Ownership and Privacy of Records in Guardianship and Conservatorship

White Paper

May 2022

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I. OVERVIEW

The purpose of this white paper is to provide individuals with a better understanding of the critical issues related to medical and other records that arise out of guardianships and conservatorships. It will address key questions pertaining to the ownership of medical records, the right of privacy held by a ward and their estate, and copyright and ownership issues relating to records produced in the course of a guardianship or conservatorship, including whether those rights attach to the beneficiaries and heirs.

II. OWNERSHIP OF MEDICAL RECORDS

Ownership of medical records is a complex and evolving area that involves numerous areas of the law, ranging from intellectual property to privacy laws. Traditionally, doctors and medical providers operated under the assumption that because they held and controlled the physical medical records, they owned them. When a medical practice was sold, the physical medical records were transferred to the new owner, thus reinforcing this concept of medical record ownership. That approach has since been called into question. The rise of Electronic Health Records (EHR), also referred to as Electronic Medical Records (EMR), has further complicated the issue since most of today's medical records are now encompassed in digital files rather than physical form. Ownership, access, and control of medical records present an ever-evolving array of complex legal and ethical issues that impact patients, their families, medical professionals, and legal professionals.

A. State Law

1. Ownership of Documents/Records

There is great variance in state laws governing medical records. When it comes to ownership of medical records, most states are silent on the issue, but they place responsibility for maintaining medical records on healthcare providers. Some state laws, however, do address ownership. A number of states have laws that very clearly state that health care providers own the medical records. California is a notable example of this approach. *See* Cal. Health & Safety Code § 123145, Cal. Code Regs. tit. 22 § 70751. *See also* 28 Pa. Code § 115.28 ("Medical records are the property of the hospital, and they shall not be removed from the hospital premises, except for court purposes."). By contrast, in New Hampshire, patients are deemed to be the legal owners of their medical records. N.H. Rev. Stat. Ann. § 151:21.

2. State Data Privacy Laws

The legal protection of data privacy in general under state law is far from uniform. At this time, most states do not have comprehensive data privacy schemes, and the approach to managing the privacy of data is more patchwork. In general, for situations arising outside of a guardianship or for data not covered by federal protections such as those provided under the Health Insurance Portability and Accountability Act ("HIPAA") those states with data privacy laws continue to focus on consumer protection in the realm of online privacy. However, there is a trend towards increasing data privacy protection. Even general data privacy laws could have implications directly or tangentially related to medical records.

California, Nevada, and Virginia are three notable examples of states that have adopted consumer-focused data privacy laws at the state level. The California Consumer Privacy Act of 2018 (CCPA), which protects all California residents, requires disclosure, upon request, of the information and categories of information that any business has collected about any California resident, and the source of that information. The CCPA allows a California consumer to request to have such information deleted and to opt-out of the business' sale of their personal information. Businesses are prohibited from discriminating against consumers that opt-out. (Cal. Civ. Code §§ 1798.100 et seq.)

Nevada's data protection law requires all businesses and owners of a website or internet providers of commercial services to designate an address, toll-free phone number, or email address that consumers can use to request that the operator not sell their personal information. Under the statute, the State Attorney General is granted the authority to seek an injunction or a civil penalty against operators that violate the statute. NRS § 603A.300.

Virginia's Consumer Data Protection Act, enacted in 2021, applies to all persons conducting business within the Commonwealth who either (i) control or process personal data of at least 100,000 consumers or (ii) derive over 50 percent of gross revenue from the sale of personal data and control or process personal data of at least 25,000 consumers. The law specifically gives consumers the rights to access and obtain a copy of personal data, to have their data corrected or deleted, and to opt out of the processing of personal data for the purposes of targeted advertising. This law does not go into effect until 2023. (2021 H.B. 2307/2021 S.B. 1392).

Each of the three state (CA, NV, VA) laws mentioned each have provisions that explicitly exclude medical information or health care providers who are subject to HIPAA confidentiality rules. However, there are parties who are not subject to HIPAA rules, but could nevertheless come into possession of consumers' health or medical information. Some commentators have opined that it is likely that the state data privacy laws will be read as applying to these parties as well. Similarly, given the broad applicability of these laws, it is possible that a party in possession of guardianship or conservatorship records could claim that the law prevents them from releasing such records. It remains to be seen whether probate courts will accept that argument. For example, the adult child of a person under a conservatorship may have concerns about his or her parent's emotional health, and may ask to see any notes or memoranda made by the parent's caregivers. A conservator who has possession of those records may claim that state data privacy laws prevent turning over the records to a family member.

