

This process, if carried out with consideration of the suggested goals, should ensure that the best possible decisions are made for newborn infants. Recognizing that these circumstances are difficult for all parties involved, the President's Commission believes that this process “has the potential

both to guarantee a discussion of the issues with a concerned and disinterested 'representative of the public' and to insulate these agonizing, tragic decisions from the glare of publicity and the distortions of public posturing that commonly attend court proceedings."

This statement has proven prescient in light of the very public controversy surrounding the death of Terri Schiavo. The potential to propagate controversy via television, internet, Twitter, and personal blogs was demonstrated in the hijacking of what should have been very private deliberations to serve as a platform for the political and private interests of many others beyond the patient and her family. I was involved, remotely and quietly, in that case, but gave advice that was not in line with the advice or positions taken by either side in the case, but which I believed to be correct in light of the law and facts that were proven as opposed to speculation. As in many cases, bad or muddled facts give rise to bad law or legal decisions. In light of the controversy surrounding decisions at the beginning of life, the potential for such trials by media always looms over what should be, as much as possible, private decisions. I can only hope that careful, knowledgeable consideration, following the tenets of the best interests standard when such cases present themselves, will result in gentle resolution of the concerns in a private way. I realize that some cases will, often because of complexity, have to be resolved more formally. But preferably without the controversy.

152 Idaho 933
Supreme Court of **Idaho**,
Boise, April 2012 Term.

In the Matter of the **ESTATE** OF
Kathleen R. **CONWAY**, Deceased.
Tanya Wooden, Petitioner–Appellant,
v.
W. Cecil Martin, Personal Representative of
the **Estate** of Kathleen R. **Conway** and Dean
Viers, Respondents–Respondents on Appeal,
and
Tanya S. Viers, Respondent,
and
Bruce Boyden, Chapter 7
Trustee, Intervenor–Appellant.

No. 38430.
|
April 26, 2012.

Synopsis

Background: Niece brought will contest action alleging will of aunt was executed without testamentary capacity and under the undue influence of testator's son, guardian, and a will beneficiary. The District Court, Second Judicial District, Nez Perce County, Carl B. Kerrick, J., affirmed a magistrate's denial of niece's claims. Niece appealed.

Holdings: The Supreme Court, J. Jones, J., held that:

[1] will was not product of undue influence;

[2] testator's statements about her negative feelings towards her children was inadmissible hearsay;

[3] documents from guardianship and conservatorship proceedings were inadmissible; and

[4] testator had testamentary capacity at time of execution of will.

Affirmed.

West Headnotes (22)

[1] **Appeal and Error**
Scope of Inquiry in General

On appeal of a decision rendered by a district court while acting in its intermediate appellate capacity, the Supreme Court directly reviews the district court's decision.

Cases that cite this headnote

[2] **Appeal and Error**
Scope of Inquiry in General

To determine whether the district court erred in its appellate capacity in affirming the magistrate court, independent review of the record before the magistrate court is necessary.

1 Cases that cite this headnote

[3] **Appeal and Error**
Scope of Inquiry in General

If the magistrate court's findings of fact are supported by substantial and competent evidence and the conclusions of law follow from the findings of fact, and if the district court affirmed the magistrate's decision, the Supreme Court will affirm the district court's decision.

Cases that cite this headnote

[4] **Appeal and Error**
Rulings on admissibility of evidence in general

Decisions to exclude evidence as hearsay are subject to an abuse of discretion standard.

Cases that cite this headnote

[5] **Wills**
Nature and degree in general

A will may be held invalid on the basis of undue influence where sufficient evidence is

presented indicating that the testator's free agency was overcome by another.

Cases that cite this headnote

[6] **Contracts**
Undue influence

Generally, undue influence is demonstrated through proof of four elements: (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence.

1 Cases that cite this headnote

[7] **Wills**
Personal, confidential, or fiduciary relations in general

A rebuttable presumption of undue influence is created where a beneficiary of the testator's will is also a fiduciary of the testator.

1 Cases that cite this headnote

[8] **Wills**
Presumptions and Burden of Proof

The proponent of the will bears the burden of rebutting the presumption of undue influence.

1 Cases that cite this headnote

[9] **Wills**
Presumptions and Burden of Proof

To rebut the presumption of undue influence, the proponent of a will must come forward with that quantum of evidence that tends to show that no undue influence existed.

2 Cases that cite this headnote

[10] **Wills**
Presumptions and Burden of Proof

Wills
Undue influence and fraud

Once presumption of undue influence of a will has been rebutted, the matter becomes one for the trier of fact.

Cases that cite this headnote

[11] **Appeal and Error**
Sufficiency of evidence in support

The existence of undue influence will only be disturbed on appeal if not supported by substantial, competent evidence.

Cases that cite this headnote

[12] **Contracts**
Undue influence

Evidence relevant to the question of undue influence includes: (1) the age and physical and mental condition of the one alleged to have been influenced; (2) whether he had independent or disinterested advice in the transaction; (3) the providence or improvidence of the gift or transaction; (4) delay in making it known; (5) consideration or lack or inadequacy thereof for any contract made; (6) necessities and distress of the person alleged to have been influenced; (7) his predisposition to make the transfer in question; (8) the extent of the transfer in relation to his whole worth; (9) failure to provide for his own family in the case of a transfer to a stranger or failure to provide for all of his children in case of a transfer to one of them; (11) active solicitations and persuasions by the other party; and (12) the relationship of the parties.

1 Cases that cite this headnote

[13] **Wills**
Physical and mental condition of testator

Will of testator was not product of undue influence by testator's son, who was also her guardian and a will beneficiary; although testator was suffering from some dementia, she was in reasonably good health, as she was physically and mentally capable to live on her own and conduct herself on a day-to-day basis

around the time the will was executed, testator had independent and disinterested advice on creating the will, testator was not denied any material needs at time of execution of will, and dispositions of will at issue and previous will were not unnatural or suspicious.

Cases that cite this headnote

[14] **Evidence**
Intention
Evidence
Statements by persons since deceased

Testator's out-of-court statements to niece concerning her negative feelings toward her children were inadmissible hearsay in niece's will contest alleging undue influence by testator's son; statements did not necessarily speak to testator's mental condition or particular susceptibility to influence, rather, they seemed more directly aimed at proving their truth, that testator was angry with her children, that they were not worthy to inherit, and that testator did not mean for them to inherit. Rules of Evid., Rule 801(c).

Cases that cite this headnote

[15] **Wills**
Time when made and res gestae

Declarations not confined to the time of the execution of the will, including those made both before and after, may be received to show testator's mental condition when there has been an allegation of undue influence, provided they are not too remote to throw light upon the mental condition of the testator at the time of the execution of the will.

Cases that cite this headnote

[16] **Appeal and Error**
Rulings on admissibility of evidence in general

As the exclusion of hearsay evidence is within the trial court's discretion, the Supreme Court's review is limited to determining whether the magistrate court's decision was within the outer bounds of its discretion, consistent with the legal standards on admissibility of hearsay, and reached through an exercise of reason.

Cases that cite this headnote

[17] **Wills**
Physical and mental condition of testator

Documents filed in son's guardianship and conservatorship proceeding concerning testator contained inadmissible hearsay and were of questionable relevance, and therefore were not admissible in niece's will contest alleging undue influence on part of son of testator; documents at issue constituted hearsay opinions regarding testator's capacity and hearsay-within-hearsay declarations of testator herself, and distinction between the tests for incapacity for guardianship purposes and testamentary capacity called the relevance of the documents into question.

1 Cases that cite this headnote

[18] **Wills**
Degree of mental capacity

Testator had testamentary capacity to execute valid will at time of execution of will, where testator was described as "alert," "perky," not distracted, testator correctly answered questions about her family members, the value of her estate, and the current date, and testator was able to live independently at the time of execution of the will. West's I.C.A. § 15–2–501.

Cases that cite this headnote

[19] **Wills**
Sufficiency of testator's understanding as to his property, persons to whom it may be given, and mode of disposition

A testator must have sufficient strength and clearness of mind and memory, to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is

about to perform, and the names and identity of persons who are to be the objects of his bounty, and his relation towards them. West's I.C.A. § 15–2–501.

1 Cases that cite this headnote

[20] **Wills**
Admissibility in General

In its inquiry into the capacity of the testatrix, the court may examine the purported will itself. West's I.C.A. § 15–2–501.

Cases that cite this headnote

[21] **Wills**
Presumptions and Burden of Proof

Where a will appears on its face to be a rational act, rationally performed, it is presumed to be valid.

Cases that cite this headnote

[22] **Wills**
Unequal, unjust, or unnatural disposition

Where a will is unnatural, unjust, or irrational, such fact, though not controlling, may be taken into consideration in determining the competency of the author.

Cases that cite this headnote

Attorneys and Law Firms

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Jones, Brower & Callery, PLLC, Lewiston, for respondent. Garry W. Jones argued.

Opinion

J. JONES, Justice.

*936 This is a will contest brought by Tanya Wooden on the basis that the Last Will and Testament of Kathleen R. Conway was executed without testamentary capacity and under the undue influence of W. Cecil Martin—Conway's son, guardian, and a will beneficiary. The magistrate court denied Wooden's claims, and the district court affirmed on appeal. Because we find the magistrate court was presented with substantial and competent evidence on which to base its decision, we affirm the district court's appellate decision.

I.

FACTUAL AND PROCEDURAL HISTORY

Conway, the testator in this will contest, had three natural children during her lifetime—Tanya Viers, Kathye Ingram, and Cecil Martin. Conway also had a niece, Wooden, who was sent to live with Conway at various times during Wooden's childhood—when she was a young child, during her seventh-grade and senior years, and for several summers. Wooden testified that the two developed a close bond that lasted throughout Conway's life. [1]

Conway executed the first will at issue in this case on January 25, 2001 (the 2001 will), providing that 80% of her estate was to "be divided evenly, per stirpes, among my children, to wit: KATHYE INGRAM, CECIL MARTIN, and TANYA VIERS; and my niece, TANYA WOODEN so that each individual named receives 20% of my estate." The remaining 20% was to be divided equally among her surviving grandchildren. On January 4, 2001, Conway had been diagnosed with dementia and received a shunt system implant to relieve a buildup of fluid in her brain. In August 2003, she was also diagnosed with Alzheimer's Disease.

In February 2004, Conway's landlady, Altha Bish, filed a petition to become Conway's guardian and conservator, citing her mental infirmities and inability to fully care for herself. Martin filed a cross-petition for the same. Pursuant to a stipulation between the parties, the court in the guardianship and conservatorship proceeding entered an order appointing Martin limited guardian for Conway. The order stated:

> This shall be a limited guardianship in that the guardian shall discuss with Kathleen R. Conway all decisions regarding her health and well-being, including, but not limited to, her place or

> residence and her medical and/or other professional care. Kathleen R. Conway shall be allowed to participate in making said decisions to the extent of her ability with due consideration being given to her wishes....

Tesco Trust and Estate Services Company was appointed conservator.

In April 2004, Martin set up a meeting for Conway with an attorney he knew, Michael Wasko.[2] Martin attended the first 15 or 20 minutes of the meeting, told Wasko that he *937 **384 was Conway's guardian, and confirmed information Conway gave about her children. He then left the room while Wasko and Conway discussed Conway's estate plan. Wasko testified that at the meeting, Conway directed him that 90% was to go to her three children, with 10% going to Wooden and Conway's grandchildren.[3] Following the meeting, Wasko prepared the will and then met with Conway again in May 2004, at which point she gave him a handwritten note reaffirming her earlier direction.[4] Some unidentified changes to the will were then made. Conway executed the will at a third meeting on May 21, 2004 (the 2004 will), with Wasko and Perry Justice acting as witnesses.

Martin only attended the first of the three meetings with Wasko. He testified that he first discovered the will had been executed when he called Wasko in late summer 2004 because he was concerned about its progress.[5] He said he later learned of the will's provisions when he received a copy of it sometime in September 2004.[6] The 2004 will provides:

> Ninety (90%) Percent of my entire estate shall be divided equally between my three (3) children, Tanya S. Viers, L. Kathye Ingram and W. Cecil Martin, as each his/her sole and separate property, including income therefrom....
>
> The remaining Ten (10%) Percent of my entire estate shall be divided equally between my grandchildren, DEAN VIERS, MEGAN K. LOWE, EIL INGRAM, COLBY W. MARTIN, KELSEY R. MARTIN, and LAUREN K. MARTIN, and my niece, TANYA WOODEN, to be held in trust ...

Compared to the 2001 will, it reduces Wooden's share from 20% to approximately 1.43% and increases Martin's share from 20% to 30%.

Conway died March 15, 2009. On June 9, 2009, Martin filed the 2004 will with the court. Martin was appointed personal representative in informal probate proceedings, and the will was admitted to informal probate. Wooden filed a Notification of Competing Will, followed by a Petition for Formal Probate of Will. She claimed that the 2004 will was invalid because it was executed without testamentary capacity and under the undue influence of Martin, making the 2001 will the last valid will of Conway. A trial was held on those issues, and the magistrate court orally ruled on January 8, 2010, that the 2004 will was valid, denying Wooden's claims. Wooden appealed to the district court, claiming that the magistrate court made several evidentiary errors, misapplied the presumption of undue influence with regard to Martin, and made unsupported findings regarding Conway's testamentary capacity. On November 29, 2010, the district court issued an opinion affirming the magistrate court's determination. Wooden timely appealed to this Court.[7]

II.

ISSUES ON APPEAL

I. Did the magistrate court fail to apply the legal presumption of undue influence in light of the fiduciary relationship between Conway and Martin?

II. Did the magistrate court abuse its discretion in excluding Wooden's testimony of statements made by Conway on the basis that such statements *938 **385 were inadmissible hearsay or otherwise irrelevant?

III. Did the magistrate court abuse its discretion in excluding documents filed in Conway's guardianship and conservatorship proceeding on the basis that they were inadmissible hearsay or otherwise irrelevant?

IV. Did the magistrate court err in relying on the opinion of Wasko in determining that Conway had testamentary capacity?

III.

DISCUSSION

A. Standard of Review

[1] [2] [3] [4] "On appeal of a decision rendered by a district court while acting in its intermediate appellate capacity, this Court directly reviews the district court's decision." *In re Doe,* 147 **Idaho** 243, 248, 207 P.3d 974, 979 (2009). However, to determine whether the district court erred in affirming the magistrate court, independent review of the record before the magistrate court is necessary. *Id.* "If the magistrate court's findings of fact are supported by substantial and competent evidence and the conclusions of law follow from the findings of fact, and if the district court affirmed the magistrate's decision, [this Court] will affirm the district court's decision." *Hausladen v. Knoche,* 149 **Idaho** 449, 452, 235 P.3d 399, 402 (2010) (citing *Losser v. Bradstreet,* 145 **Idaho** 670, 672, 183 P.3d 758, 760 (2008)). Decisions to exclude evidence as hearsay are subject to an abuse of discretion standard. *Jeremiah v. Yanke Machine Shop, Inc.,* 131 **Idaho** 242, 246, 953 P.2d 992, 996 (1998).

B. Although the magistrate court was less than explicit in its application of the presumption of undue influence, it nonetheless recognized the presumption and there was substantial and competent evidence to support its decision.

On appeal, Wooden first argues that the magistrate court failed to follow the presumption of undue influence applicable to parties who are both fiduciary and beneficiary of the testator. She also claims that the decision was tainted by erroneous findings that Tanya Viers was **Conway's** co-guardian,[8] that the "limited" status of Martin's guardianship somehow limited his fiduciary responsibility,[9] and that Martin only realized a 3.3% increase in his share via the 2004 will.[10] The district court found that "[w]hile the trial court may have inartfully set out this determination within the oral findings of fact and conclusions of law, a review of the record as a whole supports the trial court's determination that **Conway** was not unduly influenced by her son, Cecil Martin."

[5] [6] [7] [8] [9] [10] [11] [12] A will may be held invalid on the basis of undue influence where sufficient evidence is presented indicating that the testator's free agency was overcome by another. *In re Estate of Roll,* 115 **Idaho** 797, 799, 770 P.2d 806, 808 (1989). Generally, undue influence is demonstrated through proof of four elements: "(1) a person who is subject to ***939** ****386** influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence." *Gmeiner v. Yacte,* 100 **Idaho** 1, 6–7, 592 P.2d 57, 62–63 (1979). However, a rebuttable presumption of undue influence is created where a beneficiary of the testator's will is also a fiduciary of the testator. The proponent of the will bears the burden of rebutting the presumption. *Estate of Roll,* 115 **Idaho** at 799, 770 P.2d at 808. As this Court explained in *Roll:*

> To rebut the presumption, the proponent must come forward with that quantum of evidence that tends to show that no undue influence existed. Once that burden has been met, the matter becomes one for the trier of fact. The existence of undue influence will be determined accordingly, and on appeal such determination will only be disturbed if not supported by substantial, competent evidence.

Id. Evidence relevant to the question of undue influence includes

> the age and physical and mental condition of the one alleged to have been influenced, whether he had independent or disinterested advice in the transaction, the providence or improvidence of the gift or transaction, delay in making it known, consideration or lack or inadequacy thereof for any contract made, necessities and distress of the person alleged to have been influenced, his predisposition to make the transfer in question, the extent of the transfer in relation to his whole worth, failure to provide for his own family in the case of a transfer to a stranger, or failure to

> provide for all of his children in case of a transfer to one of them, active solicitations and persuasions by the other party, and the relationship of the parties.

Gmeiner, 100 Idaho at 7, 592 P.2d at 63 (quoting 25 Am.Jur.2d *Duress and Undue Influence* § 36 at 397 (1966)).

[13] Here, the magistrate court correctly found—and the district court agreed—that by virtue of the guardianship, Martin had a fiduciary relationship with Conway. *See In re Randall's Estate*, 64 Idaho 629, 649, 132 P.2d 763, 772 (1942). Further, the court expressly recognized the presumption of undue influence created by that fiduciary relationship and Martin's beneficiary status. Citing *Estate of Roll*, the court stated:

> [T]he Court is also to look at the relationship between Mr. Martin and Ms. Conway, where the parties occupy the dual role of fiduciary and beneficiary, fiduciary—more where the fiduciary has been actively involved in the will preparation, a law creates a presumption of undue influence. So, once that's raised, it becomes—the burden rests with the proponent to rebut that presumption.

However, Wooden is correct that the court never went on to expressly state that the presumption was rebutted and, indeed, never expressed a definite conclusion on the issue of undue influence. It should have done so. The court made other troubling findings.

First, the magistrate court found that Martin's guardianship was a co-guardianship with Tanya Viers. Both parties agree that this characterization is erroneous, as the order creating that guardianship clearly appoints Martin sole guardian. Second, the court seemed to place undue emphasis on the limited nature of Martin's guardianship. There is nothing in this Court's jurisprudence to suggest that the presumption of undue influence is affected by the particular nature of the fiduciary relationship. *See Estate of Roll*, 115 Idaho at 799, 770 P.2d at 808. Indeed, despite the fact that Martin was not conservator and that he was required to consult with Conway, he was still in a unique position to exert undue influence over her.

