

2004 WL 4908344 (Alaska) (Appellate Brief)  
Supreme Court of Alaska.

Susan TRAPP, Appellant,  
v.  
State of Alaska, Office of Public Advocacy, Appellee.

No. S-11280.  
April 13, 2004.

Superior Court No. 3AN-00-06545 CI  
Appeal From the Superior Court, Third Judicial District At  
Anchorage, the Honorable Peter A. Michalski, Presiding

**Brief of Appellee State of Alaska Office of Public Advocacy**

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**Article 3. GUARDIANS OF INCAPACITATED PERSONS**

**AS 13.26.090. Purpose and basis for guardianship.**

Guardianship for an incapacitated person shall be used only as is necessary to promote and protect the well-being of the person, shall be designed to encourage the development of maximum self-reliance and independence of the person, and shall be ordered only to the extent necessitated by the person's actual mental and physical limitations. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been specifically granted to the guardian by the court.

**AS 13.26.095. Testamentary appointment of guardian for incapacitated person.**

(a) The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. A testamentary appointment by a parent becomes effective when, after having given seven days' prior written notice of intention to do so to the incapacitated person and to the person having care of the incapacitated person or to the incapacitated person's nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated, if, prior thereto, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

(b) The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. The appointment becomes effective when, after having given seven days' prior written notice of intention to do so to the incapacitated person and to the person having care of the incapacitated person or to the incapacitated person's nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated. An effective appointment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.

\*vi (c) This state recognizes a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.

(d) On the filing with the court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under [AS 13.26.100 - 13.26.155](#).

(e) A testamentary appointment of a guardian by the parent of an incapacitated person, or by the spouse of a married incapacitated person, may grant all guardianship powers and duties that the deceased parent or spouse held, subject to modification by the court under [AS 13.26.125](#).

**AS 13.26.100. Venue.**

The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution under order of a court of competent jurisdiction, venue is also in the judicial district in which that court sits.

**AS 13.26.105. Petition.**

(a) Any person may petition the court for a finding of incapacity and the appointment of a guardian for oneself or for another person.

(b) The petition for appointment of a guardian must state

- (1) the name, age, and address of the petitioner and any relationship to the respondent;
- (2) the name, age, and present address of the respondent;
- (3) the name and address of the person or facility presently having care, custody, guardianship, or conservatorship of the respondent, if any, and the existence of any other restrictions on the legal capacity of the respondent to act in the respondent's own behalf;
- (4) the nature and degree of the alleged incapacity;
- \*vii (5) the particular type and duration of appointment and the protection and assistance being sought;
- (6) the names and addresses, unless they are unknown and cannot reasonably be ascertained, of the individuals most closely related to the respondent by blood or marriage;
- (7) the facts supporting the allegations of incapacity and the need for appointment of a guardian;
- (8) the names and addresses of persons known to the petitioner who have knowledge that might prove helpful in determining the capacity and needs of the respondent.

(c) The petition may also nominate a guardian and include a request for temporary guardianship as provided in [AS 13.26.140](#) if the petitioner believes there is an imminent danger that the physical health or safety of the respondent will be seriously impaired during the pendency of the guardianship proceeding. A request for temporary guardianship must specify facts that cause the petitioner to believe that a temporary guardian is necessary.

(d) If the petition seeks the appointment of a guardian for an incapacitated person who is a veteran or a minor entitled to the payment of money from the United States Department of Veterans Affairs, the petitioner shall give notice of the petition to the United States Department of Veterans Affairs.

**[AS 13.26.106. Initial court procedures.](#)**

(a) Upon the filing of a petition, the court shall schedule a hearing on the issue of incapacity. The hearing shall be conducted within 120 days from the filing of the petition unless the court postpones the hearing for cause.

(b) The respondent is entitled to be represented by an attorney in the proceedings. If the respondent is financially unable to employ an attorney, the court shall appoint the office of public advocacy ([AS 44.21.400](#)) under [AS 13.26.131](#) to represent the respondent in the proceedings.

(c) The court shall appoint a visitor. The visitor shall arrange for evaluations to be performed and prepare a written report to be filed with the court. The court shall also appoint an expert who has expertise in regard to the alleged or admitted incapacity to investigate the issue of incapacity. The visitor shall interview the respondent and the person seeking \*viii appointment as guardian, if any. The visitor shall conduct the interviews and investigations necessary to prepare the report and shall arrange for the respondent to be examined by the expert appointed under this section. The expert's written report shall be attached to the visitor's report. Interviews and examinations shall take place in the respondent's usual residence unless

- (1) the respondent consents to being examined or interviewed in a medical or mental health facility; or
- (2) the visitor considers it necessary to conduct interviews or examinations in a medical or mental health facility.

(d) Appointment of the visitor and the expert under (c) of this section shall be made through the office of public advocacy (AS 44.21.400) under AS 13.26.131

**AS 13.26.107. Notice of rights of respondent.**

(a) Upon appointment, the visitor shall promptly

(1) explain to the respondent, in a language or communication system the respondent can understand, the purpose of the interview and possible consequences of the proceedings;

(2) serve a copy of the petition on the respondent in accordance with the procedure described in AS 13.06.110 ;

(3) explain and provide to the respondent a written statement of the following rights:

(A) the respondent may communicate with an attorney or an expert in the field of the alleged incapacity before proceeding with the interview;

(B) if the respondent does not have an attorney, an attorney, whose name, address, and telephone number shall be included in the statement, will be designated to advise and represent the respondent before and at any judicial hearings, and the attorney may arrange for an examination and consultation with an expert; and

(C) the respondent may, instead, employ an attorney or expert of the respondent's own choice; and

**\*ix** (4) offer assistance to the respondent in contacting an attorney.

(b) A substantive interview of the respondent or other investigation may not be conducted until the provisions of (a) of this section are satisfied.

**AS 13.26.108. Visitor's report.**

(a) The visitor shall file with the court an evaluation report, proof of service of the petition upon the respondent, and proof of service of the report upon the respondent, the respondent's attorney, and the petitioner, within 90 days after the date on which the petition was filed.

(b) The visitor shall, as part of the evaluation report, explain alternatives to guardianship and recommend any that will safeguard the respondent's essential requirements for physical health and safety. The evaluation report may recommend personal guardianship only if the visitor determines that the needs of the respondent cannot be met by other alternatives.

(c) The evaluation report must include

(1) the results and analyses of medical and other tests and examinations performed that describe the respondent's mental, emotional, physical, and educational condition, adaptive behavior and social skills, and that specify the data on which the description is based;

(2) recommendations regarding the types and extent of assistance, if any, necessary to meet the essential requirements for the physical health and safety of the respondent;

(3) an evaluation of the respondent's need for mental health treatment and whether there is a substantial probability that available treatment will significantly improve the respondent's mental condition;

(4) an evaluation of the respondent's need for educational or vocational assistance or personal care and whether these can be made available to the respondent;

(5) an evaluation of the probability that the incapacity may significantly lessen, and the type of services or treatment that will facilitate improvement in the respondent's condition or skills;

\*x (6) a list of the names and addresses of all individuals who examined, interviewed, or investigated the respondent and of the names and addresses of all persons contacted in preparation of the report;

(7) a summary of the information that

(A) was supplied by the person described in (6) of this subsection; and

(B) supports the conclusions of the report;

(8) a description of the alternatives to guardianship that were considered and not recommended and an explanation of why they are not feasible to meet the respondent's needs;

(9) a description of the present home and living arrangement of the respondent and of any other proposed placement and a recommendation for the respondent's living arrangement that provides the least restrictive setting necessary to protect the respondent from serious illness, injury, or disease; and

(10) a specification of the financial resources of the respondent, the respondent's entitlements to insurance benefits, and publicly operated or sponsored health, mental health, and welfare assistance that might be employed in the provision of services to the respondent.

(d) If personal guardianship is recommended, the evaluation report required under this section must include a guardianship outline that identifies -

(1) potential guardians;

(2) the specific services necessary and available to protect the respondent from serious injury, illness, or disease and, to the extent possible, to return the respondent to full capacity in handling the respondent's own affairs;

(3) the means by which the services described in (2) of this subsection may be financed;

(4) the specific, least restrictive authority needed by the guardian to provide the services described in (2) of this subsection.

\*xi (e) The petitioner and the respondent may file responses to the evaluation report within 10 days of receiving it. The court may grant additional time if requested for cause.

**AS 13.26.109. Evaluations: Right to remain silent; respondent's attorney or expert.**

(a) A ward or respondent has the right to refuse to respond to questions in the course of examinations and evaluations. However, the ward or respondent may be required to submit to interviews for the purpose of ascertaining whether the ward or respondent lacks the capacity to make informed decisions about care and treatment services.

(b) Statements of a ward or respondent in the course of evaluations, examinations, and treatment under [AS 13.26.090 - 13.26.155](#) are privileged, confidential, and not admissible without the ward's or respondent's consent in any civil or criminal proceeding other than proceedings under [AS 13.26.090 - 13.26.155](#). A ward or respondent at all times has the right to refuse to answer questions if the answers may tend to incriminate the ward or respondent.

(c) During an interview or a testing conducted under [AS 13.26.090 - 13.26.155](#), a ward or respondent has the right to be accompanied by an attorney or expert of the ward's or respondent's own choosing.

(d) The court, if requested by a ward or respondent in preparation for and in connection with a hearing held under [AS 13.26.090 - 13.26.155](#), shall appoint an expert having expertise in regard to the alleged or admitted incapacity to examine the respondent and testify on the respondent's behalf. The request shall be filed in court at least five days before the hearing. An expert appointed under this subsection may be the same expert appointed under [AS 13.26.106 \(c\)](#).

#### **[AS 13.26.111. Duties and powers of attorney of ward or respondent.](#)**

(a) The principal duty of an attorney representing a ward or respondent is to represent the ward or respondent zealously. Zealous representation includes at least

(1) personal interviews with the ward or respondent; unless good cause exists, the first contact with the ward or respondent shall be at least two weeks before the hearing;

\***xii** (2) explaining, if possible, to the ward or respondent in terms that the ward or respondent can understand, the nature and possible consequences of the proceeding, the alternatives that are available, and the rights to which the ward or respondent is entitled;

(3) securing and presenting evidence and testimony and offering arguments that would tend to protect the ward's or respondent's rights and that would tend to further the interests of the ward or respondent.

(b) To the maximum extent possible, the ward or respondent shall remain responsible for determining the interests of the ward or respondent. However, the attorney for the ward or respondent may seek appointment of a guardian ad litem if the circumstances of [AS 13.26.112](#) apply.

#### **[AS 13.26.112. Appointment of a guardian ad litem.](#)**

(a) Upon the request of a ward, a respondent, or the attorney of a ward or respondent, the court shall appoint a guardian ad litem to protect the rights of the ward or respondent in proceedings under [AS 13.26.090 - 13.26.155](#) if the court is satisfied that because of impaired ability effectively to receive and evaluate information regarding the proceedings or because of impaired ability to communicate decisions regarding the proceedings, the ward or respondent cannot determine the ward's or respondent's own interests without assistance, and

(1) a guardian has not been appointed;

(2) the interests of the ward or respondent conflict with those of the ward's or respondent's guardian; or

(3) the appointment is otherwise in the interests of justice.

(b) The guardian ad litem shall assist the ward or respondent in determining the ward's or respondent's interests in regard to the legal proceedings that involve the ward or respondent. If the ward or respondent is entirely incapable of determining those interests, the guardian ad litem shall make that determination and advise the court and counsel for all parties accordingly. The guardian ad litem shall

(1) inquire thoroughly into all the circumstances that a prudent ward or respondent would consider in determining the ward's or respondent's own interests in the proceedings; and

\***xiii** (2) encourage the ward or respondent to participate, to the maximum extent possible, in all decisions and to act on the ward's or respondent's own behalf on all matters in which the ward or respondent is able.

(c) The attorney of the ward or respondent may also be the guardian ad litem for the ward or respondent if there is no other party readily available and able to serve as a guardian ad litem and whose interests would not conflict with those of the ward or respondent.

(d) The office of public advocacy shall provide guardian ad litem services to persons who would suffer financial hardship or become dependent upon a government agency or a private person or agency if the services are not provided at state expense.

**AS 13.26.113. Hearing and determination.**

(a) At the hearing scheduled under [AS 13.26.106](#), the respondent has the right to

(1) present evidence on the respondent's own behalf;

(2) cross-examine adverse witnesses;

(3) remain silent;

(4) have the hearing open or closed to the public as the respondent elects;

(5) be present unless the court determines that the respondent's conduct in the courtroom is so disruptive that the proceedings cannot reasonably continue with the respondent present;

(6) be tried by jury on the issue of incapacity.

(b) The burden of proof by clear and convincing evidence is upon the petitioner, and a determination of incapacity shall be made before consideration of proper disposition.

(c) If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of alternatives to guardianship to meet the needs of the respondent.