3. Access to Medical/Personal Information

a. Patient Access

The federal Health Insurance Portability and Accountability Act (HIPAA) provides a floor for rules related to the privacy of and access to medical records. The law requires that healthcare providers, health plans, healthcare clearinghouses, and business associates of healthcare providers take steps to protect sensitive patient health information from being disclosed without the patient's consent or knowledge. The federal law sets a nationwide minimum standard that providers and others covered by the law must follow. However, states are free to adopt non-conflicting

laws that are stricter or govern something not covered by HIPAA. A number of states have adopted their own medical record access laws. For example, Colorado requires that hospitals provide discharged patients copies of their medical records within 10 days from the request and inpatient patients the opportunity to inspect their records within 24-hours of a request. 6 Colo. Code Regs. 1011-1-5.2. The coverage and level of detail of state-level laws vary.

b. Exceptions for certain types of proceedings

Laws that provide patient access to his/her own medical records contain exceptions. One common exception is if the request to review the patient information that could be expected to cause substantial and identifiable harm to the patient, or if the material requested is "personal notes and observations." *See, e.g.*, N.Y. Pub. Health Law § 18. Some states also have an exception for mental health records if "having access to the record would be harmful to the patient's physical, mental, or emotional health". Tex. Health & Safety Code § 611.0045.

c. Access by Family Members and Other Persons

HIPAA privacy rules generally preempt all state laws with regard to access by family members and other persons. 45 C.F.R. §§ 164.502(g) and 164.510(b). HIPAA access rules are discussed in more detail in section III below.

State laws that are more stringent than HIPAA with regard to access to records are not preempted, however. 45 C.F.R. § 160.203(b). For example, the HIPAA Privacy Rule contains a generalized provision that allows disclosure of otherwise protected health information "to a family member, other relative, or a close personal friend of the individual, or any other person identified by the individual if that information is

"directly relevant to such person's involvement with the individual's health care or payment related to the individual's health care." 45 C.F.R. § 164.510(b).

Minnesota law allows such access to mental health records, but states that the request for information must be in writing. Disclosure is limited to a family member or other person who lives with, provides care for, or is directly involved in monitoring the treatment of the patient. The involvement of the person making the request must be verified by the patient's mental health care provider, the patient's attending physician, or a person other than the person requesting the information, and must be documented in the patient's medical record. Before the disclosure, the patient must be informed in writing of the request, the name of the person requesting the information, the reason for the request, and the specific information being requested, and the patient must agree, fail to object, or be unable to consent or object. The patient's decision or inability to make a decision is documented in the patient's medical record. The information disclosed under this provision is limited to diagnosis, admission to or discharge from treatment, the name and dosage of the medications prescribed, side effects of the medication, consequences of failure of the patient to take the prescribed medication, and a summary of the discharge plan. Minn. Stat. § 144.294 subd. 3.

This can have the effect of automatically excluding the families of wards of commercial guardians from obtaining information, when family members are not living with or providing care for the wards and when the ward, or the state, is paying for his/her medical care. The decision as to who is "directly involved" in a person's

care is a determination left largely to the ward's healthcare providers or to another person who is able to document the decision in the ward's medical records.

d. Court Orders and Subpoenas to Obtain Access

A HIPAA-covered health care provider or health plan may share a patient's protected health information if there is a court order, including one from an administrative court, directing the provider or plan to do so. This includes the order of an administrative tribunal. However, the provider or plan may only disclose the information specifically described in the order.

A HIPAA-covered provider or plan may disclose information to a party issuing a subpoena if the notification requirements of the Privacy Rule are met. Before responding to the subpoena, the provider or plan should receive evidence that there were reasonable efforts to:

- Notify the person who is the subject of the information about the request, so the person has a chance to object to the disclosure, or
- Seek a qualified protective order for the information from the court.

45 C.F.R. § 164.512(e).

State law usually provides for the release of otherwise protected information pursuant to a court order or subpoena. For example, under Ohio law, mental health records may be released "[p]ursuant to a court order signed by a judge" without regard to the consent of the patient. Ohio Rev. Code § 5122.31(A)(4). The results of HIV testing, however, may be released under court order only if the person requesting the release proves "by clear and convincing evidence" that they have "a compelling

need for disclosure of the information that cannot be accommodated by other means." Ohio Rev. Code § 3701.243(C)(1)(b).