However, we find neither error fatal to the court's decision. Although the court continually referred to the influence of both Martin and Viers in the conjunctive, it expressly recognized that all the evidence presented related solely to Martin and thoroughly examined that evidence. Further, the court only stated that the limited nature of the guardianship limited Martin's fiduciary responsibility; it never stated it was reducing the presumption based on that limitation. The court may have simply been examining the nature of the "relationship of the parties" more closely, which is a factor relevant to the undue influence analysis under *Gmeiner*. **387 *940 100 Idaho at 7, 592 P.2d at 63. Although the limited nature of Martin's guardianship is not particularly persuasive evidence in his favor, the decision of how much weight to place on such evidence is in the province of the trial court. *Weitz v. Green*, 148 Idaho 851, 857, 230 P.3d 743, 749 (2010). Further, while the court could and should have expressly applied the presumption and come to a definite conclusion on the issue of undue influence, it performed a thorough examination of the evidence in the context of the *Gmeiner* factors. That analysis shows that the magistrate court considered the issue and the presumption, and we find that its ultimate conclusion of validity was supported by substantial and competent evidence such that the district court correctly upheld its decision.

In regard to the first *Gmeiner* factor, the court found that Conway was "of reasonably good health," although she was obviously suffering from some dementia. This was supported by the testimony of Wasko, Perry, Martin, and Martin's wife, Sandra Martin, that Conway was physically and mentally capable to live on her own and conduct herself on a day-to-day basis around the time the 2004 will was executed. [11] Second, and most importantly, the court found that Conway had independent and disinterested advice from Wasko in creating the 2004 will. This finding was well supported by Martin's and Wasko's testimony that Conway met with the attorney three times, with almost no participation by Martin. Although Wooden argues that Wasko was a suspicious choice, there is no evidence indicating that Wasko was somehow conspiring with Martin in his handling of Conway's estate planning. On the contrary, Wasko testified that Conway independently expressed the wishes that wound up in the will at their private meetings. The court also emphasized

the distance between Martin and Conway during the will's formation and execution, highlighting that Conway was not moved to the Lewiston–Clarkston area—near Martin—from her Caldwell home until June 2004, after the will's execution. In fact, there was substantial evidence that Martin did not even know about the completed will or its provisions until well after it had been executed.

Third, the court found that Conway was not being deprived of any material needs, which was supported by Wasko's and Justice's characterization of her as "perky" and responsive at the time of execution, as well as other testimony of her reasonably good health at that time. Finally, the court found that the dispositions of the 2004 will compared to the 2001 will were not unnatural or suspicious. Here, the court made another clearly erroneous finding that the increase in Martin's share was only 3.3%, where the increase was actually 10%. Notwithstanding, the court also emphasized that it is not unnatural to primarily recognize the children of the testator, and Conway's relationship with Wooden was still recognized by the fact that Wooden took a share equal to that of Conway's grandchildren despite the fact that she was not a lineal descendent. Further, Martin received a share equal to that of his siblings—no more.

On the other hand, the court also considered the testimony of Wooden's expert, Dr. Kevin Kracke, who testified about the possible effect of Conway's dementia on the will and her ability to resist influence. Kracke testified that Conway was indeed suffering from mild to moderate dementia, which involves loss of long- and short-term memory—including autobiographical memory—and decrease in language, motor, and executive functions. Kracke also testified that dementia can induce passivity and concluded that the 2004 will was the result of that passive state. In support of this, Kracke cited Conway's distrust of her children,[12] which *941 **388 seemed to vanish before the 2004 will was executed, as well as the "tremendous switch" between the provisions of the two wills. However, the magistrate court found that the change between wills was only dramatic in regard to Wooden's share and not in view of the will as a whole. The court also cited the contrary evidence from other witnesses of Conway's faculties and behavior around the time of execution in determining that Kracke's conclusion was mistaken.

In all, notwithstanding the magistrate court's several troubling statements and omissions, the district court was correct in upholding the decision. Although Kracke's testimony was conflicting, Martin presented—and the magistrate expressly considered—substantial and competent evidence sufficient to rebut the presumption and support a finding of no undue influence.

C. The magistrate court did not abuse its discretion in excluding Wooden's testimony of statements made by Conway because such statements were inadmissible hearsay and irrelevant.

[14] Wooden next argues that the magistrate court erred in excluding her testimony of statements made by Conway to Wooden because the statements were hearsay or otherwise irrelevant. Specifically, Wooden argues that the statements were not offered to prove the "truth of the matter asserted" but rather to demonstrate Conway's inability to resist undue influence at the time of the will's formation; thus, they did not fall within the definition of hearsay in Idaho Rule of Evidence 801(c). Martin responds that the statements were made three months before the will was executed and largely concerned Conway's personal feelings about her children, making them inadmissible. The district court similarly found that the magistrate court did not abuse its discretion because the statements were too far removed from the time of execution to be relevant and did not speak to Conway's inability to resist the undue influence of Martin.

[15] All hearsay is inadmissible as evidence unless otherwise provided by Idaho rule. I.R.E. 802. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). Accordingly, this Court has upheld the admission of out-of-court "declarations of a testator pertaining to his mental condition ... to prove his inability to resist the influence of others" rather than to prove the truth of those statements. *King v. MacDonald,* 90 Idaho 272, 278, 410 P.2d 969, 972 (1965). Further, "[d]eclarations not confined to the time of the execution of the will, including those made both before and after, may be received provided they are not too remote to throw light upon the mental condition of the testator at the time of the execution of the will." *Id.* at 278–79, 410 P.2d at 972.

At trial, the magistrate court allowed Wooden to testify about her perception of Conway's mental condition

during visits around the time of the guardianship/conservatorship proceedings and in June 2004, after the will had been executed. However, the court sustained hearsay objections to her testimony of several statements of Conway regarding her children, including that Conway had expressed "anger about her children and things that they had done to her," and that "[s]he was confused about [Martin]," "called him 'that man,' " and "was angry with him for hauling her around the countryside signing papers." In sustaining the objection, the magistrate court stated, "I think [Wooden] can tell us about [Conway's] behavioral changes without getting into the hearsay."

[16] As the exclusion of hearsay evidence is within the trial court's discretion, this Court's review is limited to determining whether the magistrate court's decision was within the outer bounds of its discretion, consistent with the legal standard outlined above, and reached through an exercise of reason. *Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 599, 21 P.3d 918, 921 (2001). Here, the magistrate indeed acted within that standard. It appears that the out-of-court statements Wooden planned to recount focused entirely on Conway's negative feelings toward her children, which do not necessarily speak to her mental condition or particular *942 **389 susceptibility to influence. Indeed, they seem more directly aimed at proving their truth—that Conway was angry with her children, that they were not worthy to inherit, and that Conway did not mean for them to inherit. Thus, the court was within its discretion in deeming them inadmissible hearsay while still allowing Wooden to testify about her general perception of Conway as confused, angry, and withdrawn. In doing so, the court was able to consider the type of evidence deemed relevant in *King* without offending Idaho Rule of Evidence 802. Further, the court was also within its discretion under *King* to deem irrelevant the statements made at the time of the guardianship proceedings—three months prior to the execution of the will—on the basis that they were too remote from the execution to be probative.

In sum, the magistrate court did not abuse its discretion in excluding Wooden's testimony of Conway's out-of-court statements, and the district court correctly affirmed that exclusion.

D. The magistrate court did not abuse its discretion in excluding documents filed in Conway's guardianship and conservatorship proceeding because they contained inadmissible hearsay and were of questionable relevance.

[17] Wooden next argues that the magistrate court erred in excluding various affidavits and reports relied on during Conway's guardianship and conservatorship proceeding to demonstrate Conway's lack of testamentary capacity at the time of the 2004 will's execution. Specifically, she argues that the documents were subject to judicial notice under Idaho Rule of Evidence 201 and not hearsay. Martin responds that the documents are not adjudicative facts within the contemplation of Rule 201, contain inadmissible hearsay, and are irrelevant to the question of testamentary capacity. The magistrate declined to judicially notice the documents because they contained hearsay and were of little relevance, later admitting them for the limited purpose of completing the record of what Wooden's expert, Kracke, relied on in his testimony. The district court affirmed the magistrate court's decision.

Adjudicative facts may be judicially noticed by the court or upon request under Idaho Rule of Evidence 201. I.R.E. 201(c), (d). Rule 201 makes mandatory judicial notice of "records, exhibits, or transcripts from the court file in the same or a separate case" where a party requests such notice and supplies the requisite information. I.R.E. 201(d). However, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." I.R.E. 201(b). As the district court found, the commentary of Federal Rule of Evidence 201—the federal counterpart of the Idaho rule—is enlightening in this regard. F.R.E. 201. The commentary states that "[a] high degree of indisputability is the essential prerequisite" and that "the tradition has been one of caution in requiring that the matter be beyond reasonable controversy." F.R.E. 201, note to subdivision (a); F.R.E. 201, note to subdivision (b).

Here, the documents admitted in the guardianship/conservatorship proceeding—while perhaps relied upon by the court in that proceeding to some extent—cannot be said to be free from reasonable dispute. As the district court found, "[t]here is no indication these documents are capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned." Further, the documents constitute hearsay opinions of individuals regarding Conway's capacity and

hearsay-within-hearsay declarations of Conway herself, to which no hearsay exception applies.[13] Even *943 **390 sworn trial or deposition testimony from a prior case is inadmissible unless the declarant is unavailable and the party against whom the testimony is now offered had an opportunity and similar motive to cross-examine the declarant. I.R.E. 804(b)(1). The out-of-court declarations sought to be admitted here—medical professionals' and social workers' reports and affidavits—were never even tested in a prior proceeding, let alone one in which Martin had a similar motive as the present case.

Finally, as the district court found, the documents were also of questionable relevance. "Incapacity" for purposes of guardianship proceedings

> means a legal, not a medical disability and shall be measured by function limitations and 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.

I.C. § 15–5–101(a)(1). Further, this Court has explained that

> Testamentary capacity is a question of fact to be determined upon the evidence in the individual case. No general rule can be devised which would be a satisfactory standard for the determination of the issue in all cases. This court has held that 'if a man is able to transact business, * * * he is clearly competent to make a will, but he may be competent to make a will and still not be able to transact business.'

In re Heazle's Estate, 74 Idaho 72, 76, 257 P.2d 556, 558 (1953) (quoting *Schwarz v. Taeger*, 44 Idaho 625, 630, 258 P. 1082, 1084 (1927)). This distinction between the tests for incapacity for guardianship purposes and testamentary capacity calls the relevance of the documents into question. Additionally, as indicated above, the three-month time period between the guardianship proceeding and the execution of the will makes evidence gathered for purposes of the prior proceeding even less probative. Thus, the magistrate court was also acting within its discretion in excluding the documents as irrelevant.

In sum, the district court did not err in affirming the magistrate court's exclusion of the documents.

E. The magistrate court did not err in relying on the testimony of Wasko in determining that Conway possessed testamentary capacity, and its finding of capacity was supported by substantial and competent evidence.

[18] Finally, Wooden takes issue with the magistrate court's reliance on Wasko's testimony regarding Conway's testamentary capacity, arguing that he never sufficiently inquired into her knowledge of the extent of her assets and could not testify to a "reasonable degree of professional certainty." Wooden also argues that Wasko was required to be qualified as an expert before providing his opinion on the subject. Martin responds that Wasko was not required to be an expert, was not required to testify to a "reasonable degree of professional certainty" and, although his memory was less than perfect, presented competent testimony that Conway knew the extent of her assets. After weighing Wasko's testimony along with the other evidence, the magistrate court found that Conway possessed testamentary capacity. The district court affirmed, finding that the magistrate's decision was supported by substantial and competent evidence.

[19] [20] [21] [22] Under the Uniform Probate Code as adopted in Idaho, "Any emancipated minor or any person eighteen (18) or more years of age who is of *sound mind* may make a will." I.C. § 15–2–501 (emphasis added). Accordingly, a

> [t]estator must have sufficient strength and clearness of mind and memory, to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the *944 **391 names and identity of persons who are to be the objects of his bounty, and his relation towards them.

Heazle's Estate, 74 Idaho at 76, 257 P.2d at 558. This Court has long held that "[i]t is permissible for a lay or nonexpert

witness to testify as to the sanity or competency of a person to make a will." *Schwarz*, 44 Idaho at 631, 258 P. at 1084. In addition,

> [i]n its inquiry into the capacity of the testatrix, the court may examine the purported will itself.... Where the will appears on its face to be a rational act, rationally performed, it is presumed to be valid. On the other hand, where a will is unnatural, unjust, or irrational, such fact, though not controlling, may be taken into consideration in determining the competency of the author.

Heazle's Estate, 74 Idaho at 77, 257 P.2d at 558.

At trial, Wasko testified that it was his opinion that Conway had testamentary capacity throughout his meetings with her, including on the day the will was executed. Recalling their first meeting, he described her as "alert," "perky," not distracted, and said she correctly answered questions about her family members, the value of her estate, and the current date.[14] He did not notice any change in her faculties throughout the three meetings. However, he declined to give an opinion on testamentary capacity "to a reasonable degree of professional certainty," stating that he did not understand the meaning of that standard. Further, although Wasko could not remember at trial whether he specifically asked Conway about the extent of her assets at execution, he testified that the two had had a "continuing discussion" about her assets at their meetings. He also recalled that he and the other witness, Perry, spoke with her at execution long enough to test her testamentary capacity.

In addition to Wasko's testimony, the magistrate court also considered testimony from Perry, Sandra Martin, and Cecil Martin regarding Conway's capacity around the time of the will. As indicated above, these witnesses testified that although she was suffering from some dementia, Conway was of reasonably good health and able to live independently, corroborating Wasko's testimony. For example, Sandra Martin testified that in June 2004, very near the time of execution, Conway was still able to cook for herself, take walks alone, and had a good memory of her family members. The court also considered the will itself and found nothing unnatural or suspicious about its provisions to call Conway's capacity into question.

On the other hand, it seems the court also took into consideration Kracke's opinion that "the will was changed due to development of a passive state consistent with dementia" and that the change in the will was a "tremendous switch." The court also addressed Kracke's testimony that Conway exhibited memory deficiencies around the time of the guardianship/conservatorship proceeding, including failing to name the current president and forgetting her age and the names of certain people. As indicated above, however, the court gave little credence to these deficiencies, citing Kracke's testimony that people suffering from dementia can also function independently and lucidly at times. The court also noted Wasko's less-than-perfect memory of the events surrounding the will's execution.[15]

Although there is some conflicting evidence, we find that the magistrate court's decision was supported by substantial and competent evidence that Conway possessed testamentary capacity when she executed the 2004 will. Whether qualified as an expert or not, Wasko was allowed to opine on the issue under Idaho law, and, indeed, he had years of estate planning experience to support that *945 **392 opinion. Further, there is no support to be found for the proposition that his opinion must have been to a "reasonable degree of professional certainty." Although his memory could have been better, Wasko presented significant insight into Conway's capacity at the time of execution and indeed testified at one point that she knew the extent of her assets. Although Kracke's testimony was conflicting, the testimony of the other witnesses corroborated Wasko's opinion, and in all, the magistrate court had substantial and competent evidence before it to support its finding. Thus, the district court was correct in affirming the decision.

IV.

CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed. The Respondents are entitled to costs on appeal.

All Citations

152 Idaho 933, 277 P.3d 380

Chief Justice BURDICK, and Justices EISMANN, W. JONES and HORTON concur.

Footnotes

1 Wooden testified that the two visited each other frequently, cared for each other after surgeries, and that **Conway** even named her firstborn, Tanya, after Wooden. **Conway** referred to Wooden as "Big Tanya" and her daughter as "Little Tanya."

2 In this dispute, Wooden questions the propriety of taking **Conway** to Wasko rather than her court appointed guardian ad litem, attorney Julie Deford, or the attorney who drafted the 2001 will, John Bujak. Martin testified that he did not consult **Conway** about which attorney she would prefer but chose Wasko because "he was a familiar name, and kind of a hometown country-type lawyer I felt my mom could relate to." Wasko testified that he was an experienced **estate** planner who worked on more than approximately 100 **estates** per year.

3 Wasko testified that **Conway** explained to him at that time why Wooden was important to her, including that she had essentially raised her.

4 The note in the record is virtually unreadable, but Wasko testified that it said, "Big Tonya [sic], small part; Cecil, Kathye, Little Tonya [sic], equal parts."

5 Wasko's testimony and Wooden's Exhibit No. 2—which contains two telephone messages to Wasko from Martin inquiring about the progress of the will—also indicate that Martin was in the dark regarding the will until well after it was executed.

6 The record contains a letter from Wasko to Martin dated September 20, 2004, enclosing a copy of the will.

7 On June 2, 2011, this Court granted a Motion to Intervene filed by Bruce Boyden, the Chapter 7 Trustee in a bankruptcy proceeding filed by Wooden. The record was augmented with the docket from Wooden's bankruptcy case, which included an order exempting 75 percent of her interest in this will contest from the bankruptcy **estate** and allowing her to continue pursuit of her claim in this matter.

8 The court stated:

> The thing that I think we need to look at initially is, this was a co-guardianship .... presumably Tonya [sic] Viers had the same situation here where she received a benefit from the change in the will, and presumably she also was exerting undue influence.... But we never had any testimony of that. It was all centered on Mr. Martin. And there's been nothing raised about her role in this instance.

9 The court stated:

> In this instance, the Court needs to look if there was a separation, too, of the roles of guardian and conservator. There's no proof that Mr. Martin knew of the extent of the **estate**. I presume he had an idea because of the pleadings in the guardianship, but he was not directing management of the funds of the ward.
>
> So, I—it's significant in this instance that there was a limited guardianship. There may have been a fiduciary responsibility here, but I view—the Court finds that that fiduciary responsibility was limited by the very language of the guardianship, which provided for input in decision-making by Ms. **Conway**.

10 The court stated:

> Mr. Martin and Ms. Viers, who were presumed to be benefitting from their fiduciary relationship with Ms. **Conway**, received an additional 3.3 percent of the total **estate** or, in other words, one-third of ten percent. This, in and of itself, does not seem excessive.

11 For example, Sandra Martin testified that around June 2004, when **Conway** was moved from Caldwell to the Lewiston–Clarkston area, she was still cooking for herself regularly, taking walks by herself, and had a good memory of her family members. It wasn't until September of that year that her memory began to deteriorate somewhat, Sandra testified, but still "[m]entally ... she seemed fine."

12 Kracke found evidence of **Conway's** distrust and alienation from her children in documents submitted at the guardianship/conservatorship proceeding, which were only admitted for the limited purpose of supporting Kracke's expert testimony.

13 In her briefing to this Court, Wooden argues that the documents were not offered for the truth of the matter asserted, but rather to simply show that they were filed with the guardianship court and to demonstrate Martin's "knowledge and judicial position at an earlier point in time." However, in light of the contents of the documents, the magistrate court was within its discretion in determining that they were more directly aimed at demonstrating **Conway's** condition and negative

feelings toward her children. Indeed, Wooden argues in her briefing that the documents "demonstrate that Ms. **Conway's** condition made her susceptible to the exertion of undue influence when she executed the 2004 Will."

