

**REPORTER'S ISSUES MEMO FOR THE FIFTH MEETING OF THE  
DRAFTING COMMITTEE TO REVISE THE UGPPA**

**MEMO**

To: Drafting Committee to Revise or Amend the Uniform Guardianship and Protective Proceeding Act (UGPPA)<sup>1</sup>  
Cc: Observers for the Drafting Committee to Revise or Amend the UGPPA  
From: David English and Nina Kohn  
Date: March 14, 2017  
Re: Issues for the Committee's Consideration

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This memo outlines key issues for discussion at the Committee's upcoming meeting on March 17-18 in Bethesda, MD.

**A. OVERVIEW OF DISCUSSION**

As the chair discussed at our October 2016 meeting, we anticipate that this will be the last general meeting of the Committee prior to the ULC's consideration of the revised Act at the ULC's annual meeting in July. We therefore hope to use this meeting to go over the Act with the proverbial fine-tooth comb and to focus attention on sections of the Act that this Committee has spent less time discussing at previous meetings. To that end, we will begin discussions by looking at Article 1, move on to Article 2, then move on to Article 4, and finish with Article 3 (the article that we have spent the most time discussing at previous Committee meetings).

To facilitate an efficient discussion of the issues, a draft of the Act was distributed to the Committee and the Observers on January 27, 2017 and both were encouraged to share feedback on the draft with the Chair and Reporter. A number of people took advantage of this opportunity and provided feedback. The draft currently before the Committee has been revised to reflect the feedback received, as well as edits from a representative of the ULC Style Committee.

**B. ARTICLE 1 ISSUES**

For the March 2017 meeting, key issues that would benefit from the Committee's further discussion include:

1. Third-party acceptance (Section 123)

Section 123 was added to the draft revised Act to encourage acceptance of the authority of a validly appointed guardian or conservator. The 60 day timeframe in Section 123(a) was chosen to conform to the Uniform Commercial Code (UCC). An issue for this Committee is whether Section 123 is a helpful addition to the Act.

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<sup>1</sup> Per the Committee's recommendation, the Act has been retitled the "Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)."

2. Confidentiality of records (including Section 307, Section 408)

Under the draft revised Act, confidentiality of records is address in Section 307 (adult guardianship) and Section 408 (conservatorship) as previously discussed by the Committee with one key addition. In addition, under Section 310(d) and Section 411(e)-(g), the default is that certain key people (in addition to others named by the court) are entitled to certain records and notice of certain key actions. A key issue is whether to include provisions about confidentiality that apply to guardianship for minors. As part of discussion of this issue, the Committee may wish to consider whether Articles 2, 3, and 4 should take different approaches to confidentiality, or whether a single provision applying to all three articles should be added to Article 1. A complicating factor is that there are substantial state differences in approaches to confidentiality that reflect both policy choices (including those outside the scope of this Act) and differences in court systems and technologies. Such state differences may be particularly pronounced with regard to confidentiality of issues pertaining to the care of minors.

3. Review of key changes

There are some portions in Article 1 where changes were made that we wish to specifically point out to the Committee so that they may be discussed if there are concerns. Specifically:

- a. *Definition of “decision-making support”* (Section 101)  
This definition was revised for clarity as suggested by Nora Winkelman. We encourage all to review this definition to ensure there is agreement as to the definition. In addition, per a suggestion made by an observer, the Committee also may wish to revisit the term itself in the interest of clarity.
- b. *Protective Arrangements Instead of Guardianship of Conservatorship* (Section 118)  
Per the discussion at the last meeting, Section 118 was rewritten to add an additional basis for a limited protective order to situations where the person is placed at risk by a specific entity or person (e.g., in cases of financial exploitation by undue influence).
- c. *Use of agents* (Section 124)  
This new section addresses the issue of delegation by an appointee at a general level and distinguishes between task delegation and duty delegation. Among other things, it is designed to fill a potential gap left by the Committee’s decision to remove provisions allowing delegation of core duties by a guardian.
- d. *Temporary substitute guardians* (Section 125)  
This new Section brings together language from elsewhere in the Act with new language to make it possible for a court to appoint a temporary substitute guardian for minors or adults when the existing appointee is not meeting the need.