B. <u>Inheritability of Medical Records</u>

Under HIPAA, access to an individual's records remains limited after a person's death, just as they were when he or she was alive. Thus, HIPAA requires that healthcare facilities limit the release medical records to those individuals either appointed by the patient as their personal representative or who are deemed their executor under state law. If no executor or personal representative was named before the patient's death, state law provides the default rules for who will possess the right to access the deceased's medical records. The rights to the records would be determined in accordance with the distribution of a decedent's estate. If there was a trust, but the trust has been dissolved and its assets distributed, the right to access these records fall to the beneficiaries of the trust.

The right to access the records, under HIPAA, defers to state law and suggests that it would include disclosure of otherwise protected health information "to a family member, other relative, or a close personal friend of the individual, or any other person identified by the individual if that information is "directly relevant to such person's involvement with the individual's health care or payment related to the individual's health care." 45 C.F.R. § 164.510(b) This provision would most likely apply to a trust that paid for medical care and the records produced during the guardianship,

State laws on the inheritability of records vary. In most states, after a patient dies, their court-appointed executor or personal representative has access to their

medical records. An "executor" or "personal representative" is named by the deceased patient in his or her will or can be determined based on default rules if the deceased did not name one in their will. A spouse or adult child are the persons most likely to become the personal representative. There is no uniform single form that provides an executor or personal representative with access to the medical records. Instead, each medical provider must assess whether the person requesting the records is the executor, personal representative, or otherwise entitled to the records under state law.

Unfortunately, it is not always so simple. Some states have one set of laws that govern the release of behavioral records and another set of laws that govern the release of general medical records. For example, in Wisconsin, with respect to behavioral health records, access rights first go to the executor of the estate. If there is no executor, the patient's spouse has sole rights of access. If there is no spouse or executor, a "responsible member of the patient's family" comes next. Wis. Admin. Code DHS § 92.03(4).

III. HIPAA

A. Not Explicit on Ownership

Interestingly, HIPAA does not explicitly state who owns medical records. Instead, it focuses on privacy of those records during the life of the patient and the right of access to his/her medical records.

B. Right of Access

Under HIPAA, medical providers are generally prohibited from sharing a patient's medical or personal information with family members, friends, or others

unless permitted under what is called the "The Privacy Rule." The Privacy Rule is a regulation that sets baseline federal standards for privacy protection of his/her medical information. It was designed to carry out HIPAA's mandates.

Under the Privacy Rule, a patient generally has the right to inspect, review, and receive a copy of his/her medical records and billing records held by health plans and health care providers. A healthcare provider cannot deny a patient a copy of his or her records because he or she has not paid for the services they have received. However, a provider may charge for the reasonable costs for copying and mailing the records. The provider cannot charge the patient a fee for searching for or retrieving the records. If a person under guardianship is not considered "competent" to ask for medical records, those are given to his/her guardian instead.

One important exception is that patients do not, under HIPAA, have the right to access a provider's psychotherapy notes. Psychotherapy notes are notes that a mental health professional takes during a conversation with a patient. They must be kept separate from the patient's medical and billing records. HIPAA also does not allow a provider to make most disclosures of psychotherapy notes about the patient without the patient's written authorization. (45 C.F.R. §§ 164.508, 164.524, and 164.526).

The Privacy Rule also extends the patient's rights of access to his or her personal representative. In this context, a patient's personal representative is a person that is authorized to make medical decisions on the patient's behalf. For example, a person holding a health care power of attorney for an adult patient would be their personal representative, and the parent or guardian of a minor child patient would be the child's personal representative. To protect patients, a provider or plan

can elect not to treat an otherwise authorized person as a personal representative if it is reasonably believed that the person might endanger the patient through domestic violence, abuse, or neglect.

Friends, family, and others have no default right of access to medical records if they are not a personal representative. However, under the Privacy Rule, a medical provider or plan may still share information with them if:

- They are involved in your health care or payment for the patient's health care;
- The patient tells the provider or plan that it can do so;
- The patient does not object to sharing of the information; or
- If, using its professional judgment, a provider or plan believes that the patient does not object.