14 Notably, Wasko testified that **Conway** recited her children's phone numbers from memory, as well as two of their addresses; she could not recall Tanya Viers' address. He allowed Martin to sit in on the first portion of the meeting to confirm the accuracy of **Conway's** memory, based on the fact that Martin had told him about the guardianship and conservatorship.

15 For example, Wasko testified that he thought he had learned before the meetings that **Conway** had dementia or Alzheimer's, but could not recall whether he acquired that knowledge before or after the will was executed. He admitted that had he known more about her condition, he may have inquired further into her capacity.

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DEVELOPMENTAL DISABILITY AND GUARDIANSHIP/CONSERVATORSHIP

1. WHAT IS DEVELOPMENTAL DISABILITY

For the purposes of this discussion, Developmental Disability must appear before the individual reaches age 22. See Idaho Statutes below. Since DD symptoms and diagnosis usually occur while the person is young, the general research and information is heavily accenting children.

a. General definition: Developmental disability is a diverse group of chronic conditions that are due to mental or physical impairments. Developmental disabilities cause individuals living with them many difficulties in certain areas of life, especially in “language, mobility, learning, self-help, and independent living”. Developmental disabilities can be detected early on, and do persist throughout an individual's lifespan. Developmental disability that affects all areas of a child's development is sometimes referred to as global developmental delay.

b. Most common developmental disabilities:

- Fragile X syndrome (FXS) is thought to cause autism and intellectual disability, usually among boys (about 1 in 5,000 in US). It is the most common known cause of inherited intellectual disability. Specifically, it is caused by changes in the fragile X mental retardation 1 (FMR1) gene, which usually makes a protein called fragile X mental retardation protein (FMRP), needed for normal brain development. There is usually some degree of intellectual disability, ranging from mild to severe, but much less in females. Signs are developmental delays, learning disabilities, and social and behavior problems, including hand flapping. Average age of diagnosis in boys is 36 months, 42 months for girls, but symptoms are usually noticed by parents much earlier. FXS can be diagnosed by DNA testing. There is no cure for FXS, but treatment services can teach skills and control some issues.

- Autism Spectrum Disorder (ASD) is a group of developmental disabilities that can cause significant social, communication, and behavioral challenges. ASD people may communicate, interact, behave, and learn in ways that are different from most people. The learning, thinking, and problem-solving abilities of people with ASD can range from gifted to severely challenged. There might be repetitive behavior and requirement of rigid schedules, and often trouble relating to others. ASD includes autistic disorder, pervasive developmental disorder not otherwise specified (PDD-NOS, and Asperger syndrome, all of which were previously diagnosed separately.

- Down syndrome is a condition in which people are born with an extra copy of chromosome 21, resulting in 47 chromosomes, and sometimes called trisomy 21 because there three number 21 chromosomes - about 95% of Down syndrome cases. Normally, a person is born with two copies of chromosome 21. However, if they are born with Down syndrome, they have an extra copy of this chromosome. This extra copy affects the development of the body and brain, causing physical and mental challenges for the individual. Some degree of intellectual disability (varying widely, but most mild to moderate and, with proper intervention, few severe), characteristic facial and body features

(eye slanting upward, small ears, small mouth, small nose with flattened nasal bridge, short neck, small hands and feet, short stature, and low muscle tone), and often heart defects (about half), vision (60%), hearing loss (75%) and other health problems. Tend to develop Alzheimer's earlier and more often than general public (about 25% over age 35 have symptoms). Severity varies widely. About 1 in 700 babies each year in US. Currently more than 400,000 in US.

● Pervasive developmental disorders (PDD) are a group of developmental disabilities that can cause significant social, communication and behavioral challenges.

● Fetal alcohol spectrum disorders (FASD) are a group of conditions that can occur in a person whose mother drank alcohol during pregnancy. FASD's are 100% preventable if a woman does not drink alcohol during pregnancy. There are a whole range of effects and can range from mild to severe. Can include abnormal facial features, small head size, shorter than average height, low body weight, poor coordination, hyperactivity, difficulty in concentration, poor memory, learning disabilities, poor reasoning, vision or hearing problems, and heart, kidney, or bone problems.

● Cerebral palsy (CP) is a group of disorders that affect a person's ability to move and maintain balance and posture. CP is the most common motor disability in childhood, an estimated 1 in 323 children in US. Symptoms vary greatly and can change over time, but CP itself does not get worse over time.

● Intellectual disability is defined as an IQ below 70 along with limitations in adaptive functioning and onset before the age of 21 (in Idaho) years.

● ADHD (Attention-Deficit/Hyperactivity Disorder) - may have trouble paying attention, controlling impulsive behaviors (acting without thinking about results), or be over active. Cannot be cured, but can be successfully managed and some symptoms may improve with age. Idaho is on the low end of statistics about medication or behavioral therapy treatment percentages.

There a lot more, but relatively rare.

c. Causes

The causes of developmental disabilities are varied and remain unknown in a large proportion of cases. Even in cases of known etiology, the line between "cause" and "effect" is not always clear leading to challenges in efforts to categorize causes. Genetic factors have long been implicated in the causation of developmental disabilities. There is also a large environmental component to these conditions, and the relative contributions of nature versus nurture have been debated for decades. Current theories on causation focus on genetic factors, and over 1,000 known genetic conditions include developmental disabilities as a symptom.

Developmental disabilities affect between 1 and 2% of the population in most western countries, although many government sources acknowledge that statistics are flawed in this area. The worldwide proportion of people with developmental disabilities is believed to be approximately 1.4%. It is twice as common in males as in females, and some researchers have found that the prevalence of mild developmental disabilities is likely to be higher in areas of poverty and deprivation, and among people of certain ethnicities. Most websites I visit state that about 1 in 6 children have a developmental disability.

d. Diagnosis and quantification

Developmental disabilities can be initially suspected when a child does not reach expected child

development stages. Subsequently, a differential diagnosis may be used to diagnose an underlying disease, which may include a physical examination and genetic tests. The degree of disability can be quantified by assigning a developmental age to a person, which is age of the group into which test scores place the person. This, in turn, can be used to calculate a developmental quotient (DQ): DQ = \frac{Developmental\ age}{Chronological\ age} * 100.

e. Associated issues

i. Physical health issues

There are many physical health factors associated with developmental disabilities. For some specific syndromes and diagnoses, these are inherent, such as poor heart function in people with Down syndrome. People with severe communication difficulties find it difficult to articulate their health needs, and without adequate support and education might not recognize ill health. Epilepsy, sensory problems (such as poor vision and hearing), obesity and poor dental health are over-represented in this population. Life expectancy among people with developmental disabilities as a group is estimated at 20 years below average, although this is improving with advancements in adaptive and medical technologies, and as people are leading healthier, more fulfilling lives, and some conditions (such as Freeman-Sheldon syndrome) do not impact life expectancy.

ii. Mental health issues (dual diagnoses)

Mental health issues, and psychiatric illnesses, are more likely to occur in people with developmental disabilities than in the general population. A number of factors are attributed to the high incidence rate of dual diagnoses:

- The high likelihood of encountering traumatic events throughout their lifetime (such as abandonment by loved ones, abuse, bullying and harassment)
- The social and developmental restrictions placed upon people with developmental disabilities (such as lack of education, poverty, limited employment opportunities, limited opportunities for fulfilling relationships, boredom)
- Biological factors (such as brain injury, epilepsy, illicit and prescribed drug and alcohol misuse)
- Developmental factors (such as lack of understanding of social norms and appropriate behavior, inability of those around to allow/understand expressions of grief and other human emotions)

iii. External monitoring factor: All people with developmental disabilities that are in a federal or state funded residence require the residence to have some form of behavioral monitoring for each person with developmental disability at the residence. With this information psychological diagnoses are more easily given than with the general population that has less consistent monitoring.

iv. Access to health care providers: In the United States, all people with developmental disabilities that are in a federal- or state-funded residence require the residence to have annual visits to various health care providers. With consistent visits to health care providers more people with developmental disabilities are likely to receive appropriate treatment than the general population that is not required to visit various health care providers.

These problems are exacerbated by difficulties in diagnosis of mental health issues, and in appropriate treatment and medication, as for physical health issues.

f. Abuse and vulnerability

Abuse is a significant issue for people with developmental disabilities, and as a group they are regarded as vulnerable people in most jurisdictions. Common types of abuse include:

- Physical abuse (withholding food, hitting, punching, pushing, etc.)
- Neglect (withholding help when required, e.g., assistance with personal hygiene)
- Sexual abuse is associated with psychological disturbance. Sequeira, Howlin & Hollins found that sexual abuse was associated with increased rates of mental illness and behavioral problems, including symptoms of post-traumatic stress. Psychological reactions to abuse were similar to those observed in the general population, but with the addition of stereotypical behavior. The more serious the abuse, the more severe the symptoms that were reported. There is a special place in Hell for people who sexually abuse the vulnerable. See, for more information, the following site: [16]http://bjp.rcpsych.org/content/bjprcpsych/183/5/451.full.pdf
- Psychological or emotional abuse (verbal abuse, shaming and belittling)
- Constraint and restrictive practices (turning off an electric wheelchair so a person cannot move)
- Financial abuse (charging unnecessary fees, holding onto pensions, wages, etc.)
- Legal or civil abuse (restricted access to services)
- Systemic abuse (denied access to an appropriate service due to perceived support needs)
- Passive neglect (a caregiver's failure to provide adequate food, shelter)
- Lack of education, lack of self-esteem and self-advocacy skills, lack of understanding of social norms and appropriate behavior and communication difficulties are strong contributing factors to the high incidence of abuse among this population.

In addition to abuse from people in positions of power, peer abuse is recognized as a significant, if misunderstood, problem. Rates of criminal offense among people with developmental disabilities are also disproportionately high, and it is widely acknowledged that criminal justice systems throughout the world are ill-equipped for the needs of people with developmental disabilities – as both perpetrators and victims of crime.

g. Challenging behavior

Some people with developmental disabilities exhibit challenging behavior, defined as “culturally abnormal behavior(s) of such intensity, frequency or duration that the physical safety of the person or others is placed in serious jeopardy, or behavior which is likely to seriously limit or deny access to the use of ordinary community facilities”. Common types of challenging behavior include self-injurious behavior (such as hitting, head butting, biting), aggressive behavior (such as hitting others, screaming, spitting, kicking, swearing, hair pulling), inappropriate sexualized behavior (such as public masturbation or groping), behavior directed at property (such as throwing objects and stealing) and stereotyped behaviors (such as repetitive rocking, echolalia or elective incontinence). Such behaviors can be assessed to suggest areas of further improvement, using assessment tools such as the Nisonger Child Behavior Rating Form (NCBRF).

Challenging behavior in people with developmental disabilities may be caused by a number of factors, including biological (pain, medication, the need for sensory stimulation), social (boredom, seeking social interaction, the need for an element of control, lack of knowledge of community norms, insensitivity of staff and services to the person's wishes and needs), environmental (physical aspects such as noise and lighting, or gaining access to preferred objects or activities), psychological (feeling excluded, lonely, devalued, labeled, dis-empowered, living up to people's negative expectations) or simply a means of communication. A lot of the time, challenging behavior is learned and brings rewards and it is very often possible to teach people new behaviors to achieve the same aims. Challenging behavior in people with

developmental disabilities can often associated with specific mental health problems.

Experience and research suggests that what professionals call “challenging behavior” is often a reaction to the challenging environments that those providing services create around people with developmental disabilities. “Challenging behavior” in this context is a method of communicating dissatisfaction with the failure of those providing services to focus on what kind of life makes most sense to the person, and is often the only recourse a developmentally disabled person has against unsatisfactory services or treatment and the lack of opportunities made available to the person. This is especially the case where the services deliver lifestyles and ways of working that are centered on what suits the service provider and its staff, rather than what best suits the person.

In general, behavioral interventions or what has been termed applied behavior analysis has been found to be effective in reducing specific challenging behavior. Recently, efforts have been placed on developing a developmental pathway model in the behavior analysis literature to prevent challenging behavior from occurring.

h. Societal attitudes

Throughout history, people with developmental disabilities have been viewed as incapable and incompetent in their capacity for decision-making and development. Until the Enlightenment in Europe, care and asylum was provided by families and the Church (in monasteries and other religious communities), focusing on the provision of basic physical needs such as food, shelter, and clothing. Stereotypes such as the dim-witted village idiot, and potentially harmful characterizations (such as demonic possession for people with epilepsy) were prominent in social attitudes of the time. The word “bedlam” comes from St. Mary Bethlehem, also called Bethlem Royal Hospital (founded 1247) in London, an asylum, where the public would literally torment the inmates.

Early in the twentieth century, the eugenics movement became popular throughout the world. This led to the forced sterilization and prohibition of marriage in most of the developed world and was later used by Hitler as rationale for the mass murder of mentally challenged individuals during the Holocaust. The eugenics movement was later proven to be seriously flawed and in violation of human rights and the practice of forced sterilization and prohibition from marriage was discontinued by most of the developed world by the mid 20th century. I have a mid-1930's Readers Digest in which the main article is rife with sometimes subtle and sometimes blatant appeals to eugenics as the way to improve the world.

The movement towards individualism in the 18th and 19th centuries, and the opportunities afforded by the Industrial Revolution, led to housing and care using the asylum model. People were placed by, or removed from, their families (usually in infancy) and housed in large institutions (of up to 3,000 people, although some institutions were home to many more, such as the Philadelphia State Hospital in Pennsylvania which housed 7,000 people through the 1960s), many of which were self-sufficient through the labor of the residents. Some of these institutions provided a very basic level of education (such as differentiation between colors and basic word recognition and numeracy), but most continued to focus solely on the provision of basic needs. Conditions in such institutions varied widely, but the support provided was generally non-individualized, with aberrant behavior and low levels of economic productivity regarded as a burden to society. Heavy tranquilization and assembly line methods of support (such as "birdfeeding" and cattle herding) were the norm, and the medical model of disability prevailed. Services were provided based on the relative ease to the provider, not based on the human needs of the individual.

Ignoring the prevailing attitude, Civitans adopted service to the developmentally disabled as a major organizational emphasis in 1952. Their earliest efforts included workshops for special education teachers and day camps for disabled children, all at a time when such training and programs were almost

nonexistent. In the United States, the segregation of people with developmental disabilities wasn't widely questioned by academics or policy-makers until the 1969 publication of Wolf Wolfensberger's seminal work "The Origin and Nature of Our Institutional Models", drawing on some of the ideas proposed by S.G. Howe 100 years earlier. This book posited that society characterizes people with disabilities as deviant, sub-human, and burdens of charity, resulting in the adoption of that "deviant" role. Wolfensberger argued that this dehumanization, and the segregated institutions that result from it, ignored the potential productive contributions that all people can make to society. He pushed for a shift in policy and practice that recognized the human needs of "retardates" and provided the same basic human rights as for the rest of the population.

The publication of this book may be regarded as the first move towards the widespread adoption of the social model of disability in regard to these types of disabilities, and was the impetus for the development of government strategies for desegregation. Successful lawsuits against governments and an increasing awareness of human rights and self-advocacy also contributed to this process, resulting in the passing in the U.S. of the Civil Rights of Institutionalized Persons Act in 1980.

From the 1960's to the present, most U.S. states have moved towards the elimination of segregated institutions. Along with the work of Wolfensberger and others including Gunnar and Rosemary Dybwad, a number of scandalous revelations around the horrific conditions within state institutions created public outrage that led to change to a more community-based method of providing services. By the mid-1970s, most governments had committed to de-institutionalization, and had started preparing for the wholesale movement of people into the general community, in line with the principles of normalization. In most countries, this was essentially complete by the late 1990's, although the debate over whether or not to close institutions persists in some states, including Massachusetts.

Individuals with developmental disabilities are not fully integrated into society. Person Centered Planning and Person Centered Approaches are seen as methods of addressing the continued labeling and exclusion of socially devalued people, such as people with a developmental disability label, encouraging a focus on the person as someone with capacities and gifts, as well as support needs. This is the approach that is being taken in Idaho for future conservatorship/guardianship proceedings, as detailed later.

i. Services and support

Today, support services are provided by government agencies (such as MRDD), non-governmental organizations and by private sector providers. Support services address most aspects of life for people with developmental disabilities, and are usually theoretically based in community inclusion, using concepts such as social role valorization and increased self-determination (using models such as Person Centered Planning). Support services are funded through government block funding (paid directly to service providers by the government), through individualized funding packages (paid directly to the individual by the government, specifically for the purchase of services) or privately by the individual (although they may receive certain subsidies or discounts, paid by the government). There also are a number of non-profit agencies dedicated to enriching the lives of people living with developmental disabilities and erasing the barriers they have to being included in their community. The State of Idaho has a website with listed services available, as do organizations such as Disability Rights of Idaho.

j. Education and training

Education and training opportunities for people with developmental disabilities have expanded greatly in recent times, with many governments mandating universal access to educational facilities, and more students moving out of special schools and into mainstream classrooms with support.

Post-secondary education and vocational training is also increasing for people with these types of disabilities, although many programs offer only segregated “access” courses in areas such as literacy, numeracy and other basic skills. Legislation (such as the UK's Disability Discrimination Act 1995) requires educational institutions and training providers to make “reasonable adjustments” to curriculum and teaching methods in order to accommodate the learning needs of students with disabilities, wherever possible. There are also some vocational training centers that cater specifically to people with disabilities, providing the skills necessary to work in integrated settings, one of the largest being Dale Rogers Training Center in Oklahoma City.

k. At-home and community support

Many people with developmental disabilities live in the general community, either with family members, in supervised-group homes or in their own homes (that they rent or own, living alone or with flatmates). At-home and community supports range from one-to-one assistance from a support worker with identified aspects of daily living (such as budgeting, shopping or paying bills) to full 24-hour support (including assistance with household tasks, such as cooking and cleaning, and personal care such as showering, dressing and the administration of medication). The need for full 24-hour support is usually associated with difficulties recognizing safety issues (such as responding to a fire or using a telephone) or for people with potentially dangerous medical conditions (such as asthma or diabetes) who are unable to manage their conditions without assistance.

In the United States generally, a support worker is known as a Direct Support Professional (DSP). The DSP works in assisting the individual with their ADL’s and also acts as an advocate for the individual with a developmental disability, in communicating their needs, self-expression and goals.

