FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Senior Deputy Attorney General

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OPINION NO. 96-03GUARDIANSHIP; SOCIAL WORKERS: The social worker/client relationship is maintained through trust and with a basic understanding that boundaries limit the relationship in order for goals to be reached. The overall purpose of social work is to restore interaction between individuals and society and assist clients in being more productive.
Assumption of roles of power of attorney, guardian, or representative payee negates a client's decision-making. It would thus be inappropriate for a social worker to assume any of these positions for a client.

Carson City, March 6, 1996

Ms. Lisa Adams, Executive Secretary
Board of Examiners for Social Workers
4600 Kietzke Lane, A101
Reno, Nevada 89502

Dear Ms. Adams:

You have requested an Attorney General's opinion on the following issue:

QUESTION
Under what circumstances is it appropriate for a social worker to assume any type of power of attorney, guardianship, or representative payee for a client?

ANALYSIS
You have requested this issue be addressed with reference to all levels of social work licensure. Regardless of the level of licensure, a dual relationship would develop as a result of *any* social worker assuming the role of attorney-in-fact, guardian, or representative payee for a client. The analysis is the same for each type of social worker.

As a point of initial clarification, it must be noted that the Nevada Revised Statutes (NRS) do not specifically prohibit any qualified person from assuming power of attorney responsibilities or the role of guardian or representative payee. Additionally, there is nothing that forbids a social worker from accepting any of these roles for a person who is not a client of the social worker. The issue is problematic only when a social worker assumes any of these roles for a client. In explaining the dilemma created when a social worker becomes responsible in any of these roles for a client, it is paramount that the terms are defined and the law clarified in order to support this evaluation.

I. DEFINITIONS

A conventional "power of attorney" is designed primarily to give another person the temporary right to completely or partially manage one's financial affairs. Dennis Clifford, *The Power of Attorney Book* 2 (Nolo Press 1990). The "principal" is the person who creates the power of attorney document. Dennis Clifford, *The Power of Attorney Book* 2 (Nolo Press 1990). An "attorney-in-fact" is the person who is authorized to act for the principal. Dennis Clifford, *The Power of Attorney Book* 2 (Nolo Press 1990). A "durable power of attorney" gives someone authority to make necessary financial or medical decisions if the principal becomes incapacitated. Dennis Clifford, *The Power of Attorney Book* 3 (Nolo Press 1990). A "guardian" is a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who for defect of age, understanding, or self control, is considered incapable of administering his own affairs. *Black's Law Dictionary* 361 (5th ed. 1983). A "guardianship" is the office, duty, or authority of a guardian. *Black's Law Dictionary* 362 (5th ed. 1983) A "representative payee" is a qualified individual who provides financial management for beneficiaries who are unable to receive and manage their own funds. *Representative Payee Program*, pamphlet from Jared E. Shafer, Clark County Public Administrator and Public Guardian (1994).

II. POWER OF ATTORNEY

A. Background

When the National Conference of Commissioners on Uniform State Laws began to draft the Uniform Probate Code in the late 1960s, it was recognized that guardianships or conservatorships had become increasingly cumbersome and expensive. A suggested solution was the power of attorney which permits a contractual relationship whereby one person can act on behalf of another without court intervention. Francis J. Collin, Jr., et al., *Drafting The Durable Power of Attorney* 5 (1984). The original drafters intended the power of attorney to apply to matters relating to care and custody of persons, as well as management of property. By 1977, 33 states had passed legislation to permit a power of attorney to survive the incompetency of the principal. As of November 1983, 50 states had passed such legislation. Francis J. Collin, Jr., et al., *Drafting The Durable Power of Attorney* 5 (1984). The Nevada State Legislature approved a durable power of attorney statute on February 21, 1983. The NRS which sets forth the law in the area of power of attorney, is NRS 111.460[1] and 111.470[2].

[1] NRS 111.460 states:
Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney is not affected by disability of the principal," or "This power of attorney becomes effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred may be exercised notwithstanding his disability, the authority of the attorney in fact or agent may be exercised by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his guardian or heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a guardian thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment shall account to the guardian rather than the principal. The guardian has the same power the principal would have had if he were not disabled or incompetent, to revoke, suspend or terminate all or any part of the power of attorney or agency.

[2] NRS 111.470 states:
1. The death, disability or incompetence of any principal who has executed a power of attorney in writing other than a power as described by NRS 111.460 does not revoke or terminate the agency as to the attorney in fact, agent or other person who, without actual knowledge of the death, disability or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees and personal representatives.
2. An affidavit, executed by the attorney in fact or agent, stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability or incompetence is, in the absence of a showing of fraud or bad faith, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.
3. This section does not alter or affect any provision for revocation or termination contained in the power of attorney.

The NRS lists no formalities which must be followed in executing any power of attorney. As indicated by the statute, acts performed by an attorney-in-fact during any period of uncertainty whether the principal is dead or alive, or when he is incompetent or disabled, bind the principal or his guardian, heirs, devisees and personal representative as if the principal were alive, competent, and not disabled. Unlike in some states, the agent need not sign an affidavit that he had no knowledge of the principal's death when he performed the act.