IV. COMMON LAW RIGHT OF PRIVACY

A. Generally

The common law right of privacy is "the right to be let alone or to be free from misuse or abuse of one's personality." *Strutner v. Dispatch Printing Co*., 2 Ohio App. 3d 377, 378, 442 N.E.2d 129, 132 (App. 10th Dist. 1982). Many jurisdictions expand on this definition and consider the right of privacy to be the right to be free from unwarranted publicity, to live a life of seclusion, and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.

Under the common law, four types of claims based on invasion of privacy are viable. Specifically, an individual may bring suit against someone who: (1) unlawfully intrudes into their private affairs; (2) discloses their private information; (3) publicizes

them in a false light; or (4) appropriates their name for personal gain. The intrusion upon seclusion and publication of private facts variants are most relevant to the release of medical records.

B. Intrusion Upon Seclusion

An intrusion on seclusion claim is a special form of invasion of privacy. It applies when someone intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another. In most states, to prevail on an intrusion on seclusion claim, a plaintiff must prove that:

- the defendant, without authorization, intentionally invaded the private affairs of the plaintiff;
- the invasion would be offensive to a reasonable person;
- the matter that the defendant intruded upon involved a private matter; and
- The intrusion caused mental anguish or suffering to the plaintiff.

Restatement (Second) of Torts § 652.

C. Publication of Private Facts

The publication of private facts is another variant of a privacy claim available in most states. Typically, a suit can be brought against someone for publishing private facts about another person, even if those facts are true. In most states, to prevail on a publication of private facts claim, a plaintiff must establish that there was public disclosure of a private fact that would be offensive to a reasonable person of ordinary sensitivity and is not newsworthy. For example, sensitive medical information such as a person's HIV status is commonly considered a private fact and could serve as the basis for a claim.

There are limitations to when a private facts claim is viable. For one, only human beings, not corporations or other organizations, can sue for publication of private facts. Additionally, a private facts claim is a type of invasion of privacy and you cannot invade the privacy of a deceased person. All states, including Louisiana (the only civil law state), recognize a common law right of privacy and the related torts. Claims under the misappropriation and related privacy torts have thus far been held not to survive death. *See Tatum v. New Orleans Aviation Bd.*, 102 So. 3d 144 (La. Ct. App. 2012). Therefore, an estate cannot sue you for publishing private facts about a dead person unless your publication occurred before the person in question died. Note, however, that members of a dead person's family may be able to sue in their own right if you disclose private facts that relate to them too. Restatement (Second) of Torts § 652D.

D. <u>Survivability of Right of Privacy</u>

With one notable exception, common-law privacy rights do not survive the death of the person whose privacy was invaded. The exception to this general rule is that many states have enacted laws relating to the commercial exploitation of the name or likeness of a celebrity. *See, e.g.*, Tenn. Code Ann. § 47-25-1104.

Release of a deceased person's medical records is governed by state statute, rather than by the common law of privacy rights. Some state laws allow the protection of medical records after the patient's death if the patient has given instructions before his or her demise. For example, the law in Hawaii states that a decedent's next-of-kin may obtain medical records of a decedent if no personal representative has been appointed for his or her estate. In addition, a health care provider may honor a request

by a decedent's next of kin for information relating to information relating to HIV or AIDS, mental health diagnosis or treatment, or participation in a substance abuse program. No such request may be honored, however, "if the deceased person had previously indicated to the medical provider in writing that the person did not wish to have medical records released to next of kin." Haw. Rev. Stat. § 622-57.

E. Gag Orders and First Amendment

A "gag order" is a court order that bars the parties, witnesses, or attorneys in a lawsuit from publicly discussing the facts of the case. While gag orders are most commonly used in high-profile criminal cases and are usually directed at least in part against media coverage, they are sometimes used to restrain speech by parties and attorneys in civil cases as well.

A gag order is a "prior restraint" on speech and is thus highly suspect under the First Amendment, and subject to the strictest constitutional scrutiny. In order to be constitutional, there must be a compelling need for such a restraint and it "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968).

The U.S. Supreme Court has not considered whether or when a gag order may issue to restrain participants in a civil action from speaking out about their own cases. State courts that have considered the issue have been willing to find that such gag orders violate the First Amendment and are unenforceable. In *Barron v. Florida Freedom Newspapers, Inc*., 531 So. 2d 113 (Fla. 1988), the Court held that there is a "strong presumption" that court proceedings must be open. Closure of court

proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed. 531 So. 2d at 118.