Supports of this type also include assistance to identify and undertake new hobbies or to access community services (such as education), learning appropriate behavior or recognition of community norms, or with relationships and expanding circles of friends. Most programs offering at-home and community support are designed with the goal of increasing the individual's independence, although it is recognized that people with more severe disabilities may never be able to achieve full independence in some areas of daily life.

l. Residential accommodation

Some people with developmental disabilities live in residential accommodation (also known as group homes) with other people with similar assessed needs. These homes are usually staffed around the clock, and usually house between 3 and 15 residents. The prevalence of this type of support is gradually decreasing, however, as residential accommodation is replaced by at-home and community support, which can offer increased choice and self-determination for individuals. Some U.S. states still provide institutional care, such as the Texas State Schools. The type of residential accommodation is usually determined by the level of developmental disability and mental health needs. In Idaho, there are no large scale facilities and my recent conversation with the head of IHFA reveals that none are in the pipeline. This means that residential accommodation is mostly certified family homes, sharing roommates and similar methods, or placement in a facility that is not specifically geared to treatment of DD.

m. Employment support

Employment support usually consists of two types of support:

Support to access or participate in integrated employment, in a workplace in the general community. This may include specific programs to increase the skills needed for successful

employment (work preparation), one-to-one or small group support for on-the-job training, or one-to-one or small group support after a transition period (such as advocacy when dealing with an employer or a bullying colleague, or assistance to complete an application for a promotion).

The provision of specific employment opportunities within segregated business services. Although these are designed as "transitional" services (teaching work skills needed to move into integrated employment), many people remain in such services for the duration of their working life. The types of work performed in business services include mailing and packaging services, cleaning, gardening and landscaping, timber work, metal fabrication, farming and sewing.

Workers with developmental disabilities have historically been paid less for their labor than those in the general workforce, although this is gradually changing with government initiatives, the enforcement of anti-discrimination legislation and changes in perceptions of capability in the general community.

In the United States, a variety of initiatives have been launched in the past decade to reduce unemployment among workers with disabilities – estimated by researchers at over 60%. Most of these initiatives are directed at employment in mainstream businesses. They include heightened placement efforts by the community agencies serving people with developmental disabilities, as well as by government agencies.

Additionally, state-level initiatives are being launched to increase employment among workers with disabilities. In California, the state senate in 2009 created the Senate Select Committee on Autism and Related Disorders. The Committee has been examining additions to existing community employment services, and also new employment approaches. Committee member Lou Vismara, chairman of the MIND Institute at University of California, Davis, is pursuing the development of a planned community for persons with autism and related disorders in the Sacramento region. Another committee member, Michael Bernick, the former director of the state labor department, has established a program at the California state university system, starting at California State University East Bay, to support students with autism on the college level. Other Committee efforts include mutual support employment efforts, such as disability job networks, job boards, and identifying business lines that build on the strengths of persons with disabilities.

n. Day services

Non-vocational day services are usually known as day centers, and are traditionally segregated services offering training in life skills (such as meal preparation and basic literacy), center-based activities (such as crafts, games and music classes) and external activities (such as day trips). Some more progressive day centers also support people to access vocational training opportunities (such as college courses), and offer individualized outreach services (planning and undertaking activities with the individual, with support offered one-to-one or in small groups).

Traditional day centers were based on the principles of occupational therapy, and were created as respite for family members caring for their loved ones with disabilities. This is slowly changing, however, as programs offered become more skills-based and focused on increasing independence.

o. Advocacy

Advocacy is a burgeoning support field for people with developmental disabilities. Advocacy groups now exist in most jurisdictions, working collaboratively with people with disabilities for systemic change (such as changes in policy and legislation) and for changes for individuals (such as claiming welfare benefits or when responding to abuse). Most advocacy groups also work to support people, throughout the world, to increase their capacity for self-advocacy, teaching the skills necessary for people to advocate for their own

needs.

p. Other types of support

Other types of support for people with developmental disabilities may include:

- therapeutic services, such as speech therapy, occupational therapy, physical therapy, massage, aromatherapy, art, dance/movement or music therapy
- supported holidays
- short-stay respite services (for people who live with family members or other unpaid careers) transport services, such as dial-a-ride or free bus passes
- specialist behavior support services, such as high-security services for people with high-level, high-risk challenging behaviors
- specialist relationships and sex education

Programs are set up around the country in hopes to educate individuals with and without developmental disabilities. Studies have been done testing specific scenarios on how what is the most beneficial way to educate people. Interventions are a great way to educate people, but also the most time consuming. With the busy schedules that everybody has, it is found to be difficult to go about the intervention approach. Another scenario that was found to be not as beneficial, but more realistic in the time sense was Psychoeducational approach. They focus on informing people on what abuse is, how to spot abuse, and what to do when spotted. Individuals with developmental disabilities don't only need the support programs to keep them safe, but everybody in society needs to be aware of what is happening and how to help everybody prosper.

2. IDAHO STATUTES

First of all, to get this out of the way, the appointment of a guardian or conservator does not remove the ability to vote. There are all kinds of bad jokes that could engender, but I will refrain. With the proliferation of absentee voting, that has lead to some interesting situations that facilities should be aware of.

Second, there are restrictions/conditions about firearms if someone has an appointed guardian or conservator. Would take too long to run through the federal and state statutes on this in detail, but the Court in making appointments are supposed to determine whether or not the federal statute applies (regarding the federal register of who cannot own, buy, or sell firearms or ammunition) and that determination is supposed to flow through the Idaho State Police to the FBI. Supposed to is the operative phrase. This can get very tricky if the spouse of a person with a guardian/conservator has firearms or ammunition.

Third, we are working on merging the DD code into the Idaho Uniform Probate Code because of the many problems that would solve. The two statutes have existed in isolation (other some changes that I have carried in the legislature to provide some cross references) since their inception, but the Courts regularly act as if the two were intertwined.

Fourth, both TEPI and the Idaho Supreme Court committees have been working on addressing many areas of conservatorship/guardianship, and especially in the areas of person centered planning, supported decision making. least restrictive means, and so forth.

Fifth, the Uniform Laws Commission has been working on a complete revision of the Uniform Probate Code as if applies to conservatorship/guardianship. I am an Observer on that committee and have made a number of suggestions for changes or additions in language.. The final draft, subject to style review, was

adopted in July of 2017. Official Comments will be issued in October of 2017. Review of that draft legislation in Idaho will take, in my experience, about 2 or more years.

Sixth, you need a brief understanding of the *Rogers v. Household Life Insurance Co.* (150 Idaho 735, 250 P.3d 786 2011) and *Conway* cases, which I prefer to do orally.

The original approach of the State of Idaho, consistent with the factors discussed above, can be seen by the outline of Title 66 State Charitable Institutions, which contains Treatment and Care of the Developmentally Disabled as Chapter 4, especially the earlier chapters 1-8, which are the older law.

TITLE 66 STATE CHARITABLE INSTITUTIONS
CHAPTER 1 STATE HOSPITALS
CHAPTER 2 INSANE ASYLUMS -- [REPEALED]
CHAPTER 3 HOSPITALIZATION OF MENTALLY ILL
CHAPTER 4 TREATMENT AND CARE OF THE DEVELOPMENTALLY DISABLED
CHAPTER 5 STATE ASYLUM AND SANITARIUM FUND FOR PATIENTS
CHAPTER 6 DECLARATIONS FOR MENTAL HEALTH TREATMENT
CHAPTER 7 COMMITMENT TO IDAHO STATE SCHOOL AND COLONY -- [REPEALED]
CHAPTER 8 STERILIZATION LAW -- [REPEALED]
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The legislative intent in enacting Title 66 Chapter 4, in 1982, significantly amended in 2010, is:

> 66-401. LEGISLATIVE INTENT. It is hereby declared by the legislature of the state of Idaho in enacting chapter 4, title 66, Idaho Code, that the citizens of Idaho who have developmental disabilities are entitled to be diagnosed, cared for, and treated in a manner consistent with their legal rights in a manner no more restrictive than for their protection and the protection of society, for a period no longer than reasonably necessary for diagnosis, care, treatment and protection, and to remain at liberty or be cared for privately except when necessary for their protection or the protection of society. Recognizing that every individual has unique needs and differing abilities, it is the purpose of the provisions of this chapter to promote the general welfare of all citizens by establishing a system which permits partially disabled and disabled persons to participate as fully as possible in all decisions which affect them, which assists such persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources, and developing or regaining their abilities to the maximum extent possible. The provisions of this chapter shall be liberally construed to accomplish these purposes.

This general intent needs to be recognized in reading other statutes and in looking generally at Idaho C&G statutes. One major point to be aware of is that this statute, originally enacted in 1982, has no cross references in general to the Idaho Uniform Probate Code, enacted in 1971 and effective January 1, 1972.

For Idaho, the relevant definition of Developmental Disability is in 66-402:

> (5) “Developmental disability” means a chronic disability of a person which appears before the age of twenty-two (22) years of age and:
> (a) Is attributable to an impairment, such as intellectual disability, cerebral palsy, epilepsy,

autism or other condition found to be closely related to or similar to one (1) of these impairments that requires similar treatment or services, or is attributable to dyslexia resulting from such impairments; and

(b) Results in substantial functional limitations in three (3) or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency; and

(c) Reflects the need for a combination and sequence of special, interdisciplinary or generic care, treatment or other services which are of lifelong or extended duration and individually planned and coordinated.

Further in that section:

(9) “Lacks capacity to make informed decisions” means the inability, by reason of developmental disability, to achieve a rudimentary understanding of the purpose, nature, and possible risks and benefits of a decision, after conscientious efforts at explanation, but shall not be evidenced by improvident decisions within the discretion allowed nondevelopmentally disabled individuals.

(10) “Likely to injure himself or others” means:

(a) A substantial risk that physical harm will be inflicted by the respondent upon his own person as evidenced by threats or attempts to commit suicide or inflict physical harm on himself; or

(b) A substantial risk that physical harm will be inflicted by the respondent upon another as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm; or

(c) That the respondent is unable to meet essential requirements for physical health or safety.

(11) “Manage financial resources” means the actions necessary to obtain, administer and dispose of real, personal, intangible or business property, benefits and/or income.

(12) “Meet essential requirements for physical health or safety” means the actions necessary to provide health care, food, clothing, shelter, personal hygiene and/or other care without which serious physical injury or illness would occur.

Venue for court proceedings is straightforward:

66-403. COURT JURISDICTION. Judicial proceedings authorized by the provisions of this chapter shall be had in the district court of the county where the respondent resides or is found.

Proceedings for appointment are as follows, which was not modified after 1982 until 2009 and 2013, and which remains unintegrated with the probate code in Title 15, Chapter 5.

66-404. PROCEEDINGS FOR APPOINTMENT OF GUARDIANS AND CONSERVATORS. (1) A person with a developmental disability or any person interested in his welfare may petition for a finding of legal disability or partial legal disability and appointment of a guardian and/or conservator.

(2) The petition shall:

(a) State the names and addresses of the persons entitled to notice under subsection (4) of this section;

(b) Describe the impairments showing the respondent is developmentally disabled, the respondent's ability to receive, evaluate and communicate information, and the respondent's ability to manage financial resources and meet essential requirements for

physical health or safety;

(c) State the nature and scope of guardianship and/or conservatorship services sought;

(d) Describe the respondent's financial condition, including significant assets, income and ability to pay for the costs of judicial proceedings; and

(e) State if the appointment is made by will pursuant to section 15-5-301, Idaho Code, and the name(s) and address(es) of the person(s) named in the will to be guardian.

(3) Upon filing of a petition, the court shall set a date for a hearing, appoint an attorney to represent the respondent in the proceedings unless the respondent has an attorney, and authorize an evaluation committee to examine the respondent, interview the proposed guardians and/or conservators and report to the court in writing. The report shall contain:

(a) A description of the nature and extent of the evaluation and the alleged impairments, if any;

(b) A description of the respondent's mental, emotional and physical condition; educational status; and adaptive and social skills;

(c) A description of the services, if any, needed by the respondent to meet essential requirements for physical health and safety, and/or manage financial resources;

(d) A recommendation regarding the type and extent of guardianship or conservatorship assistance, if any, required by the respondent and why no less restrictive alternative would be appropriate;

(e) An opinion regarding the probability that the extent of the respondent's disabilities may significantly lessen, and the type of services or treatment which may facilitate improvement in the respondent's behavior, condition, or skills;

(f) The respondent's preference, if any, regarding the person or persons to be appointed as guardian and/or conservator;

(g) The suitability of the person or persons proposed as guardian and/or conservator; and

(h) The signature of each member of the evaluation committee with a statement of concurrence or nonconcurrence with the findings and any dissenting opinions or other comments of the members.

(4) Notice of the time and place of the hearing on the petition together with a copy of the petition shall be served no less than ten (10) days before the hearing on:

(a) The respondent;

(b) The respondent's spouse, parents and adult children, or if none, the respondent's closest relative, if any can be found; and

(c) Any person who is currently serving as guardian, conservator or who is providing care for the respondent.

Notice shall be served personally if the person to be served can be found within the state. If the person to be served cannot be found within the state, service shall be accomplished by registered mail to such person's last known address.

(5) The respondent is entitled to be present at the hearing in person, to present evidence, call and cross-examine witnesses, and to see or hear all evidence in the proceeding.

(6) At the hearing the court shall:

(a) Determine whether the respondent has a developmental disability;

(b) Evaluate the respondent's ability to meet essential requirements for physical health or safety and manage financial resources;

(c) Evaluate the ability of the proposed guardian and/or conservator to act in the respondent's best interests to manage the respondent's financial resources and meet essential requirements for the respondent's physical health or safety;

(d) Determine the nature and scope of guardianship or conservatorship services necessary to protect and promote the respondent's well-being; and

(e) Evaluate the ability of the respondent or those legally responsible to pay the costs associated with the judicial proceedings and fix responsibility therefor.

(7) No individual shall be appointed as guardian or conservator of an incapacitated person unless all of the following first occurs:

(a) The proposed guardian or conservator has submitted to and paid for a criminal history and background check conducted pursuant to section 56-1004A(2) and (3), Idaho Code;

(b) In the case of a petition for guardianship and pursuant to an order of the court so requiring, any individual who resides in the incapacitated person's proposed residence has submitted, at the proposed guardian's expense, to a criminal history and background check conducted pursuant to section 56-1004A(2) and (3), Idaho Code;

(c) The findings of such criminal history and background checks have been made available to the evaluation committee by the department of health and welfare; and

(d) The proposed guardian or conservator provided a report of his or her civil judgments and bankruptcies to the evaluation committee and all others entitled to notice of the guardianship or conservatorship proceeding pursuant to subsection (4) of this section.

(8) The provisions of paragraphs (a) and (d) of subsection (7) of this section shall not apply to an institution nor to a legal or commercial entity.

(9) Each proposed guardian and conservator and each appointed guardian and conservator shall immediately report any change in his or her criminal history and any material change in the information required by subsection (7) of this section to the evaluation committee, all others entitled to notice of the guardianship or conservatorship proceeding pursuant to subsection (4) of this section and to the court.

There are major differences between the DD code and the Probate code in the procedure for appointment.

First, unlike the Probate code, there is no appointment of a Court Visitor. Instead, there is an Evaluation Committee through Health&Welfare.

Second, there is not an appointment of a Guardian ad Litem attorney. Instead, there is the appointment of an attorney by the Court unless the person has their own attorney. Despite that, I have routinely been appointed as a Guardian ad Litem in DD cases. I have written articles and done seminars on the differences, especially ethically, between an attorney for a person in guardianship and a Guardian ad Litem. And some statutes refer to “an attorney with the powers of a Guardian ad Litem”, which really muddies the waters.

Third, although the criminal background check provisions apply in both the DD code and the Probate Code, the requirement of the online training created by the court system only applies to the Probate Code procedures, not DD.

§66-405 is extremely important to understand in treating developmentally disabled individuals. It is crucial to understand this section and especially what it does <u>not</u> cover. This section contains what are commonly called the “Baby Doe Regs”. The accompanying Addendum has an extensive history of the Baby Doe Regs and also an extensive discussion of their effect in the neonatal area primarily. However, it is very relevant to DD law, and to treatment generally, because much of the terminology and principles resulting from the Baby Doe case and Regs has ended up in Idaho’s DD act and in the Idaho Medical Consent and Natural Death Act.

66-405. ORDER IN PROTECTIVE PROCEEDINGS. (1) If it is determined that the respondent does not have a developmental disability but appears in need of protective services, the court may cause the proceeding to be expanded or altered for consideration under the uniform probate code.

(2) If it is determined that the respondent is able to manage financial resources and meet essential requirements for physical health or safety, the court shall dismiss the petition.

(3) <u>If it is determined that the respondent has a developmental disability and is unable to manage</u>

some financial resources or meet some essential requirements for physical health or safety, the court may appoint a partial guardian and/or partial conservator on behalf of the respondent. An order establishing partial guardianship or partial conservatorship shall define the powers and duties of the partial guardian or partial conservator so as to permit the respondent to meet essential requirements for physical health or safety and to manage financial resources commensurate with his ability to do so, and shall specify all legal restrictions to which he is subject. A person for whom a partial guardianship or partial conservatorship has been appointed under this chapter retains all legal and civil rights except those which have by court order been limited or which have been specifically granted to the partial guardian or partial conservator by the court.

(4) If it is determined that the respondent has a developmental disability and is unable to manage financial resources or meet essential requirements for physical health or safety even with the appointment of a partial guardian or partial conservator, the court may appoint a total guardian and/or total conservator.

(5) In the event that more than one (1) person seeks to be appointed guardian and/or conservator, the court shall appoint the person or persons most capable of serving on behalf of the respondent; the court shall not customarily or ordinarily appoint the department or any other organization or individual, public or private, that is or is likely to be providing services to the respondent. If an appointment of a guardian is made by will pursuant to section 15-5-301, Idaho Code, such appointment shall be entitled to preference as the guardian under this chapter, if the person so appointed by will is capable of serving on behalf of the respondent and the court finds that it is not in the best interests of the respondent to appoint a different person as guardian.

(6) Subject to the limitations of the provisions of subsection (7) of this section, guardians or conservators may have any of the duties and powers as provided in sections 15-5-312(1)(a) through (d), 15-5-424 and 15-5-425, Idaho Code, and as specified in the order. A guardian shall be required to report to the court at least annually on the status of the person with a developmental disability. A conservator shall be required to file with the court an inventory within ninety (90) days of appointment, an accounting at least annually, and a final accounting at the termination of the appointment of the conservator. All required inventories, accountings and reports shall be under oath or affirmation and shall comply with the Idaho supreme court rules. The court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the court may specify.

(7) No guardian appointed under this chapter shall have the authority to refuse or withhold consent for medically necessary treatment when the effect of withholding such treatment would seriously endanger the life or health and well-being of the person with a developmental disability. To withhold or attempt to withhold such treatment shall constitute neglect of the person and be cause for removal of the guardian. No physician or caregiver shall withhold or withdraw such treatment for a respondent whose condition is not terminal or whose death is not imminent. If the physician or caregiver cannot obtain valid consent for medically necessary treatment from the guardian, he shall provide the medically necessary treatment as authorized by section 39-4504(1)(i), Idaho Code.