\***xiv** (d) If it is found that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action and order an alternative form of protection.

(e) If it is found that the respondent is able to perform some, but not all, of the functions necessary to care for the respondent, and alternatives to guardianship are not feasible or adequate to provide for the needs of the respondent, the court may appoint a partial guardian, but may not appoint a full guardian.

(f) If it is found that the respondent is totally without capacity to care for the respondent and that a combination of alternatives to guardianship and the appointment of a partial guardian is not feasible or adequate to meet the needs of the respondent, the court may appoint a full guardian.

(g) If it is necessary to appoint a guardian, the court shall consider the ward's preference.

(h) At the time a guardian is appointed, the court shall make a reasonable effort to acquaint the ward with the ward's right to request, at a later time, the guardian's dismissal or a modification of the guardianship order. The court shall provide a written statement to the ward, explaining the ward's rights and specifying the procedures to be followed in petitioning the court.

**AS 13.26.114. Psychotropic medication influencing wards or respondents at judicial hearings.**

(a) A ward or respondent has a right to participate to the maximum extent possible in all judicial proceedings concerning the ward or respondent and to be free from the influence of psychotropic medication during the proceedings.

(b) It is the responsibility of the attorney for the ward or respondent to determine if the ward or respondent is being treated with psychotropic medication the effects of which would continue during the judicial proceedings and, if so, to inform the court in writing a reasonable time before the hearing.

(c) The court, upon receipt of the information provided under (b) of this section, shall require a medical examination of the ward or respondent, if the court determines that the medical examination is necessary, and shall determine the advisability of continuation or suspension of the treatment for \*xv the duration of the judicial proceedings. The court may make any appropriate order it considers necessary. The court in making its determination shall balance the interest of maximum participation of the ward or respondent in the hearings against the medical and rehabilitative needs of the ward or respondent.

(d) If the ward or respondent is under the influence of psychotropic medication during the judicial proceeding determining capacity, the trier of fact shall take that fact into consideration in making its determination.

**AS 13.26.115. Acceptance of appointment; consent to jurisdiction.**

By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed by ordinary mail to the guardian's address as listed in the court records and to the guardian's address as then known to the petitioner.

**AS 13.26.116. Guardianship order.**

(a) If the court or jury determines that a person is incapacitated and the services of a guardian are necessary, the court shall enter an order that

- (1) names the guardian and establishes a guardian-ward relationship;
- (2) includes findings of fact that support each grant of authority to the guardian;
- (3) adopts a guardianship plan.

(b) The guardianship plan shall specify the authority that the guardian has with regard to

- (1) medical care for the ward's physical condition;
  - (2) mental health treatment that the guardian considers to be in the ward's best interests;
  - (3) housing for the ward with consideration of the following:
    - (A) the wishes of the ward;
    - \*xvi (B) the preferability of allowing the ward to retain local community ties; and
    - (C) the requirement for services to be provided in the least restrictive setting;
  - (4) personal care, educational and vocational services necessary for the physical and mental welfare of the ward and to return the ward to full capacity;
  - (5) application for health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or related services provided to the ward;
  - (6) physical and mental examinations necessary to determine the ward's medical and mental health treatment needs; and
  - (7) control of the estate and income of the ward to pay for the cost of services that the guardian is authorized to obtain on behalf of the ward.
- (c) The guardianship plan may not be more restrictive of the liberty of the ward than is reasonably necessary to protect the ward from serious physical injury, illness or disease and to provide the ward with medical care and mental health treatment for physical and mental health. The guardianship plan shall be designed to encourage a ward to participate in all decisions that affect the ward and to act on the ward's own behalf to the maximum extent possible. The court may not assign a duty or power to a guardian unless the need for it has been proven to the satisfaction of the court and no less restrictive alternative or combination of alternatives is sufficient to satisfy the need.
- (d) The duration of the term of guardianship shall be determined by the court order. Upon receipt of a report or other information that requires further consideration, the court may order a review hearing if it determines that the hearing is in the best interests of the ward.

**AS 13.26.117. Guardianship implementation report.**

Within 90 days after appointment as guardian, the guardian shall submit to the court a report. The report must describe the guardian's program for implementing the guardianship plan. The primary goal of the program described in the report must be, to \*xvii the maximum extent possible, to develop or regain the ward's abilities to handle the ward's own affairs. The report must consider housing, medical care, and educational and vocational needs and resources. In developing the report, the guardian shall consult with the ward to the maximum extent possible. The office of public guardian shall contact the guardian to offer assistance in preparing the report. The report must specify the services that are necessary to meet the essential requirements for the ward's physical health or safety and the means for obtaining the services. The report must specify the manner in which the guardian will exercise and share decision-making authority and other items that will assist in fulfilling the needs of the ward, the terms of the guardianship order, and the duties of the guardian.

**AS 13.26.118. Other reports.**

(a) A guardian shall submit a report to the court or request that a visitor be appointed to prepare and submit a report at least annually. A court-appointed visitor shall prepare the report at least once in each three-year period. The guardian shall submit an additional report to the court when

- (1) the court orders it;
- (2) there is a significant change in the capacity of the ward to meet the essential requirements for health and safety or to protect the ward's rights;
- (3) the guardian resigns or is removed;
- (4) the guardianship is terminated; or
- (5) the ward requests it.

(b) The report must contain, but is not limited to, the following information:

- (1) the name and address of the ward and the guardian;
- (2) the ward's present mental, physical, and social conditions and present living arrangements and the ward's opinion of these arrangements;
- (3) changes in the capacity of the ward to meet essential requirements for physical health and safety;
- (4) the services being provided to the ward;
- \***xviii** (5) the significant actions taken by the guardian during the reporting period in regard to the ward;
- (6) a financial accounting of the estate that has been subject to the possession or control of the guardian;
- (7) a list of the number and nature of the contacts between the guardian and ward if the ward does not reside with the guardian;
- (8) any other information requested by the court or necessary or desirable in the opinion of the guardian or visitor.

**AS 13.26.120. Termination of guardianship for incapacitated person.**

The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, the removal or resignation of the guardian as provided in [AS 13.26.125](#), or upon the expiration of the period specified by court order as the duration of the guardianship. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect a guardian's liability for prior acts nor an obligation to account for assets of the ward over which the guardian exercised control.

**AS 13.26.125. Removal or resignation of guardian; change in or termination of guardianship.**

(a) On petition of the ward, the guardian, or any person interested in the ward's welfare, the court may (1) review and amend a decision of a guardian; or (2) if alternatives that are less restrictive than guardianship or less restrictive than the existing guardianship plan would assist the ward in meeting essential requirements for physical health and safety, modify the provisions of its order to (A) amend the guardianship plan or the responsibilities of the guardian; (B) remove a guardian and appoint a

successor; or (C) terminate the guardianship. On petition of the guardian, the court may accept a resignation and make any other order that may be appropriate.

(b) The ward, the guardian, or any person interested in the ward's welfare may petition for an order that the ward is no longer incapacitated or no longer incapacitated to the same ~~\*xix~~ extent as the ward was when the original guardianship order was made or when the court last amended the guardianship order, and for removal or resignation of the guardian, termination of the guardianship, or a change in the responsibilities of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be *held* in contempt of court.

(c) Before removing a guardian, changing the guardian's responsibilities, accepting the resignation of a guardian, or ordering that a ward's guardianship be changed or terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian and applying the least restrictive alternative necessary to meet the needs of the ward after consideration of alternatives to guardianship services, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.

(d) If at any time the ward requests or indicates to the guardian or to the agency responsible for the ward's care or its employee that the ward desires a change in guardianship, the guardian or the agency providing care shall inform the court of the request or indication.

(e) If the guardian dies, or if on the basis of a petition filed under this section or a report or other information, there is probable cause to believe a guardian is not performing the guardian's responsibilities effectively and there is an imminent danger that the physical health or safety of the ward will be seriously impaired, the court shall take whatever action is necessary to protect the ward, including the dismissal of the guardian and appointment of a temporary guardian without a hearing.

#### **AS 13.26.131. Costs in guardianship proceedings.**

(a) Subject to (d) of this section, the state shall bear the costs of the visitor and expert appointed under [AS 13.26.106 \(c\)](#).

(b) Subject to (c) and (d) of this section, the respondent shall bear the costs of the attorney appointed under [AS 13.26.106 \(b\)](#), of the expert appointed under [AS 13.26.109 \(d\)](#), of the guardian ad litem appointed under [AS 13.26.112](#), and of other court and guardianship costs incurred under this chapter.

~~\*xx~~ (c) The state shall pay all or part of the costs described in (b) of this section if the court finds that the payment is necessary to prevent the respondent from suffering financial hardship or from becoming dependent upon a government agency or a private person or agency.

(d) The court may require the petitioner to pay all or some of the costs described in (a) and (b) of this section if the court finds that the petitioner initiated a proceeding under this chapter that was malicious, frivolous, or without just cause.

#### **AS 13.26.135. Notices in guardianship proceedings.**

(a) In a proceeding for the appointment, change in responsibilities, or removal of a guardian, or termination of guardianship, other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or respondent by the visitor as provided in [AS 13.26.107](#);

(2) any person who is serving as guardian or conservator of the ward or respondent, or who has care and custody of the ward or respondent;

(3) in case a person is not notified under (4) of this subsection, at least one of the closest adult relatives of the ward or respondent, if any can be found;

(4) the spouse, parents, and adult children of the ward or respondent;

(5) any person who performed an evaluation for the visitor's report within the previous two years;

(6) the ward's or respondent's attorney;

(7) the ward's or respondent's guardian ad litem if one has been appointed; and

(8) the United States Department of Veterans Affairs if the United States Department of Veterans Affairs was given notice under [AS 13.26.105\(d\)](#).

**\*xxi** (b) Notice shall be served personally on the ward's or respondent's spouse and parents if they can be found within the state. Except as provided in (a)(1) of this section, notice to the spouse and parents, if they cannot be found within the state, and to all other persons shall be given as provided in [AS 13.06.110](#)

(c) The notice must set out the date, time, place, purpose, and possible consequences of the hearing and the rights of the ward or respondent and any other parties to the proceedings.

**[AS 13.26.140. Temporary guardians; authorization of services.](#)**

(a) If during the pendency of an initial petition for guardianship it appears that the respondent is in need of immediate services to protect the respondent against serious injury, illness, or disease and the respondent is not capable of procuring the necessary services, the petitioner may request the appointment of a temporary guardian to authorize the services. The request shall state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney. The court shall conduct a hearing within 72 hours after the filing.

(b) At the temporary guardianship hearing, the respondent shall have the rights set out in [AS 13.26.113 \(a\)](#).

(c) The burden of proof at the hearing shall be by clear and convincing evidence and shall be upon the petitioner.

(d) If the court determines that a temporary guardian should be appointed, it shall make the appointment and grant to the guardian only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary guardian to provide the emergency services necessary to protect the respondent from serious injury, illness, or disease.

(e) The temporary guardianship shall expire at the time of the appointment of a full or partial guardian or upon the dismissal of the petition for guardianship.

(f) If no guardianship petition is pending but the court is informed of a person who is apparently incapacitated and in need of emergency life-saving services, the court may authorize the services upon determining that delay until a guardianship hearing can be held would entail a life-threatening risk to the **\*xxii** person.

**AS 13.26.141. Emergency powers.**

Notwithstanding the limits of a temporary guardianship or guardianship order, a temporary guardian and guardian at all times have the right to authorize the provision of emergency life-saving services. This right includes the power to authorize hospitalization without advance court approval.

**AS 13.26.145. Who may be guardian; priorities.**

(a) The court may appoint a competent person, the public guardian, or a private association or nonprofit corporation with a guardianship program for incapacitated persons, as guardian of an incapacitated person.

(b) The court may not appoint a person to be a guardian of an incapacitated person if the person

(1) provides, or is likely to provide during the guardianship period, substantial services to the incapacitated person in a professional or business capacity, other than in the capacity as guardian;

(2) is, or is likely to become during the guardianship period, a creditor of the incapacitated person, other than in the capacity as guardian;

(3) has, or is likely to have during the guardianship period, interests that may conflict with those of the incapacitated person; or

(4) is employed by a person who would be disqualified under (1) - (3) of this subsection.

(c) A person may be appointed as the guardian of an incapacitated person notwithstanding the provisions of (b) of this section if the person is the spouse, adult child, parent, or sibling of the incapacitated person and the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the best interests of the incapacitated person.

(d) Subject to (e) of this section, qualified persons have priority for appointment as guardian in the following order:

(1) a person, association, or private nonprofit corporation \***xxiii** nominated by the incapacitated person, if at the time of the nomination the incapacitated person had the capacity to make a reasonably intelligent choice;

(2) the spouse of the incapacitated person;

(3) an adult child or parent of the incapacitated person;

(4) a relative of the incapacitated person with whom the incapacitated person has resided for more than six months during the year before the filing of the petition;

(5) a relative or friend who has demonstrated a sincere, longstanding interest in the welfare of the incapacitated person;

(6) a private association or nonprofit corporation with a guardianship program for incapacitated persons;

(7) the public guardian.