B. Social Workers

In accordance with NRS 641B.030(2), "`[s]ocial work' means the application of methods, principles and techniques of case work, group work, community organization, administration, planning, consultation and research to assist persons, groups or communities to enhance or restore their ability to function physically, socially and economically."

NRS 641B.030(3) states "`[c]linical social work' means the application of methods, principles and techniques of case work, group work, community organization, administration, planning, consultation, research and psychotherapeutic methods and techniques to persons, families and groups to help in the diagnosis and treatment of mental and emotional conditions."

Another definition, as adopted by the National Association of Social Workers, is as follows:

Social work is the professional activity of helping individuals, groups, or communities to enhance or restore their capacity for social functioning and to create societal conditions favorable to their goals.

. . . .

The purpose of social work is to promote or restore a mutually beneficial interaction between individuals and society in order to improve the quality of life for everyone. Social workers hold the following beliefs:

The environment (social, physical, organizational) should provide the opportunity and resources for the maximum realization of the potential and aspiration of all individuals, and should provide for their common human needs and for the alleviation of distress and suffering.

Individuals should contribute as effectively as they can to their own well-being and to the social welfare of others in their immediate environment as well as to the collective society.

Transactions between individuals and others in their environment should enhance the dignity, individuality, and self-determination of everyone. People should be treated humanely and with justice.

A client may be an individual, a family, a group, a community, or an organization.

Dean H. Hepworth and JoAnn Larsen, *Direct Social Work Practice, Theory & Skills* 4-5 (3rd ed. 1990).

In interviewing various clinical social workers, it became apparent the very essence of social work is to help people become more productive by locating and coordinating resources.

If a client is in need of a home, the proper course of conduct is to give the client a list of agencies to assist in locating affordable housing. It is not be appropriate to have the client move in with the social worker, as the relationship of landlord and social worker do not further the same goals.

If a client is lonely and in need of affection, it would be improper for a social worker to date that client or establish a sexual relationship with that client to meet this basic need.[3]

Referring the client to social groups which would encourage interaction with other people would be appropriate. Landlord/social worker as well as lover/social worker are dual relationships. Establishing a dual relationship with a client is one of the fundamental ethical violations taught to social work students nationwide. Due to the fact that a dual relationship signifies dual goals, the client will ultimately suffer if any of the goals are inconsistent.

Likewise, if a person is in need of assistance with financial or health care decisions, the proper course of conduct is to help the client locate a different person to accept the role as attorney-in-fact. To assume the responsibility as attorney-in-fact, the social worker would definitely create a dual relationship with the client since the power of attorney gives an attorney-in fact authority to make financial decisions, often without consultation of the client. As the goal of the social worker is to assist in making clients more productive, negating the clients decision making authority is inconsistent with the social worker's primary goal.

Durable powers of attorney often confer discretion of affairs of incompetent people upon the attorney-in-fact. As previously indicated, the primary goal of social workers is to assist clients in contacting resources to improve their ability to function in society. Managing the personal and financial concerns of a person who is not capable in any regard of functioning in society will not only create a dual relationship, but may be beyond the social worker's scope of practice and training as well.

NAC 641B.200(1) specifically states:
The status of a licensed social worker must not be used to support any claim, promise or guarantee of successful service, nor may the license be used to imply that he has competence in another profession. The licensee shall not misrepresent his own professional qualifications, affiliations and licenses, nor those of the institutions and organizations with which he is associated. If he holds more than one occupational license, he shall disclose to his client orally and in writing which of the licenses apply to the service he is rendering to that client.
This section of the administrative code clearly prohibits a social worker from using his license to imply that he has competence in another profession. Taking on the obligation of handling the financial and personal dealings of others implies a knowledge outside the boundaries for which social workers are trained.

Additionally, NAC 641B.200(1) mandates disclosure of more than one occupational license and which license applies to the service the social worker is rendering. This denotes that a social worker must specify which service is provided in order to avoid a dual relationship.

[3] NAC 641B.205(11) states:
A licensee who is serving a client who is psychologically or financially dependent upon the licensee shall not influence or attempt to influence the client in any manner which will reasonably result in the licensee deriving benefits of an unprofessional nature, including sexual activity from the client. The board will presume that the client is dependent upon the licensee if the sexual activities occur or other benefits are received during the time the client is receiving professional service from the licensee or within six (6) months after termination of those services.

Besides the provision of unfettered discretion in handling another person's affairs, a power of attorney is usually a relationship which is compensated for by the principal. NAC 641B.200(3) states "[a] licensee shall not use his relationship with a client to further his own personal, religious, political or business interests." Clearly, receiving payment for a service as attorney-in-fact is a furtherance of one's business interest. Further, if the original relationship was that of social worker/client, then the compensated

business relationship of attorney-in-fact and social worker was a result of a client/social worker relationship which is a direct violation of this regulation.

