Approved 12/2/05

REPORT OF THE JUDICIAL COUNCIL
HB 2307 ADVISORY COMMITTEE

BACKGROUND

In February of 2005, House Judiciary Chair Michael R. O'Neal requested that the Judicial Council study 2005 House Bill No. 2307 relating to the appointment of guardians and conservators. HB 2307 proposes to amend K.S.A. 2004 Supp. 59-3068, which currently relates to the priority of nominees and their qualifications when a guardian is appointed and K.S.A. 2004 Supp. 59-3075, which currently relates to a guardian's duties, responsibilities, powers and authority. A copy of HB 2307 is attached to this report at page 7.

At the June, 2005 meeting of the Judicial Council, the Council agreed to undertake the study of HB 2307 requested by Representative O'Neal. The Council assigned the study of the proposed amendment to K.S.A. 2004 Supp. 59-3068, which relates to conflicts of interests between guardians and conservators and their wards to the Judicial Council Guardianship and Conservatorship Advisory Committee. The Council formed a new advisory committee to study the proposed amendment to K.S.A. 2004 Supp. 59-3075, which relates to the guardian's authority to consent to the withholding or withdrawing of life-saving or life sustaining medical care, treatment, services or procedures from a ward.

COMMITTEE MEMBERSHIP

The Judicial Council created the HB 2307 Advisory Committee and appointed the following persons to the Committee:

Gerald L. Goodell, Chair, Topeka, practicing lawyer and member of Kansas Judicial Council.

Terry Bruce, Hutchinson, State Senator from the 34th district, vice-chair of the Senate Judiciary Committee and practicing lawyer.

Sam K. Bruner, Overland Park, Retired District Judge from the 10th Judicial District and Chair of the Judicial Council Guardianship and Conservatorship Advisory Committee.

John G. Carney, Kansas City, Vice-President of Aging and End of Life at the Center for Practical Bioethics, specializing in the ethical dimensions of decision making at the end of life.

William H. Colby, Prairie Village, Lawyer, represented the family of Nancy Cruzan, author of Long Goodbye: The Deaths of Nancy Cruzan and fellow at the Center for Practical Biothics in Kansas City, Missouri.

Lance Kinzer, Olathe, State Representative from the 14th District and practicing lawyer.

Sandy Kuhlman, Phillipsburg, State Chair of the Kansas Hospice and Palliative Care Organization.

Rud Turnbull, Lawrence, Professor of Special Education and Co-director of the Beach Center on Disability at the University of Kansas.

Tom Welk, Wichita, Catholic priest with a doctorate in medical ethics and Director of Professional Education and Pastoral Care at Harry Hynes Memorial Hospice.

Charles W. Wurth, Wichita, Chairman of the Board of Kansas Health Ethics, owner and operator of nursing homes and former Executive Director of the Institute of Logopedics.

Craig H. Yorke, Topeka, physician, with a speciality in neurosurgery.

METHOD AND STUDY

The Judicial Council appointed a Committee whose members bring knowledge, experience and a variety of points of view to the study and which met four times between July and November of 2005. The Committee discussed the assignment and related issues and considered a number of relevant articles, memoranda, reports, written testimony, position papers and court opinions. A list of the materials considered by the Committee is attached to this report at page 14 and a copy of the materials are available in the Judicial Council office.

In addition, four persons appeared before the Committee to discuss issues and answer the Committee's questions. The Litigation Director of the Disability Rights Center of Kansas, sponsor of the proposed amendments; the Executive Director of the Kansas Guardianship Program, which oversees 1500 guardianships; and two District Court Judges, each of whom had considered several petitions under K.S.A. 75-3075(e)(7)(C), appeared before the Committee.

THE ISSUE

The issue before the Committee is whether K.S.A. 2004 Supp. 59-3075(e)(7)(C) should be amended, and if it should be amended, how should the amendment be phrased. A copy of K.S.A. 2004 Supp. 59-3075 is included with the report at page 17.