(e) The priorities established in (d) of this section are not binding, and the court shall select the person, association, or nonprofit corporation that is best qualified and willing to serve. The court shall also give consideration to a nomination by a person described in (d) of this section and to a nomination in the will of a deceased parent or spouse of the incapacitated person.

**AS 13.26.150. General powers and duties of guardian.**

(a) A guardian shall diligently and in good faith carry out the specific duties and powers assigned by the court. In carrying out duties and powers, the guardian shall encourage the ward to participate to the maximum extent of the ward's capacity in all decisions that affect the ward, to act on the ward's own behalf in all matters in which the ward is able, and to develop or regain, to the maximum extent possible, the capacity to meet the essential requirements for physical health or safety, to protect the ward's rights, and to manage the ward's financial resources.

(b) A partial guardian of an incapacitated person has only the powers and duties respecting the ward enumerated in the court order.

(c) A full guardian of an incapacitated person has the same powers and duties respecting the ward that a parent has **\*xxiv** respecting an unemancipated minor child except that the guardian is not liable for the care and maintenance of the ward and is not liable, solely by reason of the guardianship, to a person who is harmed by acts of the ward. Except as modified by order of the court, a full guardian's powers and duties include, but are not limited to, the following:

(1) the guardian is entitled to custody of the person of the ward and shall assure that the ward has a place of abode in the least restrictive setting consistent with the essential requirements for the ward's physical health and safety;

(2) the guardian shall assure the care, comfort, and maintenance of the ward;

(3) the guardian shall assure that the ward receives the services necessary to meet the essential requirements for the ward's physical health and safety and to develop or regain, to the maximum extent possible, the capacity to meet the ward's needs for physical health and safety;

(4) the guardian shall assure through the initiation of court action and other means that the ward enjoys all personal, civil, and human rights to which the ward is entitled;

(5) the guardian may give consents or approvals necessary to enable the ward to receive medical or other professional care, counsel, treatment, or services except as otherwise limited by (e) of this section;

(6) if a conservator for the estate of the ward has not been appointed, the guardian may receive money and property deliverable to the ward and apply the money and property for support, care, and education of the ward; however, the guardian may not apply the ward's money or property for the services as guardian or for room and board that the guardian, or the guardian's spouse, parent, or child has furnished the ward unless, before payment, the court finds that the ward is financially able to pay and that the charge is reasonable; notice of a request for payment approval shall be provided to at least one relative of the ward if possible; the guardian shall exercise care to conserve any excess money or property for the ward's needs;

(7) if a conservator of the estate of the ward has been appointed, the guardian shall pay all of the ward's estate received by the guardian in excess of the money expended to meet current expenses for support, care, and education of the ward, **\*xxv** to the conservator for management as provided in [AS 13.26.165 - 13.26.315](#), and the guardian shall account to the conservator for money expended.

(d) A guardian of a ward, for whom a conservator has also been appointed, shall have the custody and care of the ward and is entitled to receive reasonable sums for services and for room and board furnished to the ward as agreed upon between the guardian and the conservator. The guardian may request the conservator to expend the ward's estate for the ward's care and maintenance.

(e) A guardian may not

(1) place the ward in a facility or institution for the mentally ill other than through a formal commitment proceeding under AS 47.30 in which the ward has a separate guardian ad litem;

(2) consent on behalf of the ward to an abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary to preserve the life or prevent serious impairment of the physical health of the ward;

(3) consent on behalf of the ward to the withholding of lifesaving medical procedures; however, a guardian is not required to oppose the cessation or withholding of lifesaving medical procedures when those procedures will serve only to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure of or relief from the illness or condition being treated unless the ward has clearly stated that lifesaving medical procedures not be withheld; a guardian is not civilly liable for acts or omissions under this paragraph unless the act or omission constitutes gross negligence or reckless or intentional misconduct;

(4) consent on behalf of the ward to the performance of an experimental medical procedure or to participation in a medical experiment not intended to preserve the life or prevent serious impairment of the physical health of the ward;

(5) consent on behalf of the ward to termination of the ward's parental rights;

(6) prohibit the ward from registering to vote or from casting a ballot at public election;

(7) prohibit the ward from applying for and obtaining \*xxvi driver's license;

(8) prohibit the marriage or divorce of the ward.

#### **AS 13.26.155. Proceedings subsequent to appointment; venue.**

(a) The court where the/ ward resides has concurrent jurisdiction with the court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(b) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.

### **Article 4. PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS**

#### **AS 13.26.165. Protective proceedings.**

Upon petition and after notice and hearing in accordance with the provisions of [AS 13.26.165 - 13.26.315](#), the court may appoint a conservator or make other protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by the status of being a minor, or that funds are needed for the minor's support and education and that protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

\***xxvii** (A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and

(B) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

**AS 13.26.170. Protective proceedings; jurisdiction of affairs of protected persons.**

After the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the court in which the petition is filed has

(1) exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated;

(2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state shall be managed, expended or distributed to or for the use of the protected person or any of the person's dependents;

(3) concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and the person's title to any property or claim.

**AS 13.26.175. Venue.**

Venue for proceedings under [AS 13.26.165](#) - [13.26.315](#) is

(1) in the place in this state where the person to be protected resides whether or not a guardian has been appointed in another place; or

(2) if the person to be protected does not reside in this state, in any place where the person has property.

\***xxviii** **AS 13.26.180. Original petition for appointment or protective order.**

(a) The person to be protected, any person who is interested in the estate, affairs or welfare of the person to be protected, including a parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

(b) The petition shall set out to the extent known, the interest of the petitioner; the name, age, residence and address of the person to be protected; the name and address of the person's guardian, if any; the name and address of the person's nearest relative known to the petitioner; a general statement of the person's property with an estimate of its value, including any compensation, insurance, pension or allowance to which the person is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also shall set out the name and address of the person whose appointment is sought and the basis of priority for appointment.

**AS 13.26.185. Notice.**

(a) On a petition for appointment of a conservator or other protective order, the person to be protected and the person's spouse or, if none, the person's parents, must be served personally with notice of the proceedings at least 14 days before the date of hearing if they can be found within the state, or, if they cannot be found within the state, they must be given notice in accordance with [AS 13.06.110](#). Waiver by the person to be protected is not effective unless the person to be protected attends the hearing or, unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor.

(b) Notice of a petition for appointment of a conservator or other initial protective order, and of any subsequent hearing, must be given to any person who has filed a request for notice under [AS 13.26.190](#) and to interested persons and other persons as the court may direct. Except as otherwise provided in

(a) of this section, notice shall be given in accordance with [AS 13.06.110](#)

**\*xxix AS 13.26.190. Protective proceedings; request for notice; interested person.**

Any interested person who desires to be notified before any order is made in a protective proceeding may file with the registrar a request for notice subsequent to payment of any fee required by statute or court rule. The clerk shall mail a copy of the demand to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the person's address, or that of the person's attorney, and is effective only as to matters occurring after the filing. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings.

**AS 13.26.195. Procedure concerning hearing and order on original petition.**

(a) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if 14 years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(b) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of the person's own choice, the court must appoint a lawyer to represent the person who then has the powers and duties of a guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

(c) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other **\*xxx** appropriate protective order.

(d) The court shall investigate alternatives to a conservator and the use of a special conservator as provided in [AS 13.26.205](#)  
(c). A conservator may be appointed only if a less restrictive protective order or the services of a special conservator are not adequate to protect the estate of the protected person. The court shall, to the extent possible, consult with the protected person in determining what action should be taken.

**AS 13.26.200. Permissible court orders.**

The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

(1) while a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for the person's benefit or the benefit of the person's dependents;

(2) after hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, the minor's family and members of the minor's household;

(3) after hearing-and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of the person's household, all the powers over the person's estate and affairs which the person could exercise if present and not under disability, except the power to make a will; these powers include, but are not limited to, power to make gifts, to convey or release contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond the person's disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise rights to elect \*~~xxxi~~ options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise the right to an elective share in the estate of a deceased spouse, and to renounce any interest by testate or intestate succession or by inter vivos transfer;

(4) the court may exercise, or direct the exercise of its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20 per cent of any year's income of the estate, or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that the protected person either is incapable of consenting or has consented to the proposed exercise of power;

(5) an order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person.

**AS 13.26.205. Protective arrangements and single transactions authorized.**

(a) If it is established in a proper proceeding that a basis exists as described in [AS 13.26.165](#) for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct, or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit, or retention of funds or property, sale, mortgage, lease, or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

(b) When it has been established in a proper proceeding that a basis exists as described in [AS 13.26.165](#) for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct, or ratify any contract, trust, or other transaction relating to the protected person's financial affairs or involving the person's estate if the court determines that the transaction is in the best interests of the protected person.

(c) Before approving a protective arrangement or other transaction under this section, the court shall consider the \*xxxii interests of creditors and dependents of the protected person and, in view of the protected person's disability, whether the protected person needs the continuing protection of a conservator. If only certain powers need be given to the conservator or the services of a conservator are needed only for a limited number of transactions, a special conservator may be appointed. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters carried out under the order of appointment.

**AS 13.26.210. Who may be appointed conservator; priorities.**

(a) The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(1) a conservator, guardian of property, or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(2) an individual or corporation nominated by the protected person if the protected person is 14 or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

(3) the spouse of the protected person;

(4) an adult child of the protected person;

(5) a parent of the protected person, or a person nominated by the will of a deceased parent;

(6) any relative of the protected person with whom the protected person has resided for more than six months before the filing of the petition;

(7) a person nominated by the person who is caring for or paying benefits to the protected person.

(b) A person in priorities (a) (1), (3), (4), (5), or (6) of this section may nominate in writing another person to serve. With respect to persons having equal priority, the court is to \*xxxiii select the one who is best qualified of those willing to serve. The court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.

**AS 13.26.215. Bond.**

(a) The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in the conservator's control plus one year's estimated income minus the value of securities deposited under arrangements requiring an order of the court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization. The court in place of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

(b) If the public guardian is appointed as a conservator, the court may not require a bond under this section.

(c) If the court requires a conservator to provide a bond under this section and the conservator is financially unable to provide the bond, the court may order the cost of the bond to be paid from court funds.

**AS 13.26.220. Terms and requirements of bonds.**

(a) The following requirements and provisions apply to any bond required under [AS 13.26.215](#) :

(1) unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the conservator and with each other;

(2) by executing an approved bond of a conservator, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party defendant; notice of any proceeding shall be delivered to the surety or mailed by registered or certified mail to the surety at the address as listed with the court where the bond is filed and to the surety's address as then known to the petitioner;

\***xxxiv** (3) on petition of a successor conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator;

(4) the bond of the conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) A proceeding may not be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

**AS 13.26.225. Acceptance of appointment; consent to jurisdiction; notice.**

By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the conservator, or mailed by registered or certified mail to the conservator at the address as listed in the petition for appointment or as thereafter reported to the court and to the conservator's address as then known to the petitioner.

**AS 13.26.230. Compensation and expenses.**

If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.

**AS 13.26.235. Death, resignation, or removal of conservator.**

The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. After death, resignation, or removal, the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of the conservator's predecessor.

**AS 13.26.240. Petitions for orders subsequent to appointment.**

(a) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order

\***xxxv** (1) requiring bond or security or additional bond or security, or reducing bond;

(2) requiring an accounting for the administration of the trust;

(3) directing distribution;

(4) removing the conservator and appointing a temporary or successor conservator; or

(5) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning the fiduciary responsibility of the conservator.

(c) Upon notice and hearing, the court may give appropriate instructions or make any appropriate order.

**AS 13.26.245. General duty of conservator.**

In the exercise of powers, a conservator shall act as fiduciary and shall observe the standards of care applicable to trustees under [AS 13.36.225](#) - [13.36.290](#).

**AS 13.26.250. Inventory and records.**

Within 90 days after appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with an oath or affirmation that it is complete and accurate so far as the conservator is informed. The conservator shall provide a copy of it to the protected person if the protected person can be located, has attained the age of 14 years, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator shall keep suitable records of the administration and exhibit them on request of any interested person.

**AS 13.26.255. Accounts.**

Every conservator must account to the court for administration of the trust upon resignation or removal, and at other times as the court may direct. On termination of the protected person's minority or disability, a conservator may account to the court or to the former protected person or the protected person's personal representative. Subject to appeal or ~~\*xxxvi~~ vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to the conservator's liabilities concerning the matters considered in connection with it; and an order, made upon notice and hearing, allowing a final account, adjudicates as to all previously unsettled liabilities of the conservator to the protected person or the protected person's successors relating to the conservatorship. In connection with any account, the court may require a conservator to submit to a physical check of the estate in the conservator's control, to be made in any manner the court may specify.