(8) A guardian appointed under this chapter may consent to withholding or withdrawal of artificial life-sustaining procedures, only if the respondent:

(a) Has an incurable injury, disease, illness or condition, certified by the respondent's attending physician and at least one (1) other physician to be terminal such that the application of artificial life-sustaining procedures would not result in the possibility of saving or significantly prolonging the life of the respondent, and would only serve to prolong the moment of the respondent's death for a period of hours, days or weeks, and where both physicians certify that death is imminent, whether or not the life-sustaining procedures are used; or

(b) Has been diagnosed by the respondent's attending physician and at least one (1) other physician as being in a persistent vegetative state which is irreversible and from which the respondent will never regain consciousness.

(9) Any person who has information that medically necessary treatment of a respondent has been withheld or withdrawn may report such information to adult protective services or to the Idaho protection and advocacy system for people with developmental disabilities, which shall have the authority to investigate the report and in appropriate cases to seek a court order to ensure that medically necessary treatment is provided.

If adult protective services or the protection and advocacy system determines that withholding of medical treatment violates the provisions of this section, they may petition the court for an ex parte order to provide or continue the medical treatment in question. If the court finds, based on affidavits or other evidence, that there is probable cause to believe that the withholding of medical treatment in a particular case violates the provisions of this section, and that the life or health of the patient is endangered thereby, the court shall issue an ex parte order to continue or to provide the treatment until such time as the court can hear evidence from the parties involved. Petitions for court orders under this section shall be expedited by the courts and heard as soon as possible. No bond shall be required of a petitioner under this section.

(10) No partial or total guardian or partial or total conservator appointed under the provisions of this section may without specific approval of the court in a proceeding separate from that in which such guardian or conservator was appointed:

(a) Consent to medical or surgical treatment the effect of which permanently prohibits the conception of children by the respondent unless the treatment or procedures are necessary to protect the physical health of the respondent and would be prescribed for a person who does not have a developmental disability;

(b) Consent to experimental surgery, procedures or medications; or

(c) Delegate the powers granted by the order.

I am skipping over much detail which is mainly technical. The next relevant sections are:

66-409. AUTHORITY TO ADMIT DEVELOPMENTALLY DISABLED PERSONS. The head of any facility licensed under state law is authorized to admit for observation, diagnosis, care or treatment any developmentally disabled person for services provided by that facility.

66-412. RIGHTS IN FACILITIES. (1) Every developmentally disabled person admitted to any facility shall be entitled to humane care and treatment.

(2) A developmentally disabled person shall not be put in isolation. Mechanical restraints shall not be applied unless it is determined to be necessary for the safety of that person or the safety of others. Every use of a mechanical restraint, or time out for therapeutic purposes, and the reasons therefore [therefor], shall be made a part of the permanent record of the person under the signature of the facility head.

(3) Every developmentally disabled person has the following rights:

(a) To be free from mental and physical abuse including that which arises from acts of negligence;

(b) To reside in the environment or setting that is least restrictive of personal liberties in which appropriate treatment can be provided;

(c) To communicate by sealed mail, telephone, or otherwise with persons inside or outside the facility, to have access to reasonable amounts of letter writing material and postage and to have access to private areas to make telephone calls and receive visitors;

(d) To receive visitors at all reasonable times and to associate freely with persons of his own choice;

(e) To wear his own clothes, keep and use his own personal possessions including toilet articles, keep and be allowed to spend a reasonable sum of his own money for personal expenses and small purchases, and have access to individual storage space for his own use;

(f) To have free access to established procedures to voice grievances and to recommend changes in the policies and/or services being offered at the facility;

(g) To practice his religion;

(h) To be informed of his medical and habilitative condition, of services available in the facility and the charges therefor;

(i) To have reasonable access to all records concerning himself; and

(j) Unless limited by prior court order, to exercise all civil rights, including the right to dispose of property, except property described in subsection (e) of this section, execute instruments, make purchases, enter into contractual arrangements, and vote.

(4) Adult and emancipated minor developmentally disabled individuals or a parent or guardian with authority to consent to treatment with respect to the minor child or ward, shall have the right to refuse specific modes of treatment or habilitation. The head of a facility may deny the right to refuse treatment or habilitation only in cases of emergency or when a court has determined that an adult or emancipated minor lacks the capacity to make informed decisions about treatment and there is no guardian with authority to consent to treatment. A statement explaining the reasons for any such denial shall immediately be entered in the individual's permanent record and in the case of respondents committed under section 66-406, Idaho Code, copies of the statement shall be sent to the committing court, the respondent's attorney and either the respondent's spouse, guardian, adult next of kin or friend.

(5) A list of the rights contained in this section and section 66-413, Idaho Code, shall be prominently posted in all facilities and explained as far as possible to each developmentally disabled individual.

3. PRACTICAL CONSIDERATIONS FROM THE FOREGOING

First, both the Probate Code and the DD Code are very clear that alternatives to appointment of a guardian and/or conservator should be considered first. This includes use of trusts, powers, and so forth to avoid needing a formal appointment. This also may include Supported Decision Making, which is:

> A series of relationships, practices, arrangements, and agreements, or more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life. From: Robert Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention of the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision Making*, 19 Human Rights Brief 8, 10 (Winter 2012)

This is the creation of a team of individuals, which can include family members, friends, and professionals, who commit to help explain to the person in simple language about possible choices and the impact of those choices. Usually, the person with a disability and the team will create a Supported Decision Making Agreement. The Agreement uses Person Centered Planning, which is working directly with the person who is the focus of the plan to ensure that plans are based on an understanding of the person's unique priorities and desires. Even in situations without Supported Decision Making being directly used, planning should always be Person Centered. You should be prepared to deal with this method and have procedures in place that recognize Supported Decision Making Agreements and how to deal with them in making medical decisions.

Second, if there is a need to make an appointment, the least restrictive means should be used. Limited guardianship and/or conservatorship should be the norm, not the exception. This is already in the two codes, but we are working on ways to make this happen in the real world. Absent good cause, a person has the right to make decisions, including medical decisions. The fact that some may be developmentally disabled does not automatically remove their ability to make medical decisions. The Baby Doe regs discussed above apply only when there is an actual guardianship, and then only to decisions by the

guardian. Decisions by the person with disability are not covered by those provisions in 66-405.

Third, be aware that, under current practice, there is a great tendency to have a full appointment even when the person has the ability to make decisions in many areas. Therefore, many guardians actually treat the guardianship as if it were a limited guardianship, allowing the ward to make many of their own decisions. This can create ambiguities when you are dealing with the person without the guardian present. You should have procedures in place whenever a person under guardianship is either admitted or providing information to ascertain whether a guardianship is in place, if so what form of guardianship is in place (limited or general), and if possible to discuss with the guardian whether the ward actually has the ability to make some, all, or no medical decisions. The guardian, like a medical agent under a durable power of attorney for health care, is to follow the known wishes of the ward, including their latest authentic expressed wishes.

Fourth, do not treat the POST as a magic document. It is simply a medical decision document that fits in the series. The latest authentic expression is what controls, so if a later document or statement by the person conflicts with the POST, that later document or statement controls. Also, when working with people, make sure that they really understand what a POST is. Too many are made without a correct understanding of the effects of a POST.

Fifth, facilities cannot require the execution of a POST or DNR as a condition of admission. Period. I see this far too often.

Sixth, the fact that a person is developmentally disabled does not make any initial difference in how they should be treated. Like any other person, there should be an assessment of their ability to make and/or communicate a medical decision. DD persons can make Wills, execute medical and financial powers, sign consents, choose living conditions and places, etc. unless specifically limited by law. Further, a person is developmentally disabled legally only if so determined. Do not make this diagnosis on your own.

Seventh, involve the person even if they have a guardian. Include them to the maximum extent feasible and reasonable in all discussions, decisions, explanations. Especially, do not act like they are deaf and dumb. Make eye contact, ask them questions, and treat them with dignity and respect. Work with the guardian to understand what limitations, but also what strengths and abilities, the person has. Concentrate on what they can do, not what they can't.

LEGISLATURE OF THE STATE OF IDAHO

Sixty-fourth Legislature First Regular Session - 2017

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 148

BY JUDICIARY, RULES AND ADMINISTRATION COMMITTEE

AN ACT

RELATING TO GUARDIANS AND CONSERVATORS; AMENDING SECTION 15-5-207, IDAHO CODE, TO PROVIDE FOR THE APPOINTMENT OF CO-GUARDIANS IN CERTAIN INSTANCES, TO PROVIDE FOR THE APPOINTMENT OF TEMPORARY GUARDIANS IN CERTAIN INSTANCES, TO PROVIDE FOR NOTICE TO CERTAIN PERSONS, TO PROVIDE FOR POWERS AND DUTIES OF A TEMPORARY GUARDIAN AND TO REVISE TERMINOLOGY; AMENDING SECTION 15-5-303, IDAHO CODE, TO PROVIDE FOR CO-GUARDIANS; AMENDING SECTION 15-5-304, IDAHO CODE, TO PROVIDE FOR THE APPOINTMENT OF CO-GUARDIANS IN CERTAIN INSTANCES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 15-5-308, IDAHO CODE, TO REVISE THE DUTIES AND QUALIFICATIONS FOR A VISITOR IN GUARDIANSHIP PROCEEDINGS; AMENDING SECTION 15-5-310, IDAHO CODE, TO PROVIDE FOR THE APPOINTMENT OF TEMPORARY GUARDIANS IN CERTAIN INSTANCES, TO PROVIDE FOR NOTICE TO CERTAIN PERSONS AND TO PROVIDE FOR POWERS AND DUTIES OF A TEMPORARY GUARDIAN; AMENDING SECTION 66-404, IDAHO CODE, TO REVISE THE PROCEEDINGS FOR THE APPOINTMENT OF GUARDIANS AND CONSERVATORS; AND AMENDING CHAPTER 4, TITLE 66, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 66-404A, IDAHO CODE, TO PROVIDE FOR THE APPOINTMENT OF TEMPORARY GUARDIANS IN CERTAIN INSTANCES, TO PROVIDE FOR NOTICE TO CERTAIN PERSONS AND TO PROVIDE FOR POWERS AND DUTIES OF A TEMPORARY GUARDIAN.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 15-5-207, Idaho Code, be, and the same is hereby amended to read as follows:

15-5-207. COURT APPOINTMENT OF GUARDIAN OF MINOR -- PROCEDURE. (1) Proceedings for the appointment of a guardian or co-guardians may be initiated by the following persons:

(a) Any relative of the minor;

(b) The minor if he is fourteen (14) or more years of age;

(c) Any person who comes within section 15-5-213(1), Idaho Code; or

(d) Any person interested in the welfare of the minor.

(2) Notice of the time and place of hearing of a petition ~~for the appointment of a guardian of a minor~~ under this section is to be given by the petitioner in the manner prescribed by section 15-1-401, Idaho Code, to:

(a) The minor, if he is fourteen (14) or more years of age;

(b) The person who has had the principal care and custody of the minor during the sixty (60) days preceding the date of the petition;

(c) Any person who comes within section 15-5-213(1), Idaho Code; and

(d) Any living parent of the minor; provided however, that the court may waive notice to a living parent of the minor who is, or is alleged to be, the father of the minor if:

(i) The father was never married to the mother of the minor and has failed to register his paternity as provided in section 16-1504(4), Idaho Code; or

(ii) The court has been shown to its satisfaction circumstances that would allow the entry of an order of termination of parental rights pursuant to section 16-2005, Idaho Code, even though termination of parental rights is not being sought as to such father.

(3) (a) As an alternative to appointing one (1) guardian for a minor, the court may appoint no more than two (2) persons as co-guardians for a minor if the court finds:

(i) The appointment of co-guardians will best serve the interests of the minor; and

(ii) The persons to be appointed as co-guardians will work together cooperatively to serve the best interests of the minor.

(b) If the court appoints co-guardians, the court shall also determine whether the guardians:

(i) May act independently;

(ii) May act independently but must act jointly in specified matters; or

(iii) Must act jointly.

This determination by the court must be stated in the order of appointment and in the letters of guardianship.

(4) ~~Upon hearing, i~~If the court finds, upon hearing, that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 15-5-204, Idaho Code, have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings, or make any other disposition of the matter that will best serve the interest of the minor.

(45) ~~If necessary, the court may appoint a temporary~~ Prior to the appointment of a guardian~~, with the status of an ordinary guardian of a minor, but the authority of a temporary guardian shall not last longer than six (6) months~~:

(a) The court may appoint a temporary guardian for the minor if it finds by a preponderance of evidence that:

(i) A petition for guardianship under this section has been filed, but a guardian has not yet been appointed;

(ii) The appointment is necessary to protect the minor's health, safety or welfare until the petition can be heard; and

(iii) No other person appears to have the ability, authority and willingness to act.

(b) A temporary guardian may be appointed without notice or hearing if the minor is in the physical custody of the petitioner or proposed temporary guardian and the court finds from a statement made under oath that the minor may be immediately and substantially harmed before notice can be given or a hearing held.

(c) Notice of the appointment of a temporary guardian must be given to those designated in subsection (2) of this section within seventy-two (72) hours after the appointment. The notice must inform interested persons of the right to request a hearing. The court must hold a hearing

on the appropriateness of the appointment within ten (10) days after request by an interested person. In all cases, either a hearing on the temporary guardianship or on the petition for guardianship itself must be held within ninety (90) days of the filing of any petition for guardianship of a minor.

(d) The temporary guardian's authority may not exceed six (6) months unless extended for good cause. The powers of the temporary guardian shall be limited to those necessary to protect the immediate health, safety or welfare of the minor until a hearing may be held and must include the care and custody of the minor.

(e) A temporary guardian must make reports as the court requires.

(6) When a minor is under guardianship:

(a) The court may appoint a temporary guardian if it finds:

(i) Substantial evidence that the previously appointed guardian is not performing the guardian's duties; and

(ii) The appointment of a temporary guardian is necessary to protect the minor's health, safety or welfare.

(b) A temporary guardian may be appointed without notice or hearing if the court finds from a statement made under oath that the minor may be immediately and substantially harmed before notice can be given or a hearing held.

(c) Notice of the appointment of a temporary guardian must be given to those designated in subsection (2) of this section within seventy-two (72) hours after the appointment. The notice must inform interested persons of the right to request a hearing. The court shall hold a hearing on the appropriateness of the appointment within ten (10) days after request by an interested person.

(d) The authority of a previously appointed guardian is suspended as long as a temporary guardian has authority. The court must hold a hearing before the expiration of the temporary guardian's authority and may enter any appropriate order. The temporary guardian's authority may not exceed six (6) months unless extended for good cause.

(e) A temporary guardian must make reports as the court requires.

(~~5~~7) The court shall appoint an attorney to represent the minor if the court determines that the minor possesses sufficient maturity to direct the attorney. If the court finds that the minor is not mature enough to direct an attorney, the court shall appoint a guardian ad litem for the minor. The court may decline to appoint an attorney or guardian ad litem if it finds in writing that such appointment is not necessary to serve the best interests of the minor or if the Idaho department of health and welfare has legal custody of the child.

(~~6~~8) Letters of guardianship must indicate whether the guardian was appointed by will or by court order.

SECTION 2. That Section 15-5-303, Idaho Code, be, and the same is hereby amended to read as follows:

15-5-303. PROCEDURE FOR COURT APPOINTMENT OF A GUARDIAN OF AN INCAPACITATED PERSON. (a) The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian or co-guardians, limited or general. It is desirable to make avail-

able the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their own needs. Recognizing that every individual has unique needs and differing abilities, the public welfare should be promoted by establishing a guardianship that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of guardianship that least interferes with legal capacity of a person to act in his own behalf. The petition shall include a plan in reasonable detail for the proposed actions of the guardian regarding the affairs of the ward after appointment of the guardian, to the extent reasonably known to the petitioner at the time of filing of the petition. If the complete mental, physical and emotional status, and the health care needs and other needs of the ward are not reasonably known to the petitioner at the time the petition is filed, or if the petitioner is not the proposed guardian, then the guardian shall submit to the court, and to all interested persons, in writing, within thirty (30) days after appointment of the guardian, a reasonably detailed plan covering such matters. Such plan must also be given to any person who has filed a request for notice under section 15-5-406, Idaho Code, and to other persons as the court may direct. Such plan shall be given to all such persons in accordance with the methods set forth in section 15-1-401, Idaho Code. If the plan changes during any time period between the periodic reports of the guardian, the modified plan shall be filed with the next report as a part thereof.

(b) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician or other qualified person appointed by the court who shall submit his report in writing to the court. The court may, in appropriate cases, appoint a mental health professional, defined as a psychiatrist, psychologist, gerontologist, licensed social worker, or licensed counselor, to examine the proposed ward and submit a written report to the court. The person alleged to be incapacitated also shall be interviewed by a visitor sent by the court. The visitor shall also interview the person who appears to have caused the petition to be filed and any person who is nominated to serve as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the court. Where possible without undue delay and expenses beyond the ability to pay of the allegedly incapacitated person, the court, in formulating the judgment, may utilize the service of any public or charitable agency that offers or is willing to evaluate the condition of the allegedly incapacitated person and make recommendations to the court regarding the most appropriate form of state intervention in his affairs.

(c) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. The person alleged to be incapacitated is enti-

tled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. He is entitled to be represented by counsel, to present evidence and subpoena witnesses and documents, to examine witnesses, including the court-appointed physician, mental health professional, or other person qualified to evaluate the alleged impairment, as well as the court-appointed visitor, and otherwise participate in the hearing. The hearing may be a closed hearing upon the request of the person alleged to be incapacitated or his counsel and a showing of good cause. After appointment, the guardian shall immediately provide written notice of any proposed change in the permanent address of the ward to the court and all interested parties.

SECTION 3. That Section 15-5-304, Idaho Code, be, and the same is hereby amended to read as follows:

15-5-304. FINDINGS -- ORDER OF APPOINTMENT. (a) The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure.

(b) The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision ~~of the person~~ of the incapacitated person. The court, on appropriate findings, may:

(1) Treat the petition as one for a protective order under section 15-5-401, Idaho Code, and proceed accordingly;

(2) Enter any other appropriate order; or

(3) Dismiss the proceedings.

(c) (1) As an alternative to appointing one (1) guardian for an incapacitated person, the court may appoint no more than two (2) persons as co-guardians for the incapacitated person if the court finds:

(i) The appointment of co-guardians will best serve the interests of the incapacitated person; and

(ii) The persons to be appointed as co-guardians will work together cooperatively to serve the best interests of the incapacitated person.

(2) The parents of an incapacitated person shall have preference over all other persons for appointment as co-guardians, unless the court finds that the parents are unwilling to serve as co-guardians, or are not capable of adequately serving the best interests of the incapacitated person.

(3) If the court appoints co-guardians, the court shall also determine whether the guardians:

(i) May act independently;

(ii) May act independently but must act jointly in specified matters; or

(iii) Must act jointly.

This determination by the court must be stated in the order of appointment and in the letters of guardianship.

(d) The court may, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, limit the powers of a guardian otherwise conferred by this section and thereby create a limited guardianship. Any limitations on the statutory power of a guardian of an incapacitated person shall be endorsed on the guardian's letters, or in the case of a guardian by testamentary appointment, shall be reflected in letters that shall be issued at the time any limitation is imposed. Following the same procedure, a limitation may be removed and appropriate letters issued.