Currently subsection (e)(7)(C) of K.S.A. 59-3075 reads as follows:

> "(C) in the circumstances where the ward's treating physician shall certify in writing to the guardian that the ward is in a persistent vegetative state or is suffering from an illness or other medical condition for which further treatment, other than for the relief of pain,

would not likely prolong the life of the ward other than by artificial means, nor would be likely to restore to the ward any significant degree of capabilities beyond those the ward currently possesses, and which opinion is concurred in by either a second physician or by any medical ethics or similar committee to which the health care provider has access established for the purposes of reviewing such circumstances and the appropriateness of any type of physician's order which would have the effect of withholding or withdrawing life-saving or life sustaining medical care, treatment, services or procedures. Such written certification shall be approved by an order issued by the court;"

2005 HB 2307 proposes the subsection be amended to read as follows:

"(C) when the guardian can prove beyond a reasonable doubt the ward's intent, after full informed consent, to withhold or withdraw health care or food and water in the current circumstances. The ward shall be afforded full and complete due process including, but not limited to, the right to court appointed counsel, notice, hearing, subpoena power, discovery, payment of costs for experts if such ward is deemed indigent and right to a jury trial. In making this determination, there shall be a presumption in favor of the continued treatment of the ward. If the ward is not able to communicate or give informed consent, the court appointed counsel shall make decisions on behalf of the ward in order to zealously represent the ward and protect such ward's constitutional rights. If the ward, or court appointed attorney on behalf of a non-communicative ward, elects a jury trial, the panel shall consist of 12 members and render a unanimous verdict. The court should appoint an attorney from the protection and advocacy system for the state of Kansas if they are able to serve. Health care shall not include food and water. Food and water shall not be withheld or withdrawn without express written intent of the ward. Non-terminal physical or mental disability alone shall not be a rational reason for withholding or withdrawing medical treatment. People with non-terminal physical or mental disabilities who express an interest in withholding or withdrawing medical care should be treated the same as people without disabilities and be referred for appropriate support and services;"

Consideration of the issue is complicated by the fact that the same change that is proposed in 2005 HB 2307 has been amended into 2005 SB 92, which has passed both the Senate and the House, and is currently in the Senate Health and Welfare Committee, as a result of being determined

to be materially changed. Also, 2005 SB 240 is identical to HB 2307 and is currently in the Senate Judiciary Committee.

COMMITTEE FINDINGS

Despite the Committee's diverse backgrounds, experiences and initial opinions about what K.S.A. 59-3075 should accomplish, there were several matters on which the Committee reached agreement and those serve as a basis for its recommendation.

The following are findings of the Committee, followed by a brief explanation.

1. The Kansas statute relating to end-of-life decisions for wards [K.S.A. 2004 Supp. 59-3075(e)(7)(C)] is not frequently used.

Although there is a great deal of interest both locally and nationally, and much is written about end of life decisions, the Kansas statute relating to end-of-life decisions for wards is not frequently used.

The 2000 U.S. Census found the population of Kansas to be 2.7 million persons. It is estimated that approximately 20,000 persons in Kansas are under a guardianship or a combination guardianship and conservatorship. However, research by the Judicial Council staff found that, in slightly over three years since the new Guardianship and Conservatorship Act was enacted, thirteen petitions under K.S.A. 59-3075(e)(7)(C) have been filed in Johnson, Shawnee, Sedgwick and Wyandotte Counties. Because these four counties account for approximately 40% of all guardianship and conservatorship filings and terminations, it is estimated that, on the average, less than one such petition is filed in the state each month.

2. The Committee is not aware of any cases in which the existing statute has led to abuse.

Despite the broad contacts of the Committee members in the academic, bio-ethical, disabled advocacy, hospice, legal, legislative, medical, nursing home and political communities, no Committee member is aware of any cases in which the existing statute has led to abuse.

Neither of the district judges who appeared before the Committee, nor the Executive Director of the Kansas Guardianship Program were aware of any abuses of the current statute. In addition, the Litigation Director of the Disability Rights Center of Kansas, which is a federally funded program established by Congress to create a protection and advocacy system for the disabled and has many contacts in the disabled community, stated he was not aware of any abuse of a ward under the current statute. However, he did tell the Committee that because there is no reporting system for such cases, there is the possibility there have been abuses of which no one is aware.

3. The last sentence of the existing statute which reads as follows: "Such written certification shall be approved by an order issued by the court." could be more clearly drafted to give clear directions to the courts.