**AS 13.26.260. Conservators; title by appointment.**

The appointment of a conservator vests in the conservator title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact. The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of any rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

**AS 13.26.265. Recording of conservator's letters.**

Letters of conservatorship are evidence of transfer of all assets of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate from the conservator to the protected person, or the protected person's successors. Subject to the requirements of general statutes governing the recordation of documents of title to land or other property, letters of conservatorship, and orders terminating conservatorships, may be recorded to give record notice of title as between the conservator and the protected person.

**AS 13.26.270. Sale, encumbrance, or transaction involving conflict of interest; voidable; exceptions.**

Any sale or encumbrance to a conservator, the conservator's spouse, agent, or attorney, or any corporation or trust in which the conservator has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of **\*xxxvii** interest is voidable unless the transaction is approved by the court after notice to interested persons and others as directed by the court.

**AS 13.26.275. Persons dealing with conservators; protection.**

A person who in good faith either assists a conservator or deals with the conservator for value in any transaction other than those requiring a court order as provided in [AS 13.26.200](#), is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in [AS 13.26.290](#) are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

**AS 13.26.280. Powers of conservator in administration.**

(a) A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. In addition, a conservator of the estate of an unmarried minor under the age of 18 years, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in [AS 13.26.070](#) until the minor attains the age of 18 or marries, but the parental rights so conferred on a conservator do not preclude appointment of a guardian as provided by [AS 13.26.030](#) - [13.26.085](#).

(b) A conservator has power without court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

(c) A conservator, acting reasonably in efforts to accomplish the purpose for which the conservator was appointed, may act, without court authorization or confirmation, to

(1) collect, hold and retain assets of the estate including land in another state, until, in the conservator's judgment, disposition of the assets should be made, and the assets may be **\*xxxviii** retained even though they include an asset in which the conservator is personally interested;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

- (4) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;
- (5) invest and reinvest estate assets in accordance with
  - (b) of this section;
- (6) deposit estate funds in a bank including a bank operated by the conservator;
- (7) acquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;
- (8) make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;
- (9) subdivide, develop, or dedicate land to public use; to make or obtain the vacation of plats and adjust boundaries; to adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;
- (10) enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;
- (11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;
- (12) grant an option involving disposition of an estate asset, to take an option for the acquisition of any asset;
- (13) vote a security, in person or by general or limited proxy;
- \*~~xxxix~~ (14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;
- (15) sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- (16) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;
- (17) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;
- (18) borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets, and the conservator has a lien on the estate as against the protected person from advances so made;
- (19) pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;
- (20) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration, and protection of the estate;

(21) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) pay any sum distributable to a protected person or the protected person's dependent, without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to the distributee's guardian or if none, to a relative or other person with custody of the distributee's person;

\***xl** (23) employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator to advise or assist the conservator in the performance of administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(24) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of duties; and

(25) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

**AS 13.26.285. Distributive duties and powers of conservator.**

(a) A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care, or benefit of the protected person and the protected person's dependents in accordance with the following principles:

(1) the conservator is to consider recommendations relating to the appropriate standard of support, education, and benefit for the protected person made by a parent or guardian, if any; the conservator may not be surcharged for sums paid to persons or organizations actually furnishing support, education, or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless the conservator knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person;

(2) the conservator is to expend or distribute sums reasonably necessary for the support, education, care, or benefit of the protected person with due regard to

(A) the size of the estate, the probable duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully able to manage the protected person's affairs and the estate which has been conserved;

(B) the accustomed standard of living of the protected person and members of the protected person's household;

\***xli** (C) other funds or sources used for the support of the protected person;

(3) the conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves and who are in need of support;

(4) funds expended under this subsection may be paid by the conservator to any person, including the protected person to reimburse for expenditures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(b) If the estate is ample to provide for the purposes implicit in the distributions authorized by (a) of this section, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20 per cent of the income from the estate.

(c) When a minor who has not been adjudged disabled under [AS 13.26.165\(2\)](#) attains majority, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(d) When the conservator is satisfied that a protected person's disability (other than minority) has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the formerly protected person as soon as possible.

(e) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into the conservator's possession, inform the executor or a beneficiary named in the will that the will has been so delivered, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled to it. If after 40 days from the death of the protected person no other person has been appointed personal representative and no application or petition for appointment is before the court, the conservator may apply *\*xlii* to exercise the powers and duties of a personal representative in order to proceed with administering and distributing the decedent's estate without additional or further appointment. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under [AS 13.16.070](#) and to any person nominated executor in any will of which the applicant is aware, the court may order the conferral of the power upon determining that there is no objection, and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section has the effect of an order of appointment of a personal representative as provided in [AS 13.16.115](#) and [AS 13.16.245 - 13.16.655](#) except that estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative.

#### **[AS 13.26.290. Enlargement or limitation of powers of conservator.](#)**

Subject to the restrictions in [AS 13.26.200 \(4\)](#), the court may confer on a conservator at the time of appointment or later, in addition to the powers conferred by [AS 13.26.280](#) and [13.26.285](#), any power which the court itself could exercise under [AS 13.26.200 \(2\) and \(3\)](#). The court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by [AS 13.26.280](#) and [13.26.285](#) or previously conferred by the court, and may at any time relieve the conservator of any limitation. If the court limits any power conferred on the conservator by [AS 13.26.280](#) and [13.26.285](#), the limitation shall be endorsed upon the letters of appointment.

#### **[AS 13.26.295. Preservation of estate plan.](#)**

In investing the estate, and in selecting assets of the estate for distribution under [AS 13.26.285 \(a\) and \(b\)](#), in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, the conservator and the court should take into account any known estate plan of the protected person, including a will, any revocable trust of which the protected person is settlor, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at death to another or others which the protected person may have originated. The conservator may examine the will of the protected person.

#### ***\*xliii* [AS 13.26.300. Claims against estate and protected person; enforcement.](#)**

(a) A conservator shall pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship upon their presentation and allowance. A claim is considered presented on the first to occur of receipt of the written statement of claim by the conservator, or the filing of the claim with the court. A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within 60 days after its presentation. The presentation of a claim tolls any statute of limitations relating to the claim until 30 days after its disallowance. A claim may be presented by either of the following methods:

(1) the claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed;

(2) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and deliver or mail a copy of the statement to the conservator.

(b) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by the applicable statute of limitation, and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

(c) If it appears that the estate in a conservatorship is likely to be exhausted before all existing claims are paid, preference is to be given to prior claims for the care, maintenance, and education of the protected person or the protected person's dependents and existing claims for expenses of administration.

#### **AS 13.26.305. Individual liability of conservator.**

(a) Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to **\*xliv** reveal the representative capacity and identify the estate in the contract.

(b) The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if personally at fault.

(c) Claims based on contracts entered into by a conservator in a fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in the fiduciary capacity, whether or not the conservator is individually liable for them.

(d) Any question of liability between the estate and the conservator individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding or action.

#### **AS 13.26.310. Termination of proceeding.**

The protected person, the protected person's personal representative, the conservator, or any other interested person may petition the court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The court, upon determining after notice and hearing that the minority or disability of the protected person has ceased, may terminate the conservatorship. Upon termination, title to assets of the estate passes to the former protected person or to the person's successors subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected person or the person's successors, to evidence the transfer.

**AS 13.26.315. Payment of debt and delivery of property to foreign conservator without local proceedings.**

(a) Any person indebted to a protected person, or having possession of property or of an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate, or other like fiduciary appointed by a court of the state of residence of the protected person, upon being presented with proof of the fiduciary's appointment and an affidavit made by the fiduciary or on the fiduciary's behalf stating:

\***xliv** (1) that no protective proceeding relating to the protected person is pending in this state; and

(2) that the foreign conservator is entitled to payment or to receive delivery.

(b) If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this state, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

**AS 13.26.320. Foreign conservators.**

If no local conservator has been appointed and no petition in a protective proceeding is pending in this state, a domiciliary foreign conservator may file with a court in this state in a judicial district in which property belonging to the protected person is located, authenticated copies of appointment and of any official bond given. Thereafter, the domiciliary foreign conservator may exercise as to assets in this state all powers of a local conservator and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally.

**Article 6. PUBLIC GUARDIANS**

**AS 13.26.360. Purpose.**

The legislature recognizes that many Alaskans, for reasons of incapacity or minority, are in need of a guardian or conservator. Often these persons cannot find a person able and willing to serve as guardian-or conservator. The legislature intends through [AS 13.26.360 - 13.26.410](#) to establish the function of public guardian for the purpose of furnishing guardianship and conservatorship services. It further intends by establishing this function to provide assistance to guardians throughout the state in securing necessary services for their wards and to assist the courts, attorneys, visitors, respondents, and proposed guardians in the orderly and expeditious handling of guardianship proceedings.

**AS 13.26.370. Public guardian.**

(a) The office of public advocacy ([AS 44.21.400](#)) shall serve as the public guardian.

(b) A court may order the public guardian to act as full guardian, partial guardian, conservator, or special conservator \***xlvi** for a person who is determined under this chapter to be in need of guardianship or conservatorship service if no person or private guardianship association is willing and qualified to perform the function.

**AS 13.26.380. Powers and duties of public guardian.**

(a) The public guardian has the same powers and duties with respect to the public guardian's wards and protected persons as a private guardian or conservator.

(b) The public guardian, when appointed as guardian or conservator, shall endeavor, for as long as practical, to find a suitable private guardian or conservator for the public guardian's ward or protected person. For each ward and protected person, the public guardian shall report to the court having jurisdiction of the ward or protected person, at least once every six months, efforts to find a private guardian or conservator.

(c) The public guardian shall

(1) establish and maintain relationships with governmental, public, and private agencies, institutions, and organizations to assure the most effective guardianship or conservatorship program for each ward and protected person;

(2) visit each of the public guardian's wards and protected persons at least once every quarter to monitor their welfare;

(3) keep and maintain financial and statistical records of all cases in which the public guardian provides guardianship or conservatorship services;

(4) provide information and referrals to the public regarding guardianship and conservatorship proceedings, but not information that would identify a particular case;

(5) assist guardians and court-appointed visitors of wards and respondents in the preparation and revision of guardianship plans and reports;

(6) assist guardians to understand the disabilities of wards and to foster the increased independence of wards;

(7) assist guardians in securing the rights, benefits, and services to which their wards are entitled;

\***xlvi** (8) develop and maintain a current listing of public and private medical, mental health, social advocacy, educational, rehabilitative, counseling, therapeutic, homemaking, recreational, and financial services and programs available to assist wards and protected persons and their families.

(d) The public guardian may

(1) contract for services necessary to carry out the duties of the public guardian's office;

(2) accept the services of volunteer workers or consultants and reimburse them for their necessary expenses.

#### **AS 13.26.390. Intervention by public guardian.**

The public guardian may, on the public guardian's own motion or at the request of the court, intervene in a guardianship or conservatorship proceeding if the public guardian or the court considers the intervention to be justified because

(1) an appointed guardian or conservator is not fulfilling duties;

(2) the estate is subject to waste as a result of the costs of the guardianship or conservatorship;

(3) a willing and qualified guardian or conservator is not available; or

(4) the best interests of the ward, respondent, protected person, or person who is the subject of a conservatorship proceeding require the intervention.

**AS 13.26.400. Staff; delegation of powers and duties.**

The public guardian may employ staff and delegate to members of the staff or to volunteers the powers and duties as guardian or conservator and other powers and duties under this chapter. However, the public guardian retains responsibility for the proper performance of the delegated powers and duties. All delegations shall be to persons who meet the eligibility requirements of [AS 13.26.145](#)

**\*xlviii AS 13.26.410. Allocation of costs of public guardian.**

(a) The commissioner of administration may establish by regulation a schedule of reasonable fees for the costs of the public guardian's services. The fee schedule established may be based upon the ability of the ward or protected person to pay for guardian services but may not exceed the actual cost of providing public guardian services. The office of public advocacy shall charge and collect the fees established under this subsection, but may waive collection of a fee upon a finding that collection is not economically feasible or in the public interest.

**Article 7. OFFICE OF PUBLIC ADVOCACY**

**AS 44.21.400. Public advocacy office established.**

There is created in the Department of Administration the office of public advocacy.