SECTION 4. That Section 15-5-308, Idaho Code, be, and the same is hereby amended to read as follows:

15-5-308. VISITOR IN GUARDIANSHIP PROCEEDING. (1) A visitor is, with respect to guardianship proceedings, ~~a person who is trained in law, nursing, psychology, social work, or counseling or has other qualifications that make him suitable to perform the function and is an officer, employee or special appointee of the court~~ an individual with no personal interest in the proceedings and who meets the qualifications identified in Idaho supreme court rule. A visitor may either be an employee of or appointed by the court. If appointed, a visitor becomes an officer of the court. ~~The visitor's report is to include the following information: a description of the nature, cause and degree of incapacity, and the basis upon which this judgment is made; a description of the needs of the person alleged to be incapacitated for care and treatment and the probable residential requirements; a statement as to whether a convicted felon resides in or frequents the incapacitated person's proposed residence; an evaluation of the appropriateness of the guardian or conservator whose appointment is sought and a description of the steps the proposed guardian or conservator has taken or intends to take to meet the needs of the incapacitated person; a description of the abilities of the alleged incapacitated person and a recommendation as to whether a full or limited guardianship or conservatorship should be ordered and, if limited, the visitor's recommendation of the specific areas of authority the limited guardianship or conservatorship should have and the limitations to be placed on the incapacitated person; any expression of approval or disapproval made by the alleged incapacitated person concerning the proposed guardianship or conservatorship; an analysis of the financial status and assets of the alleged incapacitated person; identification of people with significant interest in the welfare of the alleged incapacitated person who should be informed of the proceedings; a description of the qualifications and relationship of the proposed guardian or conservator; an explanation of how the alleged incapacitated person responded to the advice of the proceedings and the right to be present at the hearing on the petition; in the case of conservatorship, a recommendation for or against a bond requirement for the proposed conservator, taking into account the financial statement of the person whose appointment is sought.~~

(2) A visitor must report to the court on the status of the person proposed to be under guardianship. All reports must be under oath or affirmation and must comply with Idaho supreme court rules.

(3) ~~Any person appointed as a~~ A visitor shall be personally immune from any liability for acts, omissions or errors in the same manner as if such

~~person~~ visitor were a volunteer or director under the provisions of section 6-1605, Idaho Code.

(~~3~~4) ~~The~~ A visitor ~~may not also be appointed~~ cannot serve as guardian ad litem ~~for the person alleged to be incapacitated nor may~~. The visitor and the guardian ad litem for the person ~~alleged~~ proposed to be ~~incapacitated be appointed as visitor, nor~~ under guardianship may ~~the visitor and the guardian ad litem for the person alleged to be incapacitated~~ not be members or employees of the same entity ~~including, but not limited to, being members or employees of the same law firm~~.

(45) The ~~court~~ visitor may request to order a criminal history and background check ~~to be conducted~~ at the proposed guardian's expense on any individual who resides in ~~the incapacitated person's proposed residence~~ or may frequent the residence of the person proposed to be under guardianship. Any such check shall be conducted pursuant to section 56-1004A(2) and (3), Idaho Code.

~~(5) In preparing their reports, the visitor and guardian ad litem shall consider all information available to them concerning any proposed guardian, conservator and individual who resides in or frequents the incapacitated person's proposed residence including, but not limited to, such information as might be available to the visitor pursuant to section 15-5-311(5), Idaho Code.~~

SECTION 5. That Section 15-5-310, Idaho Code, be, and the same is hereby amended to read as follows:

15-5-310. TEMPORARY GUARDIANS OF INCAPACITATED PERSONS. (a) ~~If t~~The court ~~finds that~~ may appoint a temporary guardian ~~is not properly performing the duties of guardian or an emergency exists such that the likely result will be substantial harm to an alleged incapacitated person's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the alleged incapacitated person's welfare, may appoint an emergency guardian whose authority may not exceed ninety (90) days, unless extended for good cause upon application of the temporary guardian. The emergency guardianship must be limited to only those powers absolutely necessary, or the least restrictive to the proposed ward, for the immediate health and safety of the proposed ward until such time as a full hearing may be held in the matter and the emergency guardian may exercise only those powers specified in the order. Emergency letters of guardianship shall allow the temporary guardian only such access to the proposed ward's assets as is necessary to provide and pay for the proposed ward's necessities of life, including short and long-term health care, but shall expressly deny a temporary guardian the right to have the temporary guardian's name added to any assets of the proposed ward pending a hearing on the guardianship~~ if it finds:

(1) A petition for guardianship under section 15-5-303, Idaho Code, has been filed, but a guardian has not yet been appointed;

(2) Substantial evidence of incapacity;

(3) By a preponderance of the evidence an emergency exists that will likely result in immediate and substantial harm to the person's health, safety or welfare; and

(4) No other person appears to have the ability, authority and willingness to act.

(b) When a person is under guardianship, t~~T~~he court ~~shall~~ may appoint a temporary guardian ~~ad litem to represent the proposed ward in all cases involving a petition for adjudication of incapacity. The alleged incapacitated person may substitute his own attorney for the guardian ad litem appointed by the court. Any attorney representing an alleged incapacitated person may not serve as guardian of the proposed ward or as counsel for the petitioner for guardianship~~ if it finds:

(1) Substantial evidence that the guardian is not performing the guardian's duties; and

(2) By a preponderance of the evidence, an emergency exists that will likely result in immediate and substantial harm to the person's health, safety or welfare.

The authority of a guardian previously appointed by the court is suspended as long as a temporary guardian has authority. The court must hold a hearing before the expiration of the temporary guardian's authority and may enter any appropriate order.

(c)(1) ~~An emergency~~ A temporary guardian may be appointed without notice ~~to the alleged incapacitated person or his attorney only~~ or hearing if the court finds from ~~affidavit or other sworn testimony~~ a statement under oath that the ~~proposed ward~~ person will be immediately and substantially harmed before notice can be given or a hearing ~~on the appointment can be~~ held.

(2) If the court appoints ~~an emergency~~ a temporary guardian without notice ~~to the proposed ward~~, notice of the ~~proposed ward~~ appointment must be given ~~notice of the appointment~~ to those designated in section 15-5-309, Idaho Code, within ~~forty-eight~~ seventy-two (~~48~~72) hours after the appointment. The notice must inform the interested persons of the right to request a hearing. The court ~~shall~~ must hold a hearing on the appropriateness of the appointment within ~~five~~ ten (~~5~~10) days after the ~~appointment if requested~~ request by an interested ~~party at which time the court shall appoint a visitor to meet with the alleged incapacitated~~ person ~~and make a written report to the court. The court shall also appoint a physician to examine the proposed ward giving preference to the appointment of the proposed ward's treating physician if the proposed ward has a current treating physician~~.

(3) The temporary guardian's authority may not exceed ninety (90) days, unless extended for good cause. The powers of the temporary guardian must be limited to those necessary to protect the immediate health, safety or welfare of the person until such time as a hearing may be held in the matter.

(4) A temporary guardian must make reports as the court requires.

SECTION 6. That Section 66-404, Idaho Code, be, and the same is hereby amended to read as follows:

66-404. PROCEEDINGS FOR APPOINTMENT OF GUARDIANS AND CONSERVATORS. (1) A person with a developmental disability or any person interested in his welfare may petition for a finding of legal disability or partial

legal disability and appointment of a guardian or co-guardians, ~~and/~~ or conservator or co-conservators, or both.

(2) The petition shall:

(a) State the names and addresses of the persons entitled to notice under subsection (4) of this section;

(b) Describe the impairments showing the respondent is developmentally disabled, the respondent's ability to receive, evaluate and communicate information, and the respondent's ability to manage financial resources and meet essential requirements for physical health or safety;

(c) State the nature and scope of guardianship and/or conservatorship services sought;

(d) Describe the respondent's financial condition, including significant assets, income and ability to pay for the costs of judicial proceedings; and

(e) State if the appointment is made by will pursuant to section 15-5-301, Idaho Code, and the name(s) and address(es) of the person(s) named in the will to be guardian.

(3) Upon filing of a petition, the court shall set a date for a hearing, appoint an attorney to represent the respondent in the proceedings unless the respondent has an attorney, and authorize an evaluation committee to examine the respondent, interview the proposed guardians and/or conservators and report to the court in writing. ~~The report shall contain:~~ All reports shall be under oath or affirmation and shall comply with Idaho supreme court rules

~~(a) A description of the nature and extent of the evaluation and the alleged impairments, if any;~~

~~(b) A description of the respondent's mental, emotional and physical condition; educational status; and adaptive and social skills;~~

~~(c) A description of the services, if any, needed by the respondent to meet essential requirements for physical health and safety, and/or manage financial resources;~~

~~(d) A recommendation regarding the type and extent of guardianship or conservatorship assistance, if any, required by the respondent and why no less restrictive alternative would be appropriate;~~

~~(e) An opinion regarding the probability that the extent of the respondent's disabilities may significantly lessen, and the type of services or treatment which may facilitate improvement in the respondent's behavior, condition, or skills;~~

~~(f) The respondent's preference, if any, regarding the person or persons to be appointed as guardian and/or conservator;~~

~~(g) The suitability of the person or persons proposed as guardian and/or conservator; and~~

~~(h) The signature of each member of the evaluation committee with a statement of concurrence or nonconcurrence with the findings and any dissenting opinions or other comments of the members~~.

(4) Notice of the time and place of the hearing on the petition together with a copy of the petition shall be served no less than ten (10) days before the hearing on:

(a) The respondent;

(b) The respondent's spouse, parents and adult children, or if none, the respondent's closest relative, if any can be found; and

(c) Any person who is currently serving as guardian, conservator or who is providing care for the respondent.

Notice shall be served personally if the person to be served can be found within the state. If the person to be served cannot be found within the state, service shall be accomplished by registered mail to such person's last known address.

(5) The respondent is entitled to be present at the hearing in person, to present evidence, call and cross-examine witnesses, and to see or hear all evidence in the proceeding.

(6) At the hearing the court shall:

(a) Determine whether the respondent has a developmental disability;

(b) Evaluate the respondent's ability to meet essential requirements for physical health or safety and manage financial resources;

(c) Evaluate the ability of the proposed guardian and/or conservator to act in the respondent's best interests to manage the respondent's financial resources and meet essential requirements for the respondent's physical health or safety;

(d) Determine the nature and scope of guardianship or conservatorship services necessary to protect and promote the respondent's well-being; ~~and~~

(e) Evaluate the ability of the respondent or those legally responsible to pay the costs associated with the judicial proceedings and fix responsibility therefor; and

(f) (i) As an alternative to appointing one (1) guardian or one (1) conservator, the court may appoint no more than two (2) co-guardians or no more than two (2) co-conservators if the court finds:

1. The appointment of co-guardians or co-conservators will best serve the interests of the person with a developmental disability; and

2. The persons to be appointed as co-guardians or co-conservators will work together cooperatively to serve the best interests of the child.

(ii) The parents of a person with a developmental disability shall have preference over all other persons for appointment as co-guardians or co-conservators, unless the court finds that the parents are unwilling to serve as co-guardians or co-conservators, or are not capable of adequately serving the best interests of the person with a developmental disability; and

(iii) If the court appoints co-guardians or co-conservators, the court shall also determine whether the co-guardians or co-conservators:

1. May act independently;

2. May act independently but must act jointly in specified matters; or

3. Must act jointly.

The determination by the court must be stated in the order of appointment and in the letters of guardianship or conservatorship.

(7) No individual shall be appointed as guardian or conservator of an incapacitated person unless all of the following first occurs:

(a) The proposed guardian or conservator has submitted to and paid for a criminal history and background check conducted pursuant to section 56-1004A(2) and (3), Idaho Code;

(b) In the case of a petition for guardianship and pursuant to an order of the court so requiring, any individual who resides in the incapacitated person's proposed residence has submitted, at the proposed guardian's expense, to a criminal history and background check conducted pursuant to section 56-1004A(2) and (3), Idaho Code;

(c) The findings of such criminal history and background checks have been made available to the evaluation committee by the department of health and welfare; and

(d) The proposed guardian or conservator provided a report of his or her civil judgments and bankruptcies to the evaluation committee and all others entitled to notice of the guardianship or conservatorship proceeding pursuant to subsection (4) of this section.

(8) The provisions of paragraphs (a) and (d) of subsection (7) of this section shall not apply to an institution nor to a legal or commercial entity.

(9) Each proposed guardian and conservator and each appointed guardian and conservator shall immediately report any change in his or her criminal history and any material change in the information required by subsection (7) of this section to the evaluation committee, all others entitled to notice of the guardianship or conservatorship proceeding pursuant to subsection (4) of this section and to the court.

SECTION 7. That Chapter 4, Title 66, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 66-404A, Idaho Code, and to read as follows:

66-404A. TEMPORARY GUARDIANS. (1) The court may appoint a temporary guardian if it finds:

(a) A petition for guardianship under section 66-404, Idaho Code, has been filed, but a guardian has not yet been appointed;

(b) Substantial evidence the person has a developmental disability;

(c) By a preponderance of the evidence an emergency exists that will likely result in immediate and substantial harm to the person's health, safety or welfare; and

(d) No other person appears to have the ability, authority and willingness to act.

(2) When a person is under guardianship, the court may appoint a temporary guardian if it finds:

(a) Substantial evidence that the guardian is not performing the guardian's duties; and

(b) By a preponderance of the evidence, an emergency exists that will likely result in immediate and substantial harm to the person's health, safety or welfare.

The authority of a guardian previously appointed by the court is suspended as long as a temporary guardian has authority. The court must hold a hearing be-

fore the expiration of the temporary guardian's authority and may enter any appropriate order.

(3)(a) A temporary guardian may be appointed without notice or hearing if the court finds from a statement under oath that the person will be immediately and substantially harmed before notice can be given or a hearing held.

(b) If the court appoints a temporary guardian without notice, notice of the appointment must be given to those designated in section 66-404(4), Idaho Code, within seventy-two (72) hours after the appointment. The notice must inform interested persons of the right to request a hearing. The court must hold a hearing on the appropriateness of the appointment within ten (10) days after request by an interested person.

(c) The temporary guardian's authority may not exceed ninety (90) days, unless extended for good cause. The powers of the temporary guardian must be limited to those necessary to protect the immediate health, safety or welfare of the person until such time as a hearing may be held in the matter.

(d) A temporary guardian must make reports as the court requires.

150 Idaho 735
Supreme Court of Idaho,
Boise, December 2010 Term.

Jason ROGERS, Plaintiff–Appellant,
v.
HOUSEHOLD LIFE INSURANCE COMPANY, Defendant–Respondent.

No. 36746.
|
March 18, 2011.
|
Rehearing Denied April 29, 2011.

Synopsis

Background: Purported insured's guardian filed suit against life insurer, alleging breach of contract and tortious bad faith, arising out of insurer's declaration that insurance contract was void from its inception on basis that insured had been adjudicated mentally incompetent prior to entering into insurance contract. The District Court, Fourth Judicial District, Ada County, Darla S. Williamson, J., granted summary judgment to insurer. Guardian appealed.

Holdings: The Supreme Court, Horton, J., held that:

[1] purported insured lacked capacity to enter into life insurance contract, and, thus, contract was void, and

[2] insurer was not entitled to appellate attorney fees.

Affirmed; insurer's request for appellate attorney fees denied.

West Headnotes (12)

[1] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from

Supreme Court reviews a district court's order granting summary judgment under the same standard used by the district court in its ruling on the motion for summary judgment. Rules Civ.Proc., Rule 56(c).

Cases that cite this headnote

[2] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

Supreme Court exercises free review over questions of law.

Cases that cite this headnote

[3] **Mental Health**
Insurance

Ward who had been adjudicated incapacitated, and for whom guardian had been appointed with full powers, lacked capacity to enter into life insurance contract that guardian helped ward complete and submit online, and, thus, contract was void; statute provided that after the incapacity of a person of unsound mind has been judicially determined, that person could make no conveyance or other contract, and a finding that one was incapacitated and a grant of unrestricted guardianship powers represented a finding that ward lacked all capacity to make decisions and take actions that protected his well-being. West's I.C.A. §§ 15–1–201(23), 15–1–301(3), 15–5–101(a), 15–5–303(a), 15–5–304(a, c), 32–108.

Cases that cite this headnote

[4] **Statutes**
In pari materia

It is a fundamental law of statutory construction that statutes that are in pari materia are to be construed together, to the end that the legislative intent will be given effect.

1 Cases that cite this headnote

[5] **Mental Health**
Contracts in General

A judicial determination of incapacity and appointment of a guardian, for purposes of statute providing that a person is without legal capacity to contract after a judicial determination of incapacity, is a proceeding in which a judge assesses the capacity and decision-making ability of an individual and determines whether he is generally and consistently incapable of caring for his personal needs and financial affairs. West's I.C.A. § 32–108.

Cases that cite this headnote

[6] **Mental Health**
Mental incompetency or incapacity in general

A judicial finding of incapacity and appointment of guardian must be supported by evidence of multiple events that demonstrate the individual's inability to care for his basic needs, property, and financial affairs, such that appointment of a guardian who is capable of making those decisions in his stead is justified. West's I.C.A. § 15–5–101(a)(1–3).

Cases that cite this headnote

[7] **Mental Health**
Effect of adjudication, commitment, or guardianship

The appointment of a guardian with full powers represents a finding that the ward lacks the capacity to contract as a matter of law. West's I.C.A. §§ 15–1–201(23), 15–1–301(3), 15–5–101(a), 15–5–303(a), 15–5–304(a, c), 32–108.

Cases that cite this headnote

[8] **Statutes**
Purpose and intent;unambiguously expressed intent

Statutes are interpreted according to their plain and express meaning, and when they are unambiguous the court gives effect to the legislature's clearly expressed intent.

Cases that cite this headnote

[9] **Constitutional Law**
Judicial rewriting or revision

Constitutional Law
Policy

Supreme Court may not ignore or amend unambiguous statutes; rather, policy arguments for altering unambiguous statutes must be advanced before the legislature. West's I.C.A. Const. Art. 3, § 1.

1 Cases that cite this headnote

[10] **Courts**
Construction and operation of statutes

Where the Supreme Court has previously interpreted a statute, the rule of stare decisis dictates that the Court follow controlling precedent, unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.

Cases that cite this headnote

[11] **Costs**
Taxation of costs on appeal or error

Life insurer that prevailed on appeal in breach of contract suit brought against it by purported insured's guardian was not entitled to appellate attorney fees under statute providing that a court may award attorney fees in any action involving a dispute arising from an insurance policy if it finds that a case was brought, pursued, or defended frivolously, unreasonably, or without foundation, as insurer failed to cite the specific subsection of the statute under which it believed itself entitled to any award of attorney fees and costs. West's I.C.A. § 41–1839(4).

Cases that cite this headnote

[12] **Costs**

Form and requisites of application in general

Costs

Taxation of costs on appeal or error

If a party claims that a statute provides authority for an award of attorney fees, the party must cite to the statute and, if applicable, the specific subsection of the statute upon which the party relies.