In 2002, when the revised Kansas Guardianship and Conservatorship Act was considered by the Legislature, the last sentence of K.S.A. 59-3075(e)(7)(C) was not a part of the bill the Judicial Council recommended. The bill proposed by the Judicial Council considered end of life decisions under the subsection to be medical decisions which should be made without court involvement. The existing language was a compromise between those who sought more court involvement and those who believed the decision should be a medical decision.

An example of why the last sentence of the statute could be more clearly drafted can be found in comparing the comment under Judicial Council Probate Form No. 2743, which is the initial petition in the series of forms relating to the withholding of lifesaving treatment, with the testimony of the two District Judges that appeared before the Committee.

In form 2743 of the Kansas Judicial Council Probate Forms, a paragraph in the comment reads as follows:

> "It is important to note that the last sentence of (e)(7)(C) states that the court *shall* approve the written certificate by order. The court is not approving the withholding or the withdrawing of life-saving or life sustaining care**,** treatment, services or procedures; it is approving the written certificate of the treating physician. The court is limited to determining whether or not the certified written statement conforms with (e)(7)(C)."

The Judicial Council forms are widely used, and provide guidance in preparing filings for withholding lifesaving treatment. While the comment to the forms suggests how the statute should be interpreted, it was clear from the testimony of the District Judges before the Committee that the Judges interpret the word "shall" as "may".

It was also clear from the testimony of the District Court Judges to the Committee that the statute is interpreted differently in different courts and there may be differences in how these cases are handled in the various jurisdictions of the state.

RECOMMENDED AMENDMENT

After extensive discussion, it was agreed by the Committee to recommend that the proposed amendment to K.S.A. 2004 Supp. 59-3075 (e)(7)(C) contained in 2005 HB 2307 not be enacted and the subsection instead be amended to read as follows:

> "(C) in the circumstances where the ward's treating physician shall certify in writing to the guardian that the ward is ~~in a persistent vegetative state or is~~ suffering from an illness or other medical

condition for which further treatment, other than for the relief of pain, would not likely prolong the life of the ward other than by artificial means, ~~nor would be likely to restore to the ward any significant degree of capabilities beyond those the ward currently possesses,~~ and which opinion is concurred in by either a second physician or by any medical ethics or similar committee to which the health care provider has access established for the purposes of reviewing such circumstances and the appropriateness of any type of physician's order which would have the effect of withholding or withdrawing life-saving or life sustaining medical care, treatment, services or procedures. Such written certification shall by approved by an order issued by the court if the court determines, by clear and convincing evidence, that the ward meets the conditions set forth in the certificate. The determination shall be made after a hearing with notice to all interested parties, unless the court determines, based upon evidence presented to the court, that such notice and hearing are not necessary.

The Committee struck the phrase "in a persistent vegetative state or is" for several reasons. The phrase "persistent vegetative state" is considered by some to be pejorative language, especially by those in the disabled community who equate the language to a person being called a vegetable; in the aftermath of the Schiavo case, the term evokes a negative emotional reaction in many persons and the Committee is of the opinion that the remaining language "is suffering from an illness or other medical condition for which further treatment, other than for the relief of pain, would not likely prolong the life of the ward other than by artificial means" is broad enough to include persons in a persistent vegetative state. However, the Committee is aware that the term "persistent vegetative state" is a medical diagnosis and, though it may no longer appear in the statute, it may still be the diagnosis and be used in such cases.

The Committee struck the phrase "nor would be likely to restore to the ward any significant degree of capabilities beyond those the ward currently posses", because the standard is not an objective standard and is not necessary to include in the statute.

The new language at the end of the paragraph requires notice and hearing prior to the judge's determination, by a clear and convincing evidence standard, that the ward meets the conditions set forth in the certificate. The section also provides that the notice and hearing are not required if, based on evidence presented to the court, the judge finds that the notice and hearing are not necessary.

(Note: Committee member, William H. Colby, was unable to participate in the final Committee deliberations in which this amendment was drafted and does not endorse the amendment.)

OTHER ISSUES

The subject of artificial nutrition and hydration was discussed by the Committee several times during this study. A question raised in these discussions was whether such artificial nutrition and hydration should be considered medical treatment. The Committee did not attempt to answer that question and is aware that other groups are, or will be, studying the issue. The Committee is also aware that any general policy adopted by the Legislature will apply to wards.