**AS 44.21.410. Powers and duties.**

(a) The office of public advocacy shall

- (1) perform the duties of the public guardian under [AS 13.26.360 - 13.26.410](#);
- (2) provide visitors and experts in guardianship proceedings under [AS 13.26.131](#);
- (3) provide guardian ad litem services to children in child protection actions under [AS 47.17.030 \(e\)](#) and- to wards and respondents in guardianship proceedings who will suffer financial hardship or become dependent upon a government agency or a private person or agency if the services are not provided at state expense under [AS 13.26.112](#) ;
- (4) provide legal representation in cases involving judicial bypass procedures for minors seeking abortions under [AS 18.16.030](#), in guardianship proceedings to respondents who are financially unable to employ attorneys under [AS 13.26.106 \(b\)](#), to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency, to indigent parents or guardians of a minor respondent in a commitment proceeding concerning the minor under [AS 47.30.775](#) ;
- \*xlix** (5) provide legal representation and guardian ad litem services under [AS 25.24.310](#); in cases arising under [AS 47.15](#) (Uniform Interstate Compact on Juveniles); in cases involving petitions to adopt a minor under [AS 25.23.125 \(b\)](#) or petitions for the termination of parental 'rights on grounds set out in [AS 25.23.180 \(c\) \(3\)](#); in cases involving petitions to remove the disabilities of a minor under [AS 09.55.590](#); in children's proceedings under [AS 47.10.050 \(a\)](#) or under [AS 47.12.090](#) ; in cases involving appointments under [AS 18.66.100 \(a\)](#) in petitions for protective orders on behalf of a minor; and in cases involving indigent persons who are entitled to representation under [AS 18.85.100](#) and who cannot be represented by the public defender agency because of a conflict of interests;
- (6) develop and coordinate a program to recruit, select, train, assign, and supervise volunteer guardians ad litem from local communities to aid in delivering services in cases in which the office of public advocacy is appointed as guardian ad litem;

(7) provide guardian ad litem services in proceedings under [AS 12.45.046](#);

(8) establish a fee schedule and collect fees for services provided by the office, except as provided in [AS 18.85.120](#) or when imposition or collection of a fee is not in the public interest as defined under regulations adopted by the commissioner of administration;

(9) provide visitors and guardians ad litem in proceedings under [AS 47.30.839](#);

(10) provide legal representation to an indigent parent of a child with a disability; in this paragraph, "child with a disability" has the meaning given in [AS 14.30.350](#)

(b) The commissioner of administration may

(1) adopt regulations that the commissioner considers necessary to implement [AS 44.21.400 - 44.21.470](#);

(2) report on the operation of the office of public advocacy when requested by the governor or legislature or when required by law;

(3) solicit and accept grants of funds from governments and from persons, and allocate or restrict the use of those funds as required by the grantor.

**\*1 [AS 44.21.420](#). Employment of office personnel.**

(a) The commissioner of administration may employ guardians ad litem, public guardians, clerical staff, and other assistants that the commissioner determines are needed to perform the duties set out in [AS 44.21.410](#). Employees under this subsection are in the classified service under [AS 39.25.100](#)

(b) The commissioner of administration may employ attorneys needed to perform the duties set out in [AS 44.21.410](#). Attorneys employed by the commissioner of administration in the office of public advocacy are in the partially exempt service under [AS 39.25.120](#)

(c) The commissioner of administration may contract for services of court-appointed visitors and experts needed to perform the duties set out in [AS 44.21.410](#). The commissioner may contract with attorneys to provide legal representation, and with other persons to provide guardian ad litem services, as needed to perform the duties set out in [AS 44.21.410](#). The commissioner may determine the rate of compensation for contractual services, taking into account the time involved, the skill and experience required, and other pertinent factors.

**[AS 44.21.430](#). Attorneys engaged by public advocacy office.**

(a) Only an attorney admitted to the practice of law in this state may be retained under contract by the office of public advocacy to provide legal representation. A person is not eligible to be an attorney employed by the office unless admitted to the practice of law in this state no later than 10 months following the commencement of the person's employment by the office.

(b) An attorney employed by the office of public advocacy may not engage in the private practice of law unless the attorney provides services to the office as an independent contractor.

**AS 44.21.440. Conflicts of interests.**

Services and legal representation rendered by the office of public advocacy, whether performed by a person under contract or by an employee of the office, shall be provided in a manner that avoids conflicts of interests.

**\*li AS 44.21.450. Civil liability of volunteer guardians.**

(a) A volunteer guardian ad litem under the supervision of the office of public advocacy is not civilly liable for acts or omissions during the good faith performance of duties as a guardian unless the acts or omissions constitute gross negligence.

(b) This section does not affect the civil liability of the office of public advocacy.

**AS 44.21.460. Nonattorney volunteer guardians ad litem.**

A nonattorney volunteer guardian ad litem may not give legal advice or act in the capacity of attorney for a minor before a court or administrative agency.

**AS 44.21.470. Definition.**

In AS 44.21.410 - 44.21.460, “volunteer guardian ad litem” means a court-appointed special advocate (CASA).

**\*1 ISSUES PRESENTED FOR REVIEW**

1. The Office of Public Advocacy was appointed as conservator for Susan Trapp. Trapp sued OPA for negligence, claiming, among other things, that OPA was negligent for failing to petition the court to “upgrade” Trapp's conservatorship to a guardianship. Does a conservator have an actionable duty to petition the court to upgrade a conservatorship to a guardianship?
2. If such a duty exists, is OPA entitled to discretionary function immunity on this claim?
3. Trapp also claimed that OPA negligently failed to take other actions to protect her health and welfare. As conservator, does OPA have an actionable duty to take “other actions” to protect the health and welfare of one of its “protected persons?”

**STATEMENT OF THE CASE**

**A. FACTUAL BACKGROUND**

**1. The Conservatorship Is Established**

Susan Trapp asked the court to appoint a conservator for her. [Exc. 219-22; 224] The Social Security Administration had required her to find a responsible payee, in order to assure that its monthly benefit checks to her were spent appropriately. [Exc. 188-89; 224-25]

**\*2** The probate master scheduled a hearing on Trapp's petition, and appointed “OPA/Betty Wells” as a court visitor to gather records on Trapp and make recommendations to the court. [Exc. 222] By law, OPA is required to provide visitors for court appointments. AS 44.21.410(a)(2). By practice, in Anchorage, visitors are selected using a standard state procurement process for professional services. [Exc. 347] Once the contract is awarded, OPA has very little contact with the visitors and no supervising authority over them. [Exc. 347-48]

Prior to Trapp's hearing, visitor Betty Wells submitted a report with her findings and recommendations. [Exc. 223-25] In addition to finding that Trapp had a number of problems relating to physical and mental health issues and alcoholism, Wells recognized that Trapp was currently in good physical condition, was doing well presently, and was alert and aware concerning herself and her needs relating to the Social Security Disability payments. [Exc. 225] Wells recommended the appointment of OPA as conservator because Trapp's alcoholism forced the Social Security Administration to require her to find a responsible payee to receive and handle her disability checks. [Exc. 225]

Following a hearing on October 16, 1995, Superior Court Judge Larry Card entered an order appointing OPA as conservator for Trapp. [Exc. 33] Judge Card also signed \*3 letters of conservatorship, which were accepted by OPA representative Nancy Mueller. [Exc. 34-35] And Judge Card signed a conservatorship plan, which specified the duties assigned to OPA as Trapp's conservator. [Exc. 36-37] OPA's duties were strictly financial: to pay for Trapp's physical and mental health care, housing, personal care, comfort, maintenance, education and vocational services, and insurance, and to gather and disburse her benefits and other monies - in short, to handle all her financial affairs. [Exc. 36-37]

## 2. Course Of The conservatorship

Establishing a conservatorship for Trapp did not cure her many problems. As Trapp has noted, she continued to “cycle through the system” of jail, Alaska Psychiatric Institute, and various social services programs, just as she had in the past.<sup>1</sup> However, she had long periods of lucidity and competence, lasting up to several months. [Exc. 327, 339] During these times she was able to handle her own money, arrange her own housing, and care for herself in every regard. [Exc. 339] Trapp was highly intelligent and articulate when lucid; according to Public Advocate Brant McGee, she was “probably one of the more knowledgeable advocates for the homeless” in Anchorage, based on her advocacy work for others. [Exc. 330] \*4 This advocacy work for others made her unusually aware of the services available in the community for those with chronic mental illness or other disabilities. [Exc. 332]

On her own, Trapp was able to make appointments, follow up on them, and obtain treatment. [Exc. 326-27] At times, she was able to work, earning up to \$500 per month; she kept and managed that money on her own. [Exc. 338] She developed stable relationships with a series of boyfriends. [Exc. 338] In the proceedings below, Trapp did not dispute that there were times when she was able to care for herself. [Exc. 285]

On December 10, 1996, Trapp wrote to the court seeking to terminate her conservatorship. [Exc. 245] Court visitor Marieann Vassar discussed the letter with Trapp, who admitted that OPA's conservator, Nancy Mueller, had “basically treated her fairly.” [Exc. 245] Trapp decided not to pursue dismissal of the conservatorship because of the greater cost of using other representative payees in Kodiak, where she was living at the time. [Exc. 245]

In 1999, Trapp again requested the court to terminate the conservatorship. On April 23, 1999, Betty Wells filed another visitor's report. [Exc. 242-44] Wells noted that Trapp continued to “cycle” in the system, with arrests and admissions to API. She concluded that Trapp remained unable to handle her \*5 own financial affairs. But Wells also noted that Trapp “continues to blame her conservator for her troubles.” She concluded that Trapp's “past deceptions and actions have resulted in her current situation.” [Exc. 243] Because Trapp remained unable to handle her own finances Wells recommended that the conservatorship continue. [Exc. 244]

In December 2000, following yet another attempt by Trapp to end her conservatorship, Judge Sanders found that there was good cause for the conservatorship to continue. [Exc. 38] He ordered OPA to continue to work with Trapp and to work on a “step-down process where Ms. Trapp is given more and more control of her monies.” [Exc. 38] He terminated the court visitor, and ordered that either Trapp or OPA could approach the court if it were necessary to modify the court order. [Exc. 38]

### 3. The Earlier Stages Of This Litigation

Acting without a lawyer, Trapp filed a complaint against OPA on April 20, 2000. [Exc. 1] She claimed that OPA 1) intentionally withheld funds meant for food, shelter, and clothing and that this placed her life in jeopardy, 2) told other agencies not to help her and broke federal confidentiality laws, 3) was verbally abusive to her, and 4) disregarded her mental illness and caused her to be homeless. [Exc. 1] Upon OPA's motion, the trial court dismissed the complaint, finding \*6 OPA entitled to quasi-judicial immunity from Trapp's claims. [R. 375]

Upon appeal, this Court reversed and remanded, finding that absolute quasi-judicial immunity was inappropriate under the statutory scheme for conservatorships.<sup>2</sup>

### B. THE PROCEEDINGS BELOW

Following remand, Trapp filed an amended complaint. [Exc. 2-11] Among the claims relevant here, Trapp alleged that OPA was negligent in failing to “take formal action to address [her] psychiatric disorders, severe drug and alcohol addictions, and gambling addiction.” [Exc. 8] Specifically, Trapp alleged that OPA was negligent in never asking the court to be appointed as her guardian. [Exc. 5] Notably, Trapp also claimed, contrary to her earlier complaint, that OPA was negligent by being aware of her inability to manage money and nonetheless giving her sums that were beyond her capabilities to manage. [Exc. 5]

In Trapp's initial disclosures, and at his deposition, Trapp's expert David Schade made her claim of “failure to upgrade” quite specific. [Exc. 39, 43] He opined that OPA should have petitioned for limited guardianship powers within six months of opening the case, and then later petitioned for \*7 full guardianship. [Exc. 43] In a subsequent affidavit, Schade admitted that the “appointment of a guardianship for a person with Ms. Trapp's problems is certainly not a guarantee that the guardian will be able to provide for her safety and well-being.” [Exc. 253] He also admitted that imposition “of a guardianship is a serious matter and results in restrictions on an individual's freedom.” [Exc. 254] He concluded that dealing with a person such as Trapp “with her multiple physical and mental problems is a huge challenge.” [Exc. 253] He agreed with OPA lead guardian Steven Young that a conservator “must constantly negotiate with a protected person” such as Trapp. [Exc. 253]

By affidavit, Steven Young explained that there is a very low threshold to qualify as a “protected person” for purposes of having the court appoint a conservator. [Exc. 344] He explained that protected persons will often have only a partial or limited incapacity or disability, and frequently retain a great deal of their capacity to make other decisions in their lives. [Exc. 344] As a result, there must be constant negotiation between the protected person, who may resent losing the power over his or her own estate, and the OPA conservator, who has the final authority over use and conservation of the estate. [Exc. 344] The conservator/protected person relationship must develop a level of trust over time; imposing a \*8 duty for OPA conservators to petition for guardianship, and thus to take away more of the protected person's rights, would undermine the relationship that OPA has sought to develop in order to work with the protected person to manage the estate. [Exc. 344-45] It would be destructive of the relationship for the protected person to see OPA, as petitioner in the guardianship proceeding, working to take away more of the person's rights and have them given to OPA. [Exc. 345] OPA believes that imposition of such a duty would have an adverse effect on any conservator/protected person relationship. [Exc. 345]

Young further related that OPA, in accord with the law, attempts to discharge its duties in the least restrictive manner possible. [Exc. 53]

When this litigation resumed after the remand, OPA moved to terminate its appointment, based on the conflict that arose from continuing as Trapp's conservator while being sued by her for its ongoing actions in that same conservatorship; Judge Christen terminated OPA's appointment effective January 30, 2003. [Exc. 60-61]

OPA moved for partial summary judgment, on the ground that it did not owe Trapp an actionable duty to petition to upgrade her conservatorship to a guardianship or to take more power over her life and affairs. [Exc. 12-30] Trapp opposed, \*9 and cross moved, arguing that such a duty exists and that OPA breached it. [Exc. 62-100] Trapp argued that OPA should have petitioned for guardianship powers or taken some other form of affirmative action on her behalf. [Exc. 77-100] In a combined reply and opposition to the cross motion, OPA also asserted that discretionary function immunity protected against Trapp's claim if the court were to recognize the existence of an affirmative duty. [Exc. 270-74]

On September 11, 2003, the trial court granted OPA's motion, finding that OPA had no duty to petition for a guardianship for Trapp. [Exc. 304-05] Following further clarifying motions and orders the court issued final judgment on November 3, 2003. [Exc. 306-12, 314]

Trapp makes this timely appeal.