In Texas, the state Supreme Court ruled that the Texas Constitution provides broader protection for free speech than the First Amendment and held that

> A gag order in civil judicial proceedings will withstand constitutional scrutiny only where there are specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm.

Davenport v. Garcia, 834 S.W.2d 4, 10 (Tex. 1992).

V. OPEN GUARDIANSHIP RECORDS LAWS

A. State Law

Guardianship proceedings, by their nature, involve sensitive personal information related to the ward or proposed ward's financial affairs, physical health, mental health, and other indicia of their ability to care for themselves. The disclosure of this type of information makes open guardianship proceedings problematic as they

could result in public embarrassment and increase the risk of identity theft, scams, and fraud.

Due to the inherent risks, a few states have implemented laws requiring the full sealing of records regarding guardianships, and approximately half of the states have laws requiring partial sealing. The laws that provide this partial protection often deem medical and financial documents confidential, but they allow the appointment of a guardian and relevant testimony to remain part of the public record. Additionally, while proceedings are usually public by default, nearly all states permit the hearings to be closed to the public at the request of the respondent, their attorney, or a guardian ad litem.

B. Interaction with HIPAA

As discussed above, HIPAA privacy rules generally preempt all state laws with regard to access to patient information. 45 C.F.R. §§ 164.502(g) and 164.510(b). A HIPAA-covered health care provider or health plan may share a person's protected health information if there is a court order directing it to do so. 45 C.F.R. § 164.512(e).

State laws that are more stringent than HIPAA with regard to access to records are not preempted. 45 C.F.R. § 160.203(b). HIPAA does not prohibit the closure of records relating to guardianships under state law.

C. Privacy rights after the death of the ward

Generally, while causes of action regarding privacy rights cease to exist on a person's death, private records are still deemed private. Medical, financial, and government entities are still required to keep records private, even though the common law right to privacy on those records no longer applies. This obligation to

keep records private does not go so far as to create a cause of action against family members or heirs who obtain or release these records. Thus, the family or heirs to the ward have a very limited risk of liability with regard to disclosing private information about the deceased.

VI. COPYRIGHT LAW

A. Copyright Protection of Medical Records

1. Applicability of Copyright Law to Medical Records

U.S. Copyright protection protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102. Works of authorship include literary works, musical works, dramatic works, graphic designs and sculptural works, motion pictures, and architectural works. However, ideas, procedures, processes, systems, methods of operation, concepts, principles, and discoveries are not considered works of authorship and are not protected by U.S. copyright law.

For a work to be subject to copyright protection within the United States, the work must satisfy the three primary elements. First, the work must be original to the author. Second, the work must be fixed in a tangible form. Finally, the work must be an expression, which is defined as more than an idea. Ideas, plans, methods, and systems, without more, are not considered an expression of the author and are not protectable. Additionally, the U.S. Copyright Office will not register copyright protection for any work that is created solely by a machine or mechanical process, without the creative input or intervention of a human author.

It is unclear whether medical records are copyrightable under US law, and it is not an issue that has been squarely addressed by courts or the legislature. On the one hand, medical records are comprised primarily of facts, which are not copyrightable. However, collections of facts are generally allowed minimal copyright protection. At least one court has implied, in dicta, that medical records are uncopyrightable "fact works":

> Defendants' alleged actions significantly undermined the copyright policy of 'promoting invention and creative expression,' as Plaintiff was allegedly intimidated from using (1) **non-copyrightable fact works such as medical records** and (2) works to which Defendants did not own or control copyrights, such as letters written by third parties.

Shloss v. Sweeney, 515 F. Supp. 2d 1068, 1080 (N.D.Cal. 2007) (emphasis added.). On the other hand, while the facts alone may not be copyrightable, medical records could be conceptualized as a "collective work" or "compilation" which can be copyrighted. Encyclopedias are a quintessential example of works that are fact-heavy but nonetheless copyrightable because they gather the facts. Whether medical records are copyrightable is further complicated by the fact that multiple types of material are held within each record, including completed forms, narrative reports, lab results, electronic imaging. It is quite possible that some portions of a medical record may be subject to copyright and that other portions would not.