While the statutes governing social work do not specifically state that a social worker cannot become an attorney-in-fact for a client, NRS 641B.400 states professional incompetence as grounds for discipline. Professional incompetence is defined in NAC 641B.225 and will be interpreted by the board to mean a lack of knowledge, skill, or ability in discharging professional obligation and includes malpractice and gross negligence.

Entering into the dual relationship which is fraught with possible conflicts of interest could cause, or in and of itself be considered, below standard performance.
Nevada case law holds that statutes should be construed to be given a reasonable construction and a common sense meaning, avoiding absurd results. *See Holiday v. McMullen*, 104 Nev. 294, 756 P.2d 1179 (1988); *Las Vegas Sun, Inv. v. Eighth Judicial District Court*, 104 Nev. 508, 761 P.2d 849 (1988); *State Dep't of Motor Vehicles & Public Safety v. Brown*, 104 Nev. 524, 762 P.2d 882 (1988). The Nevada Supreme Court has also indicated statutes will not be construed to produce an unreasonable result when another construction will produce a reasonable result. *See Breen v. Caesars Palace*, 102 Nev. 79, 82, 715 P.2d 1070 (1986). In the spirit of consistency with the goals of social work, it would not be reasonable to interpret a statute to allow assumption of a role which deviates from the main objectives of social work practice.

III. GUARDIANSHIP
A guardianship is a legal relationship under which one person (a guardian) has the legal right and duty to care for another (a ward) and his or her property. A guardianship is established because of the ward's inability legally to act independently.

The difference between a guardian and a power of attorney is that a guardian is court appointed and the power of attorney is a contractual relationship without court intervention between the attorney-in-fact and the principal. According to Nevada law, the relationship of attorney-in-fact and principal is effected if, subsequent to the power of attorney relationship, a guardian is appointed. In this situation, the attorney-in-fact or agent, during continuance of the appointment, shall account to the guardian rather than the principal. The guardian has the same power the principal would have if he or she were not disabled or incompetent, to revoke, suspend or terminate all or any part of the power of attorney or agency. *See* n.1.

Like the attorney-in-fact, the guardian establishes a role which may be inconsistent, if not on a collision course, with the goals and skills of a social worker. A guardian makes all decisions affecting the ward's financial, personal, and medical situation. Since the social worker is primarily motivated by theories of accessing resources, stepping in as a guardian and deciding all crucial matters of a person's life is blatantly inconsistent with the actual purpose of a social worker. While directing a client to the public guardian would be appropriate, petitioning a court to be appointed as a guardian would be improper for a social worker.

For similar reasons discussed above, accepting the duties of guardian for a client would be considered a violation of NAC ch. 641B. As noted, the dual relationship and implication of skills outside boundaries of a social worker violate NAC 641B.200(1). The fact that guardians are compensated for services,

creating a business opportunity, denotes a violation of NAC 641B.200(3) which forbids a use of a client relationship in this manner. Lastly, the basic impropriety of a social worker assuming a guardianship for a client suggests professional incompetence in violation of NAC 641B.225.

IV. REPRESENTATIVE PAYEE

A representative payee is one who is given power to receive payment from another party on behalf of a principal. More specifically, a representative payee is a qualified individual who provides financial management for beneficiaries who are unable to receive and manage their own funds. The representative payee's authority to handle funds is granted by the Social Security Administration or any other benefit source that will grant payeeship. Many public guardians in
Nevada offer a representative payeeship program for social security beneficiaries and private pensioners who require assistance to manage their financial affairs.

People who need a representative payee include adults who are unable to manage their finances due to physical or mental limitations, individuals who receive payment due to disabilities related to drug addiction or alcoholism, and those who experience difficulty utilizing the monthly benefit checks to meet their daily needs.

Clients are referred to the representative payee program by local social service and mental health agencies, homeless shelters, housing projects, family members, or the beneficiaries themselves. Anyone can make a referral. Duties of a representative payee confer such obligations as financial management and acceptance of funds on behalf of another. For the same rationale previously discussed, accepting this position for a client would be improper and a possible violation of the same sections of NAC 641B. While it would not be appropriate for a social worker to assume the role of representative payee for a client, it would be appropriate for a social worker to refer a client to a representative payee program.

CONCLUSION

As with most professional relationships, the social worker/client relationship is maintained through trust. The client in this relationship is vulnerable and dependent upon the expertise and position of the social worker. It is therefore the social worker who is responsible for establishing boundaries of the association. *See At Personal Risk, Boundary Violation in Professional-Client Relationships*, Marilyn R. Peterson (1992).

Just as a social worker should not become sexually involved with a client or become the client's landlord, accepting the responsibilities as attorney-in-fact, guardian, or representative payee creates a similar conflict. In order to preserve the integrity of the profession, it is paramount that every level of social worker avoid assuming roles which conflict with the basic foundation of social work even though the best intentions support the decision to do so.[4]

Sincerely,

FRANKIE SUE DEL PAPA

[4] This opinion is designed as a guideline to discourage individual social workers from developing dual relationships with clients. It is not intended to hinder functioning of the public agencies such as county public guardians, which hire social workers and provide representative payee and guardian programs within the same agency.