### STANDARD OF REVIEW

This court reviews grants of summary judgment *de novo*, drawing all reasonable inferences in the non-movant's favor, and likewise viewing all facts in the light most favorable to the non-movant.<sup>3</sup> The court further determines whether the parties genuinely dispute any facts; if so, whether those facts are material to a viable legal theory; and, if not, whether the \*10 undisputed facts entitle the movant to judgment as a matter of law, pursuant to [Alaska Rule of Civil Procedure 56\(c\)](#).<sup>4</sup>

Issues of duty are questions of law,<sup>5</sup> as are issues of discretionary function immunity.<sup>6</sup> Reviewing questions of law, this court will apply its independent judgment and adopt the rule of law that is most persuasive in light of precedent, reason and policy.<sup>7</sup>

Summary judgment may be sustained on a question of duty in a tort case where the only reasonable inference from the undisputed facts is that no tort duty existed between one party and the other.<sup>8</sup>

This Court will apply its independent judgment when reviewing questions of statutory interpretation and will adopt the rule of law that is most persuasive in light of precedent, reason, and policy.<sup>9</sup>

### \*11 ARGUMENT

#### SUMMARY OF ARGUMENT

A conservatorship is not a creature of the common law, but rather of statute and the court orders that create and direct it. Therefore the duties incumbent upon a conservator are to be found in those statutes and court orders and not in the common law or the desires of the "protected person" for whom the conservatorship was instituted. Nothing in the Alaska statutes that provide for conservatorships, and in those that establish the Office of Public Advocacy and its responsibility to provide conservators upon appointment by the courts, creates an actionable duty for OPA conservators to petition the court to "upgrade" a conservatorship, which involves narrow powers over money matters, to a guardianship, with its broader powers over other aspects of the ward's life. Similarly, nothing in the court orders that created and guided Susan Trapp's conservatorship provided for such an actionable duty.

The statutes and court orders are the only possible source of such a duty. But public policy analysis does not produce a contrary result.

Even assuming that such a duty did exist, OPA conservators are entitled to discretionary function immunity for decisions about whether to petition to upgrade a conservatorship to a guardianship.

\*12 Finally, neither the statutes providing for guardianships, nor the court orders creating and guiding Susan Trapp's conservatorship, impose an actionable duty to take other affirmative steps regarding Trapp's health and safety, as opposed to managing her financial estate.

## **I. OPA AS CONSERVATOR HAS NO ACTIONABLE DUTY TO PETITION THE COURT TO UPGRADE A conservatorship TO A GUARDIANSHIP**

Where a negligence claim has been made, it is the policy of this Court to first determine whether a duty exists in the type of case presented.<sup>10</sup> The Court will turn to public policy analysis only where the issue of duty is not governed by statute.<sup>11</sup> Here, because conservatorships have their origin in an extensive statutory scheme, the Court only needs to examine the statutes and the court orders creating the particular conservatorship to determine if the duty which Trapp seeks to impose exists. It does not, and public policy analysis does not produce a contrary result.

### **\*13 A. Neither The Statutes Nor The Court Orders That Created This Conservatorship Provide For A Duty To Petition For Guardianship**

#### **1. The relevant statutes**

Examination of the statutes relating to conservatorships reveals no statutory duty for conservators to seek further powers over protected persons by seeking to convert conservatorships into guardianships.<sup>12</sup> Similarly, no such duty is imposed by the statutes relating to public guardians.<sup>13</sup> Trapp admits as much.<sup>14</sup>

AS 13.26.390 allows intervention by the public guardian into private guardianships or conservatorships, where the private guardian or conservator is not fulfilling its duties, where the estate is subjected to waste, or where the best interests of the ward or protected person require it. This statute is permissive, using “may,” which imposes no mandatory \*14 actionable duty.<sup>15</sup> But this statute is not directed at OPA's own conservatorships, for which no intervention is necessary.

Other statutory provisions regarding conservators confirm that there is no actionable duty to petition the court to “upgrade” a conservatorship to a guardianship. AS 13.26.240(b) provides that a conservator “may” petition the court for instructions concerning the conservator's responsibilities.<sup>16</sup> Again, “may” is permissive and creates no mandatory - or actionable - duty.<sup>17</sup> AS 13.26.245 emphasizes that a conservator's duties are focused on money issues, not general welfare issues, by requiring the conservator to adhere to the standards of care concerning trustees under AS 13.36.225 13.36.290.<sup>18</sup> These latter statutes contain the “prudent investor rule,”<sup>19</sup> are known collectively as the Alaska Uniform Prudent \*15 Investor Act,<sup>20</sup> and concern only financial issues relating to investment, management and trust issues.

Neither the probate rules nor the applicable regulations adumbrate such a duty to upgrade.<sup>21</sup>

Indeed, an examination of the statutes relating to conservatorships clearly demonstrates that conservatorships are created for money management issues only, and not for general issues of health and safety. An examination of the guardianship statutes confirms their interest in these broader health and safety issues and a concomitant award of significantly broader powers to a guardian when compared to those of a conservator.<sup>22</sup> Where the legislature has created an extensive statutory scheme, such as that related to conservatorships, and

Where the only arguably relevant statutes are permissive, using “may,” the Court should decline to recognize a mandatory, actionable duty for a conservator to take some additional action, especially to petition for a guardianship.

## \*16 2. The court orders

Judge Card's orders and other documents relating to Trapp's conservatorship make no allocation to OPA of a duty to petition the court to "upgrade" Trapp's conservatorship to -a guardianship, full or otherwise. [Exc. 33-37] Judge Sanders' order on review similarly imposes no such duty; indeed, it anticipates a "step-down" process whereby Trapp would gradually recover control of her monies within the conservatorship. [Exc. 38]

Judge Card's order appointing a conservator gives OPA only "the powers and duties set forth in AS 13.26.280." [Exc. 33] That statute discusses collection and disposition of the estate's assets; it makes no reference to a duty to upgrade or petition the court for more or different authority.

Both the statutes relating to conservatorships and the court orders relating to Trapp's conservatorship are narrowly focused on financial issues related to Trapp's estate. There is simply no basis to impose upon a non-suspecting conservator a duty that reaches far beyond these estate concerns.

### B. Public Policy Does Not Support Imposition Of A Mandatory Duty To Petition For Guardianship

Even though there is no duty imposed by statute or court orders, Trapp argues that this Court should create such a duty based on public policy concerns. But public policy weighs \*17 against imposing such a duty on OPA when it is acting as an appointed conservator. In an area that is so heavily controlled by statutes this Court should refrain from disturbing the balance achieved by the legislature in distributing and delineating the duties of conservators generally to achieve statutory aims.<sup>23</sup> This is especially so where the legal relationship between the conservator and the estate regarding tort suits is a creature of statute,<sup>24</sup> and the origin of the relationship is a court order that never implies in any fashion that such a duty might exist, let alone be actionable.

This Court uses the *D.S.W.* factors<sup>25</sup> to analyze the policy considerations attendant to recognition of an actionable duty.<sup>26</sup> The Court has repeatedly indicated that this analysis is not necessary if the duty issue is governed by "recognized \*18 principles of tort law,"<sup>27</sup> or is controlled by statute.<sup>28</sup> OPA has demonstrated above that the powers and duties of a conservator are intimately - and exhaustively - controlled by statute and the court order creating the conservatorship. Thus there is no need here to perform the *D.S.W.* public policy analysis. Nonetheless, this Court has at times referred to the *D.S.W.* factors in considering whether a "special relationship" gives rise to an actionable duty,<sup>29</sup> and so OPA will address these factors briefly. They include foreseeability, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the plaintiff's injury, the moral blame attached to the defendant's conduct, the policy of preventing further harm, and the extent of the burden to the defendant and consequences to the community of imposing a burden of care. Where a public agency is involved, the Court also considers the extent of the agency's power, the role imposed on it by law, and the limitations imposed on it by budget.<sup>30</sup>

## \*19 1. Class of cases

The first part of *D.S.W.* analysis is to set forth the class of cases to which the analysis is applicable.<sup>31</sup> This is necessary in order to focus on the basic relationship of the parties rather than their particular conduct on a given occasion, which goes to whether a breach of duty occurred rather than the more fundamental issue of whether a duty was owed.<sup>32</sup> The relationship here is narrow, and is defined by court orders and statutes relating to conservators. Without these, OPA would have no relationship to Trapp. This is additional support for the idea that no public policy analysis is required - the relationship is defined and contained by the court orders and extensive and specific statutes relating to conservatorships, which have to do with the administration and

preservation of money and property, and not general welfare. Thus the discussion below mainly focuses on the relationship between OPA as conservator and its protected persons generally, rather than the specifics of OPA's and Trapp's relationship.

## **\*20 2. Foreseeability**

This Court takes a broad view of foreseeability,<sup>33</sup> and could easily determine that it is generally foreseeable that a protected person might suffer injury if a guardian were not appointed for her. However, as the Court noted in *Sandsness*, foreseeability alone does not justify imposition of a duty; the Court has declined on more than a few occasions to impose a duty where harm is otherwise foreseeable.<sup>34</sup> The remaining factors strongly outweigh the foreseeability factor.

## **3. Certainty that plaintiff suffered injury**

Certainly in a theoretical sense the Court could believe that some injury could occur to a protected person that might not have occurred if the conservator, or someone else, had petitioned for, and the probate court had granted, a guardianship. However, as Trapp's own history demonstrates, it is not at all clear that she suffered any additional injury due to OPA's failure to petition for guardianship. Her longstanding problems - psychiatric, criminal, gambling, drug and alcohol - existed before the conservatorship [Exc. 224-25], during it [Exc. 170], and after it. [Exc. 173-81] The existence of additional injury, and its causation by OPA's \*21 inaction, are in doubt on these facts, as they would be for anyone with so many and such deeply troubling problems. Even Trapp's expert admitted that the appointment of a guardian for someone with her problems is not a guarantee that the guardian can provide for her safety and well-being. [Exc. 243]

## **4. Closeness of connection between defendant's conduct and plaintiff's injury**

The connection between OPA's failure to petition to upgrade to a guardianship and Trapp's damages, in whatever form, is attenuated. OPA could have petitioned the court, but the court would have had to decide whether to grant the petition. OPA's petition would thus have been a necessary, but not a sufficient, condition for imposing a guardianship.<sup>35</sup> In acting on the petition, the court would have considered Trapp's own desires.<sup>36</sup> Despite the amended complaint's claim of OPA negligence in providing funds to Trapp when she was incapable of managing them, Trapp's own handwritten, pro se complaint, which started this case, indicates that she wanted more control over her money, not less. [Exc. 1] There is no indication that she \*22 would have consented to a guardianship, with its attendant decrease in her own decision-making authority. In fact, Trapp sought to have her conservatorship terminated several times.<sup>37</sup>

In addition, OPA was not the only entity that could have acted. Trapp was a knowledgeable and resourceful advocate for herself; she could have petitioned for herself, just as she originally sought conservatorship.<sup>38</sup> There were many other possible petitioners - the criminal court system, API, Adult Protective Services, Southcentral Counseling Center, to name a few.

Because the probate court must give consideration to many factors, including the wishes of the potential ward, and because OPA was not the only entity that could have petitioned for guardianship, there is only an attenuated connection between OPA's failure to petition for a guardianship and any injuries alleged by Trapp.