C. ARTICLE 2 ISSUES, AND MINOR'S ISSUES IN ARTICLE 4

This version of the draft revised Act made a number of revisions to Article 2. These include revisions designed to provide appropriate protection for the rights of parents in light the Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), and a recognition that many minors currently involved in the system are not orphans. For the March 2017 meeting, key issues that would benefit from the Committee's further discussion include:

1. Right to counsel for parents (Section 204, Section 404)

The current draft provides for counsel for minors, but not for parents who stand to lose parental rights if a guardianship or conservatorship is imposed. An issue for the Committee is whether the revised Act should provide a right to counsel for parents (either outright or as a state option as is done in Section 305).

2. Presence requirements (Section 205, Section 409)

A key issue is whether to require the minor's presence at a hearing on a petition for guardianship under certain circumstances. Another key issue is the circumstances under which a minor has the right to be present. The Committee may also wish to discuss the issue of when parents' presence. In addition, the Committee may wish to visit these same issues in the context of conservatorship for a minor.

3. Minor's nominee (Section 206)

Under the draft revised Act, a person nominated by a parent as a standby guardian takes priority over a person nominated by a minor, regardless of the age of the minor. An issue for the Committee is whether or not this approach is advisable.

4. Protective arrangement instead guardianship for a minor (Section 202)

An issue for the Committee is whether a court should be empowered to order a protective arrangement instead of guardianship for a minor. The draft revised Act leaves this as a state option.

5. Termination of guardianship for a minor (Section 211(b))

The draft revised Act has the same standard for termination of a guardianship for a minor regardless of whether the guardian was appointed based on parental consent, based on a determination that the parents were unwilling or unable to exercise parental rights, or based on a lack of parents. A key issue for the Committee is whether there should be a unified standard or whether the standard should be lowered under certain situations, for example, in situations in which a parent seeks to regain parental rights.

6. Notice of petition for conservatorship of minor (Section 402, Section 403), and Notice of order of conservatorship over minor (Section 411)

An issue for the Committee is whether additional people should be entitled to notice of a conservatorship for a minor (e.g., parents, an adult with whom the minor resides, etc.) (*see* Section 402, Section 403). A related issue is whether the new language regarding people who are entitled to notice of a conservatorship (*see* Section 411) over a minor is advisable.

7. Review of key changes

a. *Emergency guardian provision* (Section 206)

The draft revised Act replaces the temporary guardian provisions with an emergency guardian provision that parallels that in Article 3. As such, it is shorter in duration and provides greater due process protections.

b. *Standby guardian provisions* (Section 207, Section 208)

The draft revised Act fully revised the standby guardian provisions in light of the discussion at the October 2016 meeting. The redrafted provisions aim to provide greater clarity and reduce confusion.

c. *Delegation by parent*

The 1997 Act contained a provision allowing a parent of a minor to delegate. The Chair and Reporter, upon review, are of the opinion that this provision does not fall within the scope of the Act and recommend that the Committee not include it, but include a legislative note in the revised Act alerting states of this change and that they may wish to address the issue elsewhere in their laws. The provision read as follows: “A parent of a minor, by a power of attorney, may delegate to another person, for a period not exceeding nine months, any power regarding care, custody, or property of the minor, except the power to consent to marriage or adoption.”

**D. ARTICLE 4 ISSUES**

For the March 2017 meeting, key issues that would benefit from the Committee’s further discussion include:

1. Appointment of a visitor (Section 405, Section 304)

In its current form, Article 4 does not require the court to appoint a visitor if the respondent is represented by counsel unless the petition requests such an appointment. An issue for this Committee is whether a visitor should be required in Article 4, parallel to requirements for Article 3 (*see* Section 304). A related issue is whether a visitor always be appointed in an Article 3 guardianship action even if the individual is appointed by counsel.