2. Copyright Office Guidance

The U.S. Copyright office provides minimal additional guidance. Its Compendium of Copyright practices provides that it "will not register works produced by a machine or mere mechanical process that operates randomly or automatically

without any creative input or intervention from a human author." As example of this type of machine-created output, the Compendium includes "medical imaging produced by X-rays, ultrasounds, magnetic resonance imaging, or other diagnostic equipment." Compendium of the U.S. Copyright Office Practices, Third Edition § 313.2. Unfortunately, the guidance stops there and the Compendium does not discuss or refer to any other types of medical record content such as narrative reports from medical providers.

B. Work-for-hire

1. Definition of Work for Hire

A "work for hire" or "work made for hire" is an exception to the general rule that the author of a creative work owns the copyright. Creative work is considered a work for hire if it was:

1. prepared by an employee within the scope of his or her employment; or
2. specially ordered or commissioned for use
    - as a contribution to a collective work,
    - as a part of a motion picture or other audiovisual work,
    - as a translation,
    - as a supplementary work,
    - as a compilation,
    - as an instructional text,
    - as a test,
    - as answer material for a test, or
    - as an atlas,

- and the parties expressly agree in a written instrument signed by them that the work would be considered a work made for hire.

17 U.S.C. § 101.

If a work is a work for hire, the employer or party that commissioned (not created) in writing the work owns the copyright. In a traditional employer-employee relationship, works created by the employee are presumed to be owned by the employer. In situations where a work is commissioned under a contract, if the contract does not expressly state the ownership of the work, the work is presumed to be owned by the author. Under a guardianship where the ward is the author of the work, the ward would retain ownership of the work unless there is a contract that expressly states otherwise. Although there is no specific caselaw on point, if a ward of the state authors a work, the ownership of a work would transfer to heirs, not to the state.

2. Applicability to State Government

If medical records are protected by copyright that copyright protection could extend to works created by an agent or employee of state government. The question of whether state governments are entitled to copyright protection is not addressed by federal law. However, the U.S. Copyright Office has issued guidance that states that "a work that does not constitute a government edict may be registered, even if it was prepared by an officer or employee of a state, local, territorial, or foreign government while acting within the course of his or her official duties." Compendium of U.S. Copyright Office Practices § 313.6(C)(2) (3rd ed. 2021). The term "edict" includes

"legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials." *Id.*

If medical records or information are regarded as protected by copyright and if those records are "created" by an employee or agent of a state government, then it is possible that the state would be regarded as the owner of the copyright in the compilation (but not the underlying facts) if the state employee or agents role in creating the work includes an expressive aspect and not merely mechanical assembly of a collection of facts. Such copyright ownership, if any would be thin, however, and would probably not be allowed to override state and federal laws and regulations governing access to medical records.

C. <u>Conservator "Standing in Shoes" of Ward</u>

Depending on the terms of the order appointing a conservator, the conservator could have the power to enforce any copyright-related claim that the ward would have regarding the ward's medical records. Most state laws grant the conservator broad power over the business affairs of the ward. *See, e.g.*, Ala. Code § 26-2A-136(b)(3): a conservator "has all the powers over the estate and business affairs which the [ward] could exercise if present and not under disability, except the power to make a will." This broad grant does not, however, include any powers that the ward did not have. Thus, if the ward could not have made a claim regarding the copyright protection of his or her medical records, the conservator would acquire no such power by reason of his or her appointment as conservator.

Once the ward has passed away and the conservatorship/guardianship has ceased to exist, this right passes to the executor, trustee, heirs, and beneficiaries. If a trust has been dissolved, these rights should pass on to the beneficiaries.

VII. CONCLUSION

Medical records are an integral part of guardianship proceedings. The deceptively simple-sounding questions of who owns medical records and who can access them have no simple answer. There are a variety of state and federal laws that determine ownership and access to medical records in the United States. Over the years, more legislation addressing ownership and access issues has developed, HIPAA is chief among these legal advancements. Yet even with increased legislation, there remains a great deal of uncertainty, and the law remains in a state of evolution. Those involved in guardianship proceedings may need to resolve questions of ownership or may need access to medical records. Guardians would be well-served by making efforts to remain up to date on laws that may impact such ownership and/or access rights. Obtaining legal counsel from those skilled in the relevant areas of law is advisable, particularly in cases where these issues are before the court.

Generally speaking, the context of guardians and wards with respect to protections, rights, and transferability of records and intellectual property is unclear. The statutory language is overwhelmingly silent on these issues and there has been no case law on the appellate level to properly interpret what should be done.