## **\*23 5. The moral blame attached to defendant's conduct**

As for moral blame, there is none here. OPA was assigned to administer a narrowly crafted conservatorship that had a specific purpose - to preserve Trapp's estate for her use in meeting her basic needs. No court order, statute, regulatory rule, or case decision indicated that OPA had the obligation to seek, *sua sponte*, an increase in its assigned powers or duties over its wards or protected persons. In fact, the entire tenor of the guardianship and conservator statutes goes the other way - requiring guardians

and conservators to act in the least restrictive manner possible and with the goal of returning wards' or protected persons' authority to them as soon as possible.<sup>39</sup> The decision not to petition to upgrade is entirely consistent with that approach and contrary to the approach that Trapp's attorneys now claim should have been taken toward her. It is noteworthy that the amended complaint claims that, among other OPA failings, OPA violated Trapp's civil rights by imposing restrictions on her that would only be appropriate if OPA had been appointed her guardian. [Exc. 8-9] Trapp's desire to have it both ways indicates that moral blame can hardly be \*24 directed at OPA.

OPA could also be considered to have a conflict of interest if it were required to petition for more restrictive conditions and greater authority, where its statutory obligations trend otherwise and especially where OPA's petition might result in OPA itself, rather than some other entity, being appointed as guardian. This certainly places the issue of OPA's apparent self-aggrandizement squarely between the conservator and the protected person, and at the very least complicates their relationship. [Exc. 344-45]

## **6. Policy of preventing future harm**

Likewise, the policy of preventing future harm would not obviously be served by imposing upon OPA a duty to petition the court to upgrade its conservatorships. As noted above, many other entities exist, from families to public and private institutions, that can petition for a guardianship without presenting a conflict of interest. And the court need not grant the petition. More importantly, however, even if the guardianship is established, OPA as guardian does not have the power to prevent Trapp from drinking or consuming drugs, gambling, committing crime, or being committed to API or jail. Schade admitted that an OPA guardian could not keep Trapp in a \*25 recommended placement - she would always be free to leave.<sup>40</sup> No guardian has the legal or physical power to restrain a ward in this manner; and indeed, guardians must treat their wards in the least restrictive manner possible.<sup>41</sup> Thus guardianship is no guarantee that future harm will not come to a ward who is as self-destructive as Trapp. [Exc. 253]

## **7. Burden on the defendant and consequences to the community**

The factor of burden on the defendant and consequences to the community, and consideration of the agency's appropriate role and the power accorded to it by law, further counsels against imposition of a duty. If such a duty is imposed it may open the floodgates to litigation.<sup>42</sup> Every protected person or ward of OPA could file suit against OPA for not going to the court and asking for more restrictions on the person and the person's ability to control her own life and her own money. As noted, this is contrary to the statutory policy of meeting needs in the "least restrictive" manner possible. Turning a permissive duty into a mandatory, actionable duty will burden \*26 the courts with the processing of unnecessary petitions as OPA, seeking to avoid liability, takes a "most restrictive" approach designed to avoid lawsuits and damages, again contrary to statute. Imposing liability for failure to petition to upgrade a conservatorship to a guardianship would have a chilling effect on conservators, who should spend their time assisting their "protected persons" to achieve the purpose of the court order and not seeking more work merely for the purpose of pre-empting burdensome collateral litigation.<sup>43</sup>

In addition, imposing a duty on OPA to petition to "upgrade" its conservatorships to guardianships would create a conflict that will degrade OPA's relationships with its clients. The fiduciary relationship that OPA bears toward its wards and protected persons is based on trust and minimizing conflict. If OPA must petition to take away or restrict rights, that trust will be undermined, and the fiduciary relationship will be damaged. OPA should not be put in this position.

Imposing upon OPA the duty to seek and be granted more power over its protected persons would also cause OPA's caseload and workloads to go up. Excessive caseloads already constitute \*27 a problem for the agency, one that Trapp has made an independent claim in this lawsuit.<sup>44</sup>

The monetary burdens of such an imposition of duty fall directly on the public, in a time of fiscal difficulty and tight budgets. The Susan Trapps of this world are already supported by public money. They are further supported by a public agency - OPA - that allows them access to their money in a way that tries to prevent its waste before it can be applied to its intended use - basic support. It would simply go too far to then allow damages lawsuits - whose defense and judgments are equally borne by the public - for failing to ask the court to take away more of the individuals' rights and liberties and treat them more restrictively. This would be a poor result from a policy perspective.

Imposing a duty to petition to upgrade would take away OPA's ability to serve its protected persons within its professional discretion and the confines of the court orders of conservatorship, and within the least restrictive manner required by the statutes. It would make courts the sole arbiters of whether every step taken for a protected person has been sufficient, when in fact the court, via the statutory \*28 structure, has already delegated these powers to OPA.<sup>45</sup>

Finally, there is no principled way to limit either the duty or the consequences in alleged damages to the relatively minor governmental function of petitioning the probate court for more restrictive conservatorships or guardianships for individuals with known self-destructive propensities.<sup>46</sup>

This *D.S.W.* policy analysis confirms the statutory analysis - there should be no actionable duty imposed upon OPA conservators to petition the court for the imposition of a guardianship.

### C. Trapp's Argument Misperceives And Overstates The Nature Of The conservatorship

Trapp argues that common law principles control here. She argues that OPA undertook a responsibility to protect her welfare, and that OPA was therefore negligent in failing to take the next step of petitioning for a guardianship.<sup>47</sup> She also cites the [Restatement \(Second\) of Torts, §323 \(1965\)](#). This line of argument is flawed because it assumes the answer to the very question at issue in the litigation: What was the nature of the task or duty undertaken by OPA? Because OPA was appointed to \*29 and undertook a conservatorship and nothing more, it did not incur the larger duties for general welfare that Trapp seeks to impose.

Trapp relies on a series of cases that discuss “special relationships” where this Court has imposed affirmative duties to aid or protect.<sup>48</sup> But the injuries in those cases arose out of breach of the duties that were actually undertaken, which, of course, is necessary before a tort may be found. For example, in *Adams v. State*,<sup>49</sup> the state undertook fire inspection for the purpose of preventing injuries and damages by fire. The court ruled that the state owed a duty to conduct the inspections with care and to take affirmative action relating to those fire hazards that were discovered.<sup>50</sup> The damages arose out of a hotel fire complicated by the hazards previously discovered and for which the state had promised, but never delivered, a detailed letter so that the manager could correct them.<sup>51</sup> The damages did not arise out of food poisoning from the hotel restaurant, and the court did not impose a duty to inspect for cleanliness in the kitchen. But that is what Trapp seeks to do \*30 here - impose liability for breach of a duty to protect general welfare, when all that OPA undertook was a conservatorship.

Similarly, in *R.E. v. State*,<sup>52</sup> the court recognized a duty to use reasonable care in daycare licensing. The “special relationship” arose out of reliance on daycare licensing, not driver's licensing, or barber's licensing, or acupuncture licensing, or anything else.

Trapp simply reads the duties imposed by the conservatorship too broadly. She argues that a conservatorship is “conduct designed to protect others.”<sup>53</sup> But it is actually only conduct designed, by statute and court order, to protect the *financial* estates of the protected persons, for their own benefit as well as that of their families and their creditors.

The same analysis applies to Trapp's brief references to *Joseph v. State*,<sup>54</sup> *P.G. v. State*,<sup>55</sup> and others.<sup>56</sup>

\*31 Trapp's reliance on Restatement §323 fails for the same reason. Restatement §323 provides: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care *to perform his undertaking*, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking. (Emphasis added).

OPA agrees that it must “perform [its] undertaking.” The question is: “What is the undertaking?” The answer is that the undertaking is a conservatorship, which is defined by statutes and court orders to relate only to the financial estate of the protected person. It is not “conduct designed to protect others,” or “protect the welfare of a specific individual,” both of which are too broad and neither of which appear in the conservatorship statutes or Judge Card's orders.

In sum, the issue here is the scope of the undertaking. Trapp construes it too broadly. The resolution, which is quite simple, is found in the statutes and the court orders. Those sources narrowly define the conservator's duties and preclude Trapp's efforts to refashion a conservatorship into an all purpose “duty to protect” relationship.

## **\*32 II. DISCRETIONARY FUNCTION IMMUNITY PROVIDES AN ALTERNATIVE BASIS FOR AFFIRMING SUMMARY JUDGMENT FOR OPA**

Trapp and OPA filed cross-motions on the issue of whether or not OPA has an actionable duty to petition the court to “upgrade” a conservatorship to a guardianship. But Trapp's cross-motion demonstrates why discretionary function immunity would be an alternative ground for summary judgment in OPA's favor if the Court should find that such a duty exists.<sup>57</sup>

AS 09.50.250 provides that no claim may be brought against the State “if the claim (1)...is an action for tort and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused.”

This Court follows the federal decisions relating to the Federal Tort Claims Act, upon which Alaska's statute is based.<sup>58</sup> The test is twofold, and examines whether 1) the questioned act is discretionary and 2) is of the type of \*33 decision-making that discretionary function immunity was intended to protect.<sup>59</sup>

Where a statute or regulation is permissive, using “may,” state officials have the authority, but no mandatory duty, to perform the act in question.<sup>60</sup> As we have seen, no statute creates the duty Trapp wishes to impose upon OPA. But AS 13.26.240(b) allows a conservator to petition (“may petition”) the appointing court for instructions concerning the fiduciary responsibility of the conservator. Thus, as to the first prong of the test, OPA has the discretion to petition, but no mandatory duty.

As to the second prong, OPA's discretion to petition the appointing court is of the type of decision-making intended to be protected by discretionary function immunity. The decision to upgrade a conservatorship to a guardianship is a planning issue relating to the allocation of resources<sup>61</sup> and \*34 issues of health and safety.<sup>62</sup> The absence of any standard by which the court may judge whether state officials have made the “correct” decision in weighing the various policy considerations is an indication that the decision is to be protected by discretionary function immunity.<sup>63</sup>

The issue of lack of standards is critical here. Trapp has suggested no standards by which a decision to upgrade (or not) can be judged. Her attempts to characterize the duty are numerous and instructive. At various places, she \*35 characterizes the trigger for the duty she seeks to impose on OPA, to petition for guardianship, as follows:

- 1) "To take whatever steps were necessary to protect her when she was unable to protect herself" [Exc. 82];
- 2) To serve Ms. Trapp's "best interests" [Exc. 93];
- 3) To petition "if the circumstances should warrant it" [Exc. 95] ;
- 4) To petition "when the facts warrant" [Exc. 96];
- 5) To petition the court for a guardianship "when a protected person shows on a periodic and episodic basis, that they lack the ability to provide the essential requirements for their own personal health or safety" [Exc. 97];
- 6) "When a person demonstrates that they are partially incapacitated" [Exc. 97]; and
- 7) "When the circumstances show that a protected person is unable to take care of herself, and OPA is was [sic] aware of her predicament" [Exc. 97].

All of these formulations are "health and safety" evaluations that require allocation of resources and policy-based decision-making. Trapp never acknowledges the policy implications or the issues that must be balanced: removal of a protected person's rights from her during the step-up to guardianship; return of those rights when appropriate, as required by statute; court ordered intrusion into a person's \*36 life; OPA's balancing of the person's needs versus the possible detriment to the relationship resulting from OPA's attempt to take rights away; impacts to personal dignity; and so on. On a more concrete level, how many API commitments are sufficient to trigger a duty to petition? How many arrests? How many convictions? How many felonies versus how many misdemeanors? How many failed rehabilitation attempts? There are no standards, and there cannot be, that control when a decision like this must be made, and therefore such a decision should be protected by discretionary function immunity.

Whether or not the discretion involved is abused, the decision whether to petition the appointing court to establish a guardianship is an immune discretionary decision, for which tort claims are barred by [AS 09.50.250\(1\)](#). On this alternative ground, OPA is entitled to have the judgment in its favor affirmed.

### **III. TRAPP'S ALTERNATIVE STATUTORY DUTY ARGUMENT SHOULD BE DEEMED WAIVED FOR FAILURE TO DEVELOP IT IN A TIMELY MANNER**

In her briefing below and in her points on appeal, Trapp has argued that OPA owed a duty to take some other affirmative action to protect her health and safety. [Exc. 64, 100, 277, 291] In her appellate briefing, Trapp has apparently narrowed this claim to assert only that OPA owed her a statutory duty, under [AS 47.24.010\(a\) \(5\)](#), to make a report of harm to \*37 Adult Protective Services (APS).<sup>64</sup> The Court should refrain from ruling on this issue, and deem it waived, because Trapp raised it below only in a reply brief.<sup>65</sup> There was thus no factual development of the issue or legal finding of the applicability of the statute to Trapp herself.