Cases that cite this headnote

Attorneys and Law Firms

**787 Thomas, Williams & Park, LLP, Boise, for appellant. Daniel Williams argued.

Naylor & Hales, P.C., Boise, for respondent. Bruce Castleton argued.

Opinion

HORTON, Justice.

*736 This appeal arises from a claim for life insurance proceeds. The district court granted summary judgment in favor of Household Life Insurance Company (HLIC) on the grounds that Alan Rogers' life insurance contract was void because he was adjudicated incompetent before he entered the contract. Alan's son and guardian, Jason Rogers, argues that the contract was merely voidable, that as Alan's guardian he had the capacity to and did ratify the contract, and that the contract was thus enforceable. We affirm, but deny HLIC's request for attorney fees incurred on appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

Alan Rogers was diagnosed with Alzheimer's and dementia in 2003. Soon after, Alan's son Jason sought an adjudication that Alan was incapacitated. An order to that effect was entered on January 27, 2004. The letters appointing Jason as guardian and conservator for his father did not place any limitations on Jason's powers.

On May 15, 2007, Jason assisted his father in completing and submitting an online application for life insurance offered by HLIC. The application requested information regarding Alan's health, but did not specifically inquire as to whether Alan suffered from Alzheimer's or dementia. The completed application did not reveal that Alan was adjudicated to be incapacitated, nor did it reveal that Jason had been appointed as his father's guardian and conservator. That day, HLIC approved the application, the initial $447.20 premium was paid, and Alan Rogers' term life insurance policy with a face value of $250,000 took effect. Jason was the sole beneficiary of the policy.

Alan passed away on June 7, 2007. His death certificate lists the sole cause of his death as "dementia of the Alzheimer's type." Jason submitted a notice of claim to HLIC, seeking the $250,000 policy proceeds. HLIC conducted a medical-history verification, a routine procedure for claims arising within two years of a policy's inception. Several months later, HLIC informed Jason of its *737 **788 position that, because Alan had been adjudicated mentally incompetent prior to the May 15, 2007, application and effective date, the policy was void from its inception.

Jason brought suit against HLIC, alleging breach of contract and tortious bad faith. HLIC moved for summary judgment on the grounds that Alan Rogers was adjudicated mentally incapacitated prior to entering into the insurance contract and therefore the contract was void *ab initio*. Jason countered that a contract entered into by one adjudicated incompetent is not void, but rather is merely voidable at the election of the incompetent's guardian, and also that a guardian may ratify such a contract.

The district court granted summary judgment in favor of HLIC on the ground that Alan's adjudication of incompetence rendered the contract void and dismissed Jason's complaint. Jason timely appealed. HLIC requests attorney fees and costs on appeal under Idaho Code § 41–1839.

II. STANDARD OF REVIEW

[1] [2] This Court reviews a district court's order granting summary judgment under the same standard used by the district court in its ruling on the motion for summary judgment. *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 307, 160 P.3d 743, 746

(2007). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). This Court exercises free review over questions of law. *Cristo,* 144 Idaho at 307, 160 P.3d at 746.

III. ANALYSIS

A. Under Idaho Code § 32–108, one who is adjudicated incapacitated lacks the capacity to contract as a matter of law.

[3] Idaho Code § 32–108 provides as follows:

> After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person had been discharged therefrom cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge.

Jason asserts that the statute's language that one adjudicated to be incapacitated "can make no conveyance or other contract" means that although such a person should not contract, if he or she does, the contract is merely voidable. HLIC responds that under the statute's plain language, the contracts of one who is adjudicated incompetent are void because the individual lacks all capacity to contract.

[4] The language of I.C. § 32–108 does not, upon preliminary consideration, support Jason's position. Effectively, Jason argues that the statutory language that a person adjudicated to be incapacitated "can make no ... contract" means that such a person may enter into a contract, while simultaneously retaining the ability to avoid the obligations imposed by the agreement. Nevertheless, when considering Jason's claim that the insurance contract in this case was merely voidable, rather than void *ab initio,* we consider the statutory framework relating to persons who suffer from impaired capacity and their ability to make decisions regarding the conduct of their lives. This is because "[i]t is a fundamental law of statutory construction that statutes that are *in pari materia* are to be construed together, to the end that the legislative intent will be given effect." *State v. Yager,* 139 Idaho 680, 689–90, 85 P.3d 656, 665–66 (2004) (citing *State v. Creech,* 105 Idaho 362, 367, 670 P.2d 463, 468 (1983)).

Idaho Code §§ 32–106 through 32–108 address the enforceability of contracts involving persons of unsound mind. If a person is "entirely without understanding," he "has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or *738 **789 the support of his family." I.C. § 32–106. A contract involving a party who is "not entirely without understanding" and has not been adjudicated to be incapacitated "is subject to rescission." I.C. § 32–107. In other words, prior to a judicial determination of incapacity, such contracts are voidable. However, after a judicial determination of incapacity, "a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right until his restoration to capacity." I.C. § 32–108. Comparing I.C. § 32–107 and I.C. § 32–108, it is evident that the legislature intended that contracts involving persons not adjudicated to be incapacitated are to be voidable and to declare that a person adjudicated to be incompetent is without the legal capacity to contract until that person has been "restored to reason."

[5] A judicial determination of incapacity and appointment of a guardian is a proceeding in which a judge assesses the capacity and decision-making ability of an individual and determines whether he or she is generally and consistently incapable of caring for his or her personal needs and financial affairs. Several statutory definitions inform the magistrate court's determination of competency and, under the doctrine of *pari materia,* inform this Court's interpretation of the statutes at issue here.

[6] First, an "incapacitated person" is one "who is impaired ... to the extent that he lacks sufficient understanding or capacity to make or communicate

responsible decisions concerning his person ..." I.C. § 15–5–101(a). "Incapacity" is the legal disability of one "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." I.C. § 15–5–101(a)(1). Further, "[i]solated instances of simple negligence or improvidence, lack of resources, or any act, occurrence, or statement ... [that is] the product of an informed judgment [ ] shall not constitute evidence of inability to provide for personal needs or to manage property." I.C. § 15–5–101(a)(3). Rather, a judicial finding of incapacity must be supported by evidence of "acts or occurrences, or statements which strongly indicate imminent acts or occurrences ... [that] occurred within twelve (12) months prior to the filing of the petition for guardianship or conservatorship." I.C. § 15–5–101(a)(2). Thus, a judicial finding of incapacity and appointment of guardian must be supported by evidence of multiple events that demonstrate the individual's inability to care for his basic needs, property, and financial affairs, such that appointment of a guardian who is capable of making those decisions in his stead is justified.

These definitions support a plain reading of Idaho Code § 32–108, as does longstanding Idaho precedent. In 1925, this Court approvingly quoted the Colorado Supreme Court's statement that because one was adjudicated incompetent, her "contract and [ ] deed were absolutely void.... 'To compromise a suit instituted to set aside such a void deed is to nullify the statute. It is by judicial decree to inject life and vitality into an instrument which the law imperatively prohibits as contrary to public policy.' " *Miles v. Johanson,* 40 Idaho 782, 787, 238 P. 291, 292 (1925) (quoting *Rohrer v. Darrow,* 66 Colo. 463, 182 P. 13, 15 (1919)).

This Court recognizes the individual's interest in the right to contract, and in *Fleming v. Bithell* we held that a summary civil commitment proceeding, as then conducted, was "not a conclusive judicial determination of sanity or insanity, capacity or incapacity." 56 Idaho 261, 266, 52 P.2d 1099, 1101 (1935). Jason asserts that the policy considerations set forth in *Fleming* also apply in the context of proceedings for the appointment of a guardian, i.e., that guardianship proceedings are not conclusive judicial determinations of incapacity, because they are also short and often uncontested.

[7] However, guardianship proceedings fall directly within the scope of those the legislature intended to be conclusive judicial determinations of incapacity. The magistrate judges handling probate matters have jurisdiction over incapacitated persons, I.C. § 15–1–301(3), and the general definitions of the Uniform Probate Code expressly refer to the guardianship provisions to define "incapacitated **790 *739 person," I.C. § 15–1–201(23) (" 'Incapacitated person' " is as defined in section 15–5–101, Idaho Code.). In a guardianship proceeding, the trial court assesses whether an individual's acts and statements during the twelve preceding months strongly indicate the inability to maintain his or her self or property. I.C. § 15–5–101(a). If the individual has some ability to care for himself or herself, the court may craft a guardianship that corresponds with his or her capacity in a manner that "permit[s] [the] incapacitated person[ ] to participate as fully as possible in all decisions affecting them ... [through] the form of guardianship that least interferes with legal capacity of a person to act in his own behalf." I.C. § 15–5–303(a). Thus, the court should "make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure." I.C. § 15–5–304(a). This "limited guardianship" is accomplished by noting limitations within the letters of guardianship. I.C. § 15–5–304(c). Since the court is not only vested with this ability to limit a guardian's role, but is also charged with the responsibility "to encourage the development of maximum self-reliance and independence of the incapacitated person," I.C. § 15–5–304(a), a finding that one is incapacitated and a grant of unrestricted guardianship powers represents a finding that the ward lacks all capacity to make decisions and take actions that protect his or her well-being. Thus, we conclude that the appointment of a guardian with full powers represents a finding that the ward lacks the capacity to contract as a matter of law.

[8] Jason urges this Court to overrule *Miles v. Johanson* by holding that contracts of a person adjudicated incompetent are merely voidable, a position he supports with the assertion that upholding contracts that benefit an incapacitated person is in line with the protective purpose of Idaho Code §§ 32–106 through 32–108. As noted above, statutory construction is a question of law over which this Court exercises free review. *Yager,* 139 Idaho at 689, 85 P.3d at 665. Statutes are interpreted according

to their plain and express meaning, and when they are unambiguous this Court gives effect to the legislature's clearly expressed intent. *Kootenai Hosp. Dist. v. Bonner Cnty. Bd. of Comm'rs,* 149 Idaho 290, 293, 233 P.3d 1212, 1215 (2010) (citing *St. Luke's Reg'l Med. Ctr., Ltd. v. Bd. of Comm'rs of Ada Cnty.,* 146 Idaho 753, 755, 203 P.3d 683, 685 (2009)).

[9] [10] This Court may not ignore or amend unambiguous statutes; rather, policy arguments for altering unambiguous statutes must be advanced before the legislature. Idaho Const., art. III, § 1; *Farber v. Idaho State Ins. Fund,* 147 Idaho 307, 313, 208 P.3d 289, 295 (2009). Further, where this Court has previously interpreted a statute, "the rule of stare decisis dictates that we follow [controlling precedent], unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *Houghland Farms, Inc. v. Johnson,* 119 Idaho 72, 77, 803 P.2d 978, 983 (1990). Since the plain language of Idaho Code § 32–108 is unambiguous and Jason has failed to demonstrate that the *Miles* holding is unjust or manifestly wrong, this Court must give effect to the legislature's clearly expressed intent. According to the plain language of Idaho Code § 32–108, an adjudication that one is incapacitated is a determination that one lacks the capacity to contract as a matter of law. Thus, agreements entered into by such a person do not give rise to enforceable contracts, and the district court properly granted HLIC's motion for summary judgment.

B. HLIC is not entitled to attorney fees on appeal because it failed to cite the specific subsection of Idaho Code entitling it to an award of fees.

[11] HLIC requests an award of attorney fees on appeal under Idaho Code § 41–1839, asserting that Jason's claims were pursued without any foundation in the law because of the plain language of I.C. § 32–108 and longstanding Idaho precedent. A court may award attorney fees in any action involving a dispute arising from an insurance policy if it finds "that a case was brought, pursued or defended frivolously, unreasonably or without foundation." I.C. § 41–1839(4). Although Jason's claims may be supported to some extent by modern policy considerations that would be properly presented to the legislature, **791 *740 the existing statutory and case law on this issue has long been established. It thus would appear that an award to HLIC of fees is appropriate.

[12] However, if a party claims "a statute provides authority for an award of attorney fees, the party must cite to the statute and, if applicable, the specific subsection of the statute upon which the party relies." *Bream v. Benscoter,* 139 Idaho 364, 369, 79 P.3d 723, 728 (2003) (citing *Appel v. LePage,* 135 Idaho 133, 138, 15 P.3d 1141, 1146 (2000)). HLIC failed to cite the specific subsection of Idaho Code § 41–1839 under which it believed itself entitled to an award of attorney fees and costs, and thus is not entitled to an award thereof.

IV. CONCLUSION

We affirm the district court's order granting HLIC's motion for summary judgment and dismissing Jason Rogers' claims, and deny HLIC's request for attorney fees. Costs to respondent.

Chief Justice EISMANN and Justices BURDICK, J. JONES and W. JONES concur.

All Citations

150 Idaho 735, 250 P.3d 786

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ETHICAL CONSIDERATIONS IN DEVELOPMENTAL DISABILITY AND THE IDAHO RULES OF PROFESSIONAL CONDUCT

The following is a very brief outline of some of the Rules that may be involved in representation of a client who has a Developmental Disability. I have included only the bare minimum portion of the Rule and no Comments when possible.

1. Rule 1.1 Competence.

> RULE 1.1: COMPETENCE A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill,thoroughness and preparation reasonably necessary for the representation.

Any attorney dealing with incapacity had better fully understand the ramifications of *Rogers* and *Conway*, and of conservatorship and guardianship generally, including the alternatives available and mandated. Further, the attorney should be very familiar with the recent updates in the statutes, including both House Bill 148 and Senate Bill 10190 (both attached). And, given the severe consequences of a general guardianship after *Rogers*, the attorney should be equipped and ready to analyze whether a limited or general guardianship should be sought, or any formal proceeding at all, and what are appropriate limitations.

2. Rule 1.2 Scope of Representation.

> RULE 1.2: SCOPE OF REPRESENTATION (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

When can you “abide by a client’s decisions” and consult with the client about pursuing those decisions in the context of a C&G proceeding? The statutes, both for Developmental Disaiblity and for probate code proceedings, makes it clear, at least to me, that a person for whom a proceeding has been brought has the right to counsel and this counsel is not only the Guardian ad Litem. When does your attorney-client relationship cease? If incapacity removes the ability of the attorney to communicate with the client, does the representation cease? Can you enter an appearance as attorney of record for the client in the appointment procedures and does that depend on the nature of your prior representation and fee agreements, written or oral or established by conduct?

3. Rule 1.4 Communication.

> RULE 1.4: COMMUNICATION (a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter;

You must consult with the client about any relevant limitation on the lawyer’s conduct not permitted by the Rules of Professional Conduct or by “other law”. Further you must “keep the client reasonably informed about the status of the matter.” What happens upon temporary or permanent

appointment of a guardian or conservator? Do you have a duty to inform the client that you cannot proceed or that you cannot consult with him or her? Or is that appointment irrelevant to your status as attorney for the client? Can you inform the client or consult with the client about the effect of changing a general appointment to a limited appointment? Can you continue with estate planning and so inform the client? What effect does *Rogers* have on this

4. Rule 1.14 Client with Diminished Capacity.

> RULE 1.14: CLIENT WITH DIMINISHED CAPACITY (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal clientlawyer relationship with the client. (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.
>
> Commentary. [1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.
>
> [2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

This is the prime Rule in dealing with clients who have any diagnosis that may, and I stress the may, indicate diminished capacity. A diagnosis of developmental disability does not automatically mean diminished capacity. In fact many of the spectrum of conditions that are labeled as a developmental disability have no effect on capacity. The attorney must be ready to take whatever steps are necessary to determine whether the client has capacity and not make assumptions either way. Often, a discussion with the client, properly done, can accomplish that. You must be careful not to just ask questions that can be answered “yes-no”. Make the client come up with narrative answers that require an appreciation of the issues involved and an understanding of the basic concepts. Some clients become very good at what I call “cocktail party talk” – you can’t understand or even hear a word the other person is saying, but you have learned how to nod and make non-

committal sounds of affirmation at the appropriate times. But don't expect the client to have a lawyer's appreciation of the complexities of the legal process. And remember that capacity is measured differently for different types of matters – estate planning is pretty low, while entering into complex financial transactions (e.g. negotiating a complex sale or purchase of a business) is much higher.

A temporary appointment of a guardian or conservator made without hearing is not a finding that the person has diminished capacity. Due process requires a hearing and notice before any such determination can be made. And remember that the fundamental purpose of appointment of a guardian or conservator is to protect the person when they might otherwise be damaged. Some people with full capacity have an inability to say no to a family member, or a friend, who will bleed them dry, but otherwise can make rational decisions. I have been involved in such cases. Additionally, as I have testified before two US Senate Committees and multiple times in the Idaho legislature, we have the right to be eccentric and occasionally stupid. End of soap box.

You can, in theory, under this Rule,essentially trigger the appointment of a conservator or guardian for your client. Given *Rogers* and your duty to protect your client, what is your duty to attempt to keep the appointment limited if possible? How do you effectively do that? Does that mandate attempting to appear as attorney of record for the client in the appointment proceedings even if a Guardian ad Litem is appointed? Or should you be the Guardian ad Litem? Should you attempt to create trusts, powers, and so forth to avoid having an appointment made to the extent the client still has capacity to do so? Commentary 8 to this Rule talks about disclosure that could "adversely affect the client's interests." A general appointment certainly could be described as potentially adversely affecting the client's interests, and the Rule may require that the attorney, pursuant to Commentary 8, "at the very least," determine whether the outside person or entity will act adversely to the client's interests.

LEGISLATURE OF THE STATE OF IDAHO
Sixty-fourth Legislature First Regular Session - 2017

IN THE SENATE

SENATE BILL NO. 1090

BY JUDICIARY AND RULES COMMITTEE

AN ACT

RELATING TO HEALTH CARE; AMENDING SECTION 39-4503, IDAHO CODE, TO REVISE PROVISIONS REGARDING PERSONS WHO MAY CONSENT TO THEIR OWN HEALTH CARE; AMENDING SECTION 39-4511A, IDAHO CODE, TO REVISE PROVISIONS REGARDING REVOCATION OF AN ADVANCE DIRECTIVE; AMENDING SECTION 39-4511B, IDAHO CODE, TO REVISE PROVISIONS REGARDING SUSPENSION OF AN ADVANCE DIRECTIVE; AMENDING SECTION 39-4514, IDAHO CODE, TO REVISE PROVISIONS REGARDING PRESUMED CONSENT TO RESUSCITATION AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 66-402, IDAHO CODE, TO REVISE DEFINITIONS; AND AMENDING SECTION 66-405, IDAHO CODE, TO REVISE PROVISIONS REGARDING ORDER IN PROTECTIVE PROCEEDINGS FOR CERTAIN DEVELOPMENTALLY DISABLED PERSONS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 39-4503, Idaho Code, be, and the same is hereby amended to read as follows:

39-4503. PERSONS WHO MAY CONSENT TO THEIR OWN CARE. Any person, including one who is developmentally disabled and not a respondent as defined in section 66-402, Idaho Code, who comprehends the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental, surgical or other health care, treatment or procedure is competent to consent thereto on his or her own behalf. Any health care provider may provide such health care and services in reliance upon such a consent if the consenting person appears to the health care provider securing the consent to possess such requisite comprehension at the time of giving the consent.