2. Standard of care for conservator (Section 419)

An issue for the Committee is whether greater specificity and direction should be provided in Section 419(a). To facilitate the discussion, the Chair will share ideas about standards of care applicable to trustees based on learning from other statutes.

3. Agreements made by individual subject to conservatorship (Section 425, Section 426)

Section 425 replaces a Section in the 1997 Act, which vested title to property of the conservatorship estate in the conservator. A key question for the Committee is the conditions under which an agreement entered into by an individual subject to conservatorship is binding, its effect both on the conservatorship estate and third parties (not limited to the other party to the agreement), and whether Section 425 and Section 426 take the right approach to this issue.

4. Emergency conservator (Section 410)

The draft revised Act includes an emergency conservator provision that parallels Article 3's provision. This is a departure from the 1997 Act, which allowed the appointment of a master to address emergencies, but not the appointment of an emergency conservator. A review of the 1997 Act's comments indicates that it was felt that a protective arrangement directed by a master was more constrained approach than an emergency conservator. The 1997 Act, in turn, was a departure from the 1982 Act, which allowed for the appointment of a "special conservator." The draft revised Act's approach is designed to be more tailored by limiting the term of the emergency guardian to 60 days and making the standard for appointment turn on a finding of that there is a likelihood of substantial and irreparable harm and requiring the appointment of an attorney for the individual if an emergency conservatorship is imposed. An issue for the Committee is whether the addition of this provision is advisable.

5. Modifying provisions where the individual subject to conservatorship is a minor.

An issue for this Committee is whether there are additional places in Article 4 where modifications to rules should be made if the individual for whom a conservatorship is sought or imposed is a minor.

**E. ARTICLE 3 ISSUES**

For the March 2017 meeting, key issues that would benefit from the Committee's further discussion include:

1. Pets (Section 313)

An observer suggested adding language to address the pets of an adult subject to guardianship or conservatorship. Specifically, the observer noted:

We hear horror stories about guardians who have their ward's pets put down, or they give them away, take them for themselves, or let them loose to fend for themselves, or won't take them to the vet, etc. One of the best ways to break someone's spirit, especially an elderly person, is to take their pet(s) away or mistreat them. The majority of elderly or adults with disability who have pets don't just love them but think of them as family. I don't know what pets are considered in a legal regard but to the elderly person, they're not property; they're family. . . .

In response to this feedback, the draft revised Act includes a provision in Section 313(a) that a guardian has a duty to take reasonable care of the pets of an adult subject to guardianship. An issue raised for the Committee is whether this new language addresses the situation appropriately. A secondary issue is whether payment of pet-related expenses is adequately addressed by the current decision-making standard in Article 415 (and perhaps an accompanying comment explicitly stating that expenditures to care for a pet are appropriate where the individual would likely incur such expenditures if able to make the decision).

2. Residential moves (Section 314)

Section 314(c) has been revised to provide that a permanent move to a nursing home cannot be made if an objection has been filed with the court. A question for this Committee is whether this approach strikes the right balance between protecting the individual's interest in remaining at home and allowing a guardian to obtain appropriate, affordable care for the individual.

Specifically, per a suggestion made by an observer, Section 307 was amended to grant an agent appointed pursuant to a power of attorney for finances or health care access to an evaluation absent a court order to the contrary. Likewise, 408 was amended to grant an agent appointed pursuant to a power of attorney for finances access to an evaluation absent a court order to the contrary.

3. Access to professional evaluations (Section 307, Section 408)

Per a suggestion made by an observer, Section 307 was amended to grant an agent appointed pursuant to a power of attorney for finances or health care access to an evaluation absent a court order to the contrary. Likewise, 408 was amended to grant an agent appointed pursuant to a power of attorney for finances access to an evaluation absent a court order to the contrary.

4. Review of key changes

a. *Priority for appointment* (Section 309, Section 410)

Per the Committee's agreement at the last meeting, the priority lists in Article 3 and Article 4 were shortened and largely replaced with a decision-making standard.