In the trial court, Trapp filed a cross-motion for summary judgment combined with her opposition to OPA's motion for partial summary judgment.<sup>66</sup> Neither the cross-motion nor the opposition made any reference to [AS 47.24.010](#) or a duty by conservators to file reports of harm with APS. Trapp relied upon [Restatement \(Second\) of Torts, §323](#), and the *D.S.W.* factors. [Exc. 62] OPA then filed a brief combining its reply on its own motion for partial summary judgment with its opposition

to Trapp's motion for partial summary judgment.<sup>67</sup> Trapp next filed \*38 her reply on her motion for partial summary judgment.<sup>68</sup> It was only in this reply that Trapp raised the issue of AS 47.24.010 and the duty to make a report of harm. [Exc. 278, 281-82] There was no more briefing; the trial court issued its order finding no duty a few days later. [Exc. 304]

This procedural background raises two issues. First, the trial court never expressly ruled on any possible duty under AS 47.24.010 or its application to Trapp. Trapp sought clarification of the court's duty ruling [Exc. 306-07] but never mentioned the statute. Trapp only sought to clarify that the trial court had denied her cross-motion that OPA had alternative duties - to *either* petition for guardianship *or* take "affirmative steps to protect plaintiff's health and safety." [Exc. 307] The trial court's amended order added a simple sentence: "Plaintiff's cross-motion for summary judgment is hereby denied." [Exc. 309]

Second, and perhaps more importantly, there was never any factual development of whether the statutory use of "vulnerable adult" - see AS 47.24.900(16)<sup>69</sup> - applies to Trapp, or whether those who administer the statute would actually apply \*39 it to attempt to aid Trapp. Further, even though Trapp was in and out of API and jail during this period, and both API and the police are also mandatory reporters under AS 47.24.010(a), there was never any development of facts concerning whether these other reporters had made their reports, or whether APS had received any reports, from any source, on Trapp. This is significant because the record already shows Trapp "cycling" in and out of the system. If it is the same system to which APS would make referrals - the courts, the court visitors, API, South Central Counseling, the Alaska Center for the Blind, and "various drug and alcohol abuse programs"<sup>70</sup> - then such a referral or report of harm would be of no legal consequence and perhaps not even required. This is not simply a theoretical discussion of what the law requires, in a vacuum. Whether or not a duty exists is a matter of law and public policy.<sup>71</sup> But it is the factual context that puts flesh on the bones, so to speak. If Susan Trapp's chronic alcoholism, drug addiction, and personality disorder do not qualify as "physical or mental impairment" within the report of harm statute, then there may be no duty to make such reports. If Trapp does not meet the \*40 criteria for "self-neglect" - see AS 47.24.900(13)<sup>72</sup> - then there may be not be a duty to make such reports.

The Court should treat this argument as waived because it was first made below in a reply brief, the trial court never addressed it directly, and it was never made explicit in the points on appeal.<sup>73</sup>

## CONCLUSION

The Court should hold that OPA as conservator is under no actionable duty to petition to upgrade a conservatorship to a guardianship. In the alternative, the Court should find that discretionary function immunity protects against such a claim. Trapp's argument concerning a statutory duty under the report of harm statute - AS 47.24.010 - should be deemed waived because it was first introduced in a reply below, never developed factually \*41 or addressed legally by the trial court, and omitted from the points on appeal.

The Court should affirm the judgment below.

### Footnotes

- 1 Trapp's Opening Brief, pp. 5-8.
- 2 *See, Trapp v. State*, 53 P.3d 1138 (Alaska 2002).
- 3 *Brady v. State*, 965 P.2d 1, 8 (Alaska 1998).
- 4 *Id.*
- 5 *Mesiar v. Heckman*, 964 P.2d 445, 448 (Alaska 1998).
- 6 *Kiokun v. State, Dep't. of Pub. Safety*, 74 P.3d 209, 212 (Alaska 2003).
- 7 *State, Dep't. of Transp. and Pub. Fac. v. Sanders*, 944 P.2d 453, 456 (Alaska 1997).
- 8 *Arctic Tug & Barge, Inc. v. Raleigh Schwarz & Powell*, 956 P.2d 1199, 1203 (Alaska 1998).

9 *Jerue v. Millett*, 66 P.3d 736, 740 (Alaska 2003)(internal quotation and citation omitted).

10 *Kooly v. State*, 958 P.2d 1106, 1108 (Alaska 1998) (“Determining whether a duty exists in the type of case presented is the first analytical step in deciding whether a negligence action can be maintained.”).

11 *Id.*

12 These statutes, which are quite lengthy, are found in Title 13, Art. 4, at AS 13.26.165-320. Because of their length, in this brief, the statutes will be found only in the “Authorities Principally Relied Upon” and not primarily in these notes.

13 These statutes are found in Title 13, Art. 6, at AS 13.26.360-410. Similarly, they are not reproduced here, but are found only in the principal authorities at the beginning of the brief.

14 Trapp's Opening Brief, p. 12.

15 *State, Dep't. of Transp. v. Sanders*, 944 P.2d 453, 457-58 (Alaska 1997) (use of “may” in a regulation indicates discretion and does not create a mandatory duty).

16 AS 13.26.240(b) provides, “A conservator *may* petition the appointing court for instructions concerning the fiduciary responsibility of the conservator.” (emphasis added).

17 *See* n. 15, *supra*.

18 AS 13.26.245 provides: “In the exercise of powers, a conservator shall act as fiduciary and shall observe the standards of care applicable to trustees under AS 13.36.225 - 13.36.290.”

19 AS 13.36.225.

20 AS 13.36.290.

21 *See esp.* PR 17; 2 AAC 60.010, *et seq.*

22 The statutes pertaining to guardians are found in Title 13, Art. 3, at AS 13.26.090-.155.

23 *See State v. Sandsness*, 72 P.3d 299, 302-03 (Alaska 2003) (court should not disturb “delicate balance” crafted by legislature between best interests of children and broader interests of public safety; no actionable duty imposed on DFYS decisions about whether to petition the court to retain custody of juveniles beyond their eighteenth birthdays).

24 *See* AS 13.26.305, and *Trapp v. State*, 53 P.3d 1128 (Alaska 2002)

25 *D.S.W. v. Fairbanks North Star Borough Sch. Dist.*, 628 P.2d 554, 555 (Alaska 1981).

26 *Sandsness*, 72 P.3d at 305.

27 *Id.* Those principles are found in the Restatement (Second) of Torts, or prior caselaw.

28 *Kooly v. State*, 958 P.2d 1106, 1108 (Alaska 1998) (“Where it is not governed by statute, the existence of a legal duty is a public policy question.”).

29 *Sandsness*, 72 P.3d at 305 and n. 35 (citing illustrative cases).

30 *Id.* at 305, 306 (footnotes omitted).

31 *Mesiar v. Heckman*, 964 P.2d 445, 449 (Alaska 1998).

32 *Id.*

33 *Sandsness*, 72 P.3d at 306.

34 *Id.* and n. 49 (collecting cases).

35 *Id.* at 307 (DFYS' petition for commitment of a juvenile beyond his eighteenth birthday was a necessary, but not sufficient, condition for extending commitment; therefore, the relationship between the state's failure to act and plaintiff's injury was attenuated).

36 *See, e.g.*, AS 13.26.108(e); AS 13.26.113(a) (1); AS 13.26.116(b) (3) (A); and others.

37 *See* [R. 436], report of Betty Wells dated April 23, 1999, attached to OPA's original motion to dismiss, filed in this same lawsuit. *See* also [Exc. 38], Judge Sanders' order of December, 2000, issued after Trapp asked for and received a “review of her conservatorship,” and [Exc. 245], Marieann Vassar's report of April 15, 1997.

38 *See* [Exc. 188-89, 224-25]

39 *See, e.g.*, AS 13.26.090 (statement of purpose); AS 13.26.108(d) (visitor to recommend least restrictive authority needed to accomplish purposes of guardianship); AS 13.26.125(c)(court to apply “least restrictive alternative necessary” to meet needs to the ward); and others.

40 [Exc. 45] at p. 39. *See also* AS 13.26.150, listing powers and duties of guardians.

41 *See* AS 13.26.125 (court applies standard of “least restrictive alternative necessary to meet the needs of the ward”), and n. 40, *supra*.

42 *See Hawks v. State, Dept. of Pub. Safety*, 908 P.2d 1013, 1017 (Alaska 1995) for “floodgates” argument.

43 *See Karen L. v. Dept. of Health and Social Services*, 953 P.2d 871, 877 (Alaska 1998) (burden on community and defendants includes chilling effect on social workers, who should be working toward best interests of children in need of aid, not spending time in “burdensome collateral litigation.”).

44 [Exc. 7, 9-10], Amended complaint, at ¶¶ 34, 50.  
45 *Sandsness*, 72 P.3d at 307.  
46 *Id.* at 308.  
47 Trapp's Opening Brief, pp. 12-14.  
48 Trapp's Opening Brief, pp. 13-14.  
49 555 P.2d 235 (Alaska 1976).  
50 *Id.* at 240.  
51 *Id.* at 238-39.  
52 878 P.2d 1341 (Alaska 1994). -  
53 Trapp's Opening Brief, p. 14.  
54 26 P.3d 459, 462 (Alaska 2001) (jailer owes duties to prisoners to protect them from reasonably foreseeable harm, including that which is self inflicted; "intentionality" of the suicide is not a complete defense).  
55 4 P.3d 326, 331-32 (Alaska 2000)(DFYS' special relationship both with children in its care and their prospective foster parents requires it to gather and disclose facts about potential harm in order that the foster parents can make informed decisions).  
56 Trapp's Opening Brief, p. 13.  
57 See *Kiokun v. State, Dept. of Public Safety*, 74 P.3d 209 (Alaska 2003). Notwithstanding its usual practice to discuss duty issues first, the Court resolved the case on discretionary function immunity analysis because "it better illustrates the public policy issues that would also bear on a duty analysis." *Id.* at 213.  
58 *R.E. v. State*, 878 P.2d 1341, 1349 n. 15 (Alaska 1994).  
59 *Sanders*, 944 P.2d at 457-58.  
60 *Id.* at 457 (regulation using "may" indicates that state officials have discretion to enforce vehicle regulations on airport roads).  
61 Resource allocation decisions are immune discretionary decisions. *Kiokun*, 74 P.3d at 215; *Estate of Arrowwood v. State*, 894 P.2d 642, 646 (Alaska 1995).  
62 *Earth Movers of Fairbanks, Inc. v. State*, 691 P.2d 281, 283-84 (Alaska 1984) (decision whether to issue speeding tickets); *Arrowwood*, 894 P.2d at 645-46 (decision whether to close Parks Highway due to ice); *Kiokun*, 74 P.3d at 214 ("In [*Earth Movers* and *Arrowwood*] we held that the state's decisions were protected from tort claims under the doctrine of discretionary function immunity because the decision involved evaluation of safety concerns."), and at 217 ("[W]e think that a decision whether to conduct a search and rescue is inherently a decision regarding public safety objectives and the allocation of resources."). See also [Exc. 99], Trapp's memo below (the state has "no higher responsibility to its citizens" than to protect the physical health and safety of individuals who need court-ordered assistance.).  
63 *Sanders*, 944 P.2d at 458-59 ("Because the governing regulation provides no standards that a court might use to analyze the non-enforcement decision, the non-enforcement decision is protected by the discretionary function exception in AS 09.50.250(1)."); *Arrowwood*, 894 P.2d at 645 ("[T]he relevant statutory and administrative code provisions do not require officials to act to carry out a predetermined policy;" therefore, on-scene road closure decisions are protected by discretionary function immunity); *Earth Movers*, 691 P.2d at 284 (same, as to on-scene decisions about lowering speed limits).  
64 Trapp's Opening Brief, pp. 16-18.  
65 *Demmert v. Kootznoowoo, Inc.*, 960 P.2d 606, 611 (Alaska 1998) ("The function of a reply memorandum is to respond to the opposition to the primary motion, not to raise new issues or arguments, much less change the nature of the primary motion.").  
66 [Exc. 12-61], OPA's motion for partial summary judgment, including the lack of duty issue, dated August 4, 2003; [Exc. 62-254], Trapp's combined cross-motion for partial summary judgment and opposition to OPA's motion, dated August 15, 2003.  
67 [Exc. 255-76], dated August 29, 2003.  
68 [Exc. 277-303], dated September 4, 2003.  
69 This statute defines "vulnerable adult" as "a person 18 years of age or older who, because of physical or mental impairment, is unable to meet the person's own needs or to seek help without assistance."  
70 Trapp's Opening Brief, pp. 5-7.  
71 *Mesiar v. Heckman*, 964 P.2d 445, 448 (Alaska 1998) ("Whether an actionable duty exists is a question of law and public policy.").  
72 "Self neglect" is "an act or omission by a vulnerable adult that results or could result in the deprivation of essential services necessary to maintain minimal mental, emotional, or physical health and safety." Without factual development below, to see whether Trapp actually fits within the report of harm statutes as administered, there is simply nothing for this Court to review.  
73 See, e.g., *Alaska State Employees Ass'n v. Alaska Public Employees Ass'n.*, 813 P.2d 669, 671 n. 6 (Alaska 1991) (argument raised for the first time in reply memorandum could not be considered); *Bittner v. State*, 627 P.2d 648, 649 (Alaska 1981)(summary judgment may not be upheld on the basis of a ground which was urged for the first time in the movant's reply memorandum).

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