SECTION 2. That Section 39-4511A, Idaho Code, be, and the same is hereby amended to read as follows:

39-4511A. REVOCATION OF ADVANCE DIRECTIVE. (1) A living will and durable power of attorney for health care or physician orders for scope of treatment (POST) form or other ~~similar~~ advance directive may be revoked at any time by the maker thereof by any of the following methods:

(a) By being intentionally canceled, defaced, obliterated or burned, torn, or otherwise destroyed by the maker thereof, or by some person in his presence and by his direction;

(b) By a written, signed revocation of the maker thereof expressing his intent to revoke; ~~or~~

(c) By an oral expression by the maker thereof expressing his intent to revoke; or

(d) By any other action that clearly manifests the maker's intent to revoke the advance directive.

(2) The maker of the revoked ~~living will and durable power of attorney for health care~~ advance directive is responsible for notifying his health care provider of the revocation. A health care provider who does not have actual knowledge of the revocation is entitled to rely on an otherwise apparently valid advance directive as though it had not been revoked.

(3) There shall be no criminal or civil liability on the part of any person for the failure to act upon a revocation of a living will and durable power of attorney for health care, physician orders for scope of treatment (POST) form or other advance directive made pursuant to this chapter unless that person has actual knowledge of the revocation.

SECTION 3. That Section 39-4511B, Idaho Code, be, and the same is hereby amended to read as follows:

39-4511B. SUSPENSION OF ADVANCE DIRECTIVE. (1) A living will and durable power of attorney for health care, physician orders for scope of treatment (POST) form or other ~~similar~~ advance directive may be suspended at any time by the maker thereof by any of the following methods:

(a) By a written, signed suspension by the maker thereof expressing his intent to suspend; ~~or~~

(b) By an oral expression by the maker thereof expressing his intent to suspend; or

(c) By any other action that clearly manifests the maker's intent to suspend the advance directive.

(2) A health care provider who does not have actual knowledge of the suspension is entitled to rely on an otherwise apparently valid advance directive as though it had not been suspended.

(3) Upon meeting the termination terms of the suspension, as defined by the written or oral expression by the maker, the conditions set forth in the living will and durable power of attorney, physician orders for scope of treatment (POST) or other ~~similar~~ advance directive will resume.

SECTION 4. That Section 39-4514, Idaho Code, be, and the same is hereby amended to read as follows:

39-4514. GENERAL PROVISIONS. (1) Application. Except as specifically provided herein, sections 39-4510 through 39-4512B, Idaho Code, shall have no effect or be in any manner construed to apply to persons not executing a living will and durable power of attorney for health care, POST form or other health care directive pursuant to this chapter nor shall these sections in any manner affect the rights of any such persons or of others acting for or on behalf of such persons to give or refuse to give consent or withhold consent for any medical care; neither shall sections 39-4510 through 39-4512B, Idaho Code, be construed to affect chapter 3 or chapter 4, title 66, Idaho Code, in any manner.

(2) Euthanasia, mercy killing, or assisted suicide. This chapter does not make legal, and in no way condones, euthanasia, mercy killing, or assisted suicide or permit an affirmative or deliberate act or omission to end life, including any act or omission described in section 18-4017, Idaho Code, other than to allow the natural process of dying.

(3) Withdrawal of care. Assisted feeding or artificial nutrition and hydration may not be withdrawn or denied if its provision is directed by a competent patient in accordance with section 39-4503, Idaho Code, by a patient's health care directive under section 39-4510, Idaho Code, or by a patient's surrogate decision-maker in accordance with section 39-4504, Idaho Code. Health care necessary to sustain life or to provide appropriate comfort for a patient other than assisted feeding or artificial nutrition and hydration may not be withdrawn or denied if its provision is directed by a competent patient in accordance with section 39-4503, Idaho Code, by a patient's health care directive under section 39-4510, Idaho Code, or by a patient's surrogated decision-maker in accordance with section 39-4504, Idaho Code, unless such care would be futile care as defined in subsection (6) of this section. Except as specifically provided in chapters 3 and 4, title 66, Idaho Code, health care, assisted feeding or artificial nutrition and hydration, the denial of which is directed by a competent patient in accordance with section 39-4503, Idaho Code, by a patient's health care directive under section 39-4510, Idaho Code, or by a patient's surrogate decision-maker in accordance with section 39-4504, Idaho Code, shall be withdrawn and denied in accordance with a valid directive. This subsection does not require provision of treatment to a patient if it would require denial of the same or similar treatment to another patient.

(4) Comfort care. Persons caring for a person for whom artificial life-sustaining procedures or artificially administered nutrition and hydration are withheld or withdrawn shall provide comfort care as defined in section 39-4502, Idaho Code.

(5) Presumed consent to resuscitation. There is a presumption in favor of consent to cardiopulmonary resuscitation (CPR) unless:

(a) ~~A completed durable power of attorney for health care or living will for that person is in effect, pursuant to section 39-4510, Idaho Code, in which the person has stated that he or she does not wish to receive cardiopulmonary resuscitation, and any terms set forth in the durable power of attorney for health care or living will upon which such statement is conditioned have been met; or~~ CPR is contrary to the person's advance directive and/or POST;

(b) The person's surrogate decision-maker has communicated the person's unconditional wishes not to receive CPR;

(c) The person's surrogate decision-maker has communicated the person's conditional wishes not to receive ~~cardiopulmonary resuscitation~~ CPR and ~~any terms on which the wishes not to receive cardiopulmonary resuscitation are conditioned~~ those conditions have been met; ~~or~~

(~~e~~d) The person has a ~~physician orders for scope of treatment (POST) form that meets the requirements of section 39-4512A, Idaho Code, stating that the person does not wish to receive cardiopulmonary resuscitation and any terms on which the statement is conditioned have been met and/or has a~~ proper POST identification device pursuant to section 39-4502(15), Idaho Code; or

(e) The attending health care provider has executed a DNR order consistent with the person's prior expressed wishes or the directives of the legally authorized surrogate decision-maker.

(6) Futile care. Nothing in this chapter shall be construed to require medical treatment that is medically inappropriate or futile; provided that this subsection does not authorize any violation of subsection (3) of this section. Futile care does not include comfort care. Futile care is a course of treatment:

(a) For a patient with a terminal condition for whom, in reasonable medical judgment, death is imminent within hours or at most a few days whether or not the medical treatment is provided and that, in reasonable medical judgment, will not improve the patient's condition; or

(b) The denial of which in reasonable medical judgment will not result in or hasten the patient's death.

(7) Existing directives and directives from other states. A health care directive executed prior to July 1, 2012, but which was in the living will, durable power of attorney for health care, DNR, or POST form pursuant to prior Idaho law at the time of execution, or in another form that contained the elements set forth in this chapter at the time of execution, shall be deemed to be in compliance with this chapter. Health care directives or similar documents executed in another state that substantially comply with this chapter shall be deemed to be in compliance with this chapter. This section shall be liberally construed to give the effect to any authentic expression of the person's prior wishes or directives concerning his or her health care.

(8) Insurance.

(a) The making of a living will and/or durable power of attorney for health care, physician orders for scope of treatment (POST) form, or DNR order pursuant to this chapter shall not restrict, inhibit or impair in any manner the sale, procurement or issuance of any policy of life insurance, nor shall it be deemed to modify the terms of an existing policy of life insurance. No policy of life insurance shall be legally impaired or invalidated in any manner by the withholding or withdrawal of artificial life-sustaining procedures from an insured person, notwithstanding any term of the policy to the contrary.

(b) No physician, health care facility or other health care provider and no health care service plan, insurer issuing disability insurance, self-insured employee plan, welfare benefit plan or nonprofit hospital service plan shall require any person to execute a living will and durable power of attorney for health care or physician orders for scope of treatment (POST) form, or DNR order as a condition for being insured for, or receiving, health care services.

(9) Portability and copies.

(a) A physician orders for scope of treatment (POST) form that meets the requirements of section 39-4512A, Idaho Code, shall be transferred with the person to, and be effective in, all care settings including, but not limited to, home care, ambulance or other transport, hospital, residential care facility, and hospice care. The POST form shall remain in effect until such time as there is a valid revocation pursuant to section 39-4511A, Idaho Code, or new orders are issued by a physician, APPN or PA.

(b) A photostatic, facsimile or electronic copy of a valid physician orders for scope of treatment (POST) form may be treated as an original

by a health care provider or by an institution receiving or treating a person.

(10) Registration. A directive or the revocation of a directive meeting the requirements of this chapter may be registered with the secretary of state pursuant to section 39-4515, Idaho Code. Failure to register the health care directive shall not affect the validity of the health care directive.

(11) Rulemaking authority.

(a) The department of health and welfare shall adopt those rules and protocols necessary to administer the provisions of this chapter.

(b) In the adoption of a physician orders for scope of treatment (POST) or DNR protocol, the department shall adopt standardized POST identification devices to be used statewide.

SECTION 5. That Section 66-402, Idaho Code, be, and the same is hereby amended to read as follows:

66-402. DEFINITIONS. As used in this chapter:

(1) "Adult" means an individual eighteen (18) years of age or older.

(2) "Artificial life-sustaining procedures" means any medical procedure or intervention which utilizes mechanical means to sustain or supplant a vital function. Artificial life-sustaining procedures shall not include the administration of medication, and it shall not include the performance of any medical procedure deemed necessary to alleviate pain, or any procedure which could be expected to result in the recovery or long-term survival of the patient and his restoration to consciousness.

(3) "Department" means the Idaho department of health and welfare.

(4) "Director" means the director of the department of health and welfare.

(5) "Developmental disability" means a chronic disability of a person which appears before the age of twenty-two (22) years of age and:

(a) Is attributable to an impairment, such as intellectual disability, cerebral palsy, epilepsy, autism or other condition found to be closely related to or similar to one (1) of these impairments that requires similar treatment or services, or is attributable to dyslexia resulting from such impairments; and

(b) Results in substantial functional limitations in three (3) or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency; and

(c) Reflects the need for a combination and sequence of special, interdisciplinary or generic care, treatment or other services which are of lifelong or extended duration and individually planned and coordinated.

(6) "Emancipated minor" means an individual between fourteen (14) and eighteen (18) years of age who has been married or whose circumstances indicate that the parent-child relationship has been renounced.

(7) "Evaluation committee" means an interdisciplinary team of at least three (3) individuals designated by the director or his designee to evaluate an individual as required by the provisions of this chapter. Each committee must include a physician licensed to practice medicine in the state of Idaho,

a licensed social worker and a clinical psychologist or such other individual who has a master's degree in psychology as designated by the department director. Each committee member must be specially qualified by training and experience in the diagnosis and treatment of persons with a developmental disability.

(8) "Facility" means the southwest Idaho treatment center, a nursing facility, an intermediate care facility, an intermediate care facility for people with intellectual disabilities, a licensed residential or assisted living facility, a group foster home, other organizations licensed to provide twenty-four (24) hour care, treatment and training to the developmentally disabled, a mental health center, or an adult and child development center.

(9) "Lacks capacity to make informed decisions" means the inability, by reason of developmental disability, to achieve a rudimentary understanding of the purpose, nature, and possible risks and benefits of a decision, after conscientious efforts at explanation, but shall not be evidenced by improvident decisions within the discretion allowed nondevelopmentally disabled individuals.

(10) "Licensed independent practitioner" or "LIP" means:

(a) A licensed physician or physician assistant pursuant to section 54-1803, Idaho Code; or

(b) A licensed advance practice registered nurse pursuant to section 54-1402, Idaho Code.

(11) "Likely to injure himself or others" means:

(a) A substantial risk that physical harm will be inflicted by the respondent upon his own person as evidenced by threats or attempts to commit suicide or inflict physical harm on himself; or

(b) A substantial risk that physical harm will be inflicted by the respondent upon another as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm; or

(c) That the respondent is unable to meet essential requirements for physical health or safety.

(1~~1~~2) "Manage financial resources" means the actions necessary to obtain, administer and dispose of real, personal, intangible or business property, benefits and/or income.

(1~~2~~3) "Meet essential requirements for physical health or safety" means the actions necessary to provide health care, food, clothing, shelter, personal hygiene and/or other care without which serious physical injury or illness would occur.

(1~~3~~4) "Minor" means an individual ~~seventeen (17) years of~~ under age ~~or less~~ eighteen (18) years.

(1~~4~~5) "Protection and advocacy system" means the agency designated by the governor of the state of Idaho to provide advocacy services for people with disabilities pursuant to 42 U.S.C. section 6042.

(1~~5~~6) "Respondent" means the individual subject to judicial proceedings authorized by the provisions of this chapter.

SECTION 6. That Section 66-405, Idaho Code, be, and the same is hereby amended to read as follows:

66-405. ORDER IN PROTECTIVE PROCEEDINGS. (1) If it is determined that the respondent does not have a developmental disability but appears in need of protective services, the court may cause the proceeding to be expanded or altered for consideration under the uniform probate code.

(2) If it is determined that the respondent is able to manage financial resources and meet essential requirements for physical health or safety, the court shall dismiss the petition.

(3) If it is determined that the respondent has a developmental disability and is unable to manage some financial resources or meet some essential requirements for physical health or safety, the court may appoint a partial guardian and/or partial conservator on behalf of the respondent. An order establishing partial guardianship or partial conservatorship shall define the powers and duties of the partial guardian or partial conservator so as to permit the respondent to meet essential requirements for physical health or safety and to manage financial resources commensurate with his ability to do so, and shall specify all legal restrictions to which he is subject. A ~~person~~ respondent for whom a partial guardianship or partial conservatorship has been appointed under this chapter retains all legal and civil rights except those which have by court order been limited or which have been specifically granted to the partial guardian or partial conservator by the court.

(4) If it is determined that the respondent has a developmental disability and is unable to manage financial resources or meet essential requirements for physical health or safety even with the appointment of a partial guardian or partial conservator, the court may appoint a total guardian and/or total conservator.

(5) In the event that more than one (1) person seeks to be appointed guardian and/or conservator, the court shall appoint the person or persons most capable of serving on behalf of the respondent; the court shall not customarily or ordinarily appoint the department or any other organization or individual, public or private, that is or is likely to be providing services to the respondent. If an appointment of a guardian is made by will pursuant to section 15-5-301, Idaho Code, such appointment shall be entitled to preference as the guardian under this chapter, if the person so appointed by will is capable of serving on behalf of the respondent and the court finds that it is not in the best interests of the respondent to appoint a different person as guardian.

(6) Subject to the limitations of the provisions of subsection (7) of this section, guardians or conservators may have any of the duties and powers as provided in sections 15-5-312(1)(a) through (d), 15-5-424 and 15-5-425, Idaho Code, and as specified in the order. A guardian shall be required to report to the court at least annually on the status of the ~~person with a developmental disability~~ respondent. A conservator shall be required to file with the court an inventory within ninety (90) days of appointment, an accounting at least annually, and a final accounting at the termination of the appointment of the conservator. All required inventories, accountings and reports shall be under oath or affirmation and shall comply with the Idaho supreme court rules. The court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the court may specify.

(7) Except as otherwise provided in subsection (8) of this section, n~~N~~o guardian appointed under this chapter shall have the authority to refuse or withhold consent for medically necessary treatment when the effect of withholding such treatment would seriously endanger the life or health and well-being of the ~~person with a developmental disability~~ respondent. To withhold or attempt to withhold such treatment ~~shall constitute neglect of the person and~~ may be cause for removal of the guardian. ~~No physician~~ Except as otherwise provided in subsection (8) of this section, no health care provider or caregiver shall, based on such guardian's direction or refusal to consent to care, withhold or withdraw such treatment for a respondent ~~whose condition is not terminal or whose death is not imminent~~. If the ~~physician or caregiver~~ health care provider cannot obtain valid consent for medically necessary treatment from the guardian, ~~he~~ the health care provider or caregiver shall provide the medically necessary treatment as authorized by section 39-4504(1)(i), Idaho Code.

(8) ~~A~~ Notwithstanding the provisions of subsection (7) of this section, a guardian appointed under this chapter may consent to withholding or ~~withdrawal of artificial life-sustaining procedures, only if the respondent~~ withdrawing treatment other than appropriate nutrition or hydration to a respondent, and a health care provider may withhold or withdraw such treatment in reliance upon such consent, when in the treating LIP's reasonable medical judgment any of the following circumstances apply:

(a) ~~Has an incurable injury, disease, illness or condition, certified by the respondent's attending physician and at least one (1) other physician to be terminal such that the application of artificial life-sustaining procedures would not result in the possibility of saving or significantly prolonging the life of the respondent, and would only serve to prolong the moment of the respondent's death for a period of hours, days or weeks, and where both physicians certify that death is imminent, whether or not the life-sustaining procedures are used; or~~ The attending LIP and at least one (1) other LIP certifies that the respondent is chronically and irreversibly comatose;

(b) ~~Has been diagnosed by the respondent's attending physician and at least one (1) other physician as being in a persistent vegetative state which is irreversible and from which the respondent will never regain consciousness~~ The provision of such treatment would merely prolong dying, would not be effective in ameliorating or correcting all of the respondent's life-threatening conditions, or would otherwise be futile in terms of the survival of the respondent; or

(c) The provision of such treatment would be virtually futile in terms of the survival of the respondent and the treatment itself would be inhumane under such circumstances.

(9) Any person who has information that medically necessary treatment of a respondent has been withheld or withdrawn in violation of this section may report such information to adult protective services or to the Idaho protection and advocacy system for people with developmental disabilities, which shall have the authority to investigate the report and in appropriate cases to seek a court order to ensure that medically necessary treatment is provided.

If adult protective services or the protection and advocacy system determines that withholding of medical treatment violates the provisions of this section, they may petition the court for an ex parte order to provide or continue the medical treatment in question. If the court finds, based on affidavits or other evidence, that there is probable cause to believe that the withholding of medical treatment in a particular case violates the provisions of this section, and that the life or health of the patient is endangered thereby, the court shall issue an ex parte order to continue or to provide the treatment until such time as the court can hear evidence from the parties involved. Petitions for court orders under this section shall be expedited by the courts and heard as soon as possible. No bond shall be required of a petitioner under this section.

(10) No partial or total guardian or partial or total conservator appointed under the provisions of this section may without specific approval of the court in a proceeding separate from that in which such guardian or conservator was appointed:

(a) Consent to medical or surgical treatment the effect of which permanently prohibits the conception of children by the respondent unless the treatment or procedures are necessary to protect the physical health of the respondent and would be prescribed for a person who does not have a developmental disability;

(b) Consent to experimental surgery, procedures or medications; or

(c) Delegate the powers granted by the order.

(11) Nothing in this section shall affect the rights of a competent patient or surrogate decision-maker to withhold or withdraw treatment pursuant to section 39-4514, Idaho Code, unless the patient is a respondent as defined in section 66-402, Idaho Code.