

MEMO

To: Uniform Law Commissioners
From: David English and Nina Kohn
Re: Revision of the Uniform Guardianship and Protective Proceedings Act Prepared for the
2016 Annual Meeting of Uniform Law Commission
Date: June 1, 2016

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The Drafting Committee is charged with revising selected portions of the Uniform Guardianship and Protective Proceedings Act (UGPAA) in order to implement some of the recommendations of the Third National Guardianship Summit (NGS) and otherwise to update the Act. This memo highlights the overarching concerns guiding the Committee's work.

Protection for persons subject to guardianship or conservatorship, including improved monitoring of appointees. As recent media coverage of exploitation by guardians and conservators suggests, there is significant concern about ensuring the accountability of guardians and conservators. The Committee worked to find a balance between enhancing protections for persons subject to guardianship and conservatorship, and not making the processes overly cumbersome or expensive. One innovation in the revised Act is to allow the court to identify people who will be given notice of certain key changes or suspect actions, and who can therefore serve as an extra set of eyes and ears (Section 310, Section 411). Other revisions include a provision that makes bond a default option for conservators (Section 416) and provisions that clarify relevant factors in setting fees for guardians and conservators (Section 210, Section 317, Section 418).

Better guidance for appointees. The revised Act seeks to provide greater guidance to appointees, many of whom are lay people. Revisions include a clearer decision-making standard (Section 314, Section 419), and clarity as to the role of prior appointees including appointed health care agents or attorneys-in-fact who, absent a court order to the contrary, retain their authority even after a guardianship or conservatorship has been put in place (Section 205, Section 318, Section 414).

Enhanced procedural rights for respondents. One key concern facing the Drafting Committee is that guardianships and conservatorships are over-used and over-broad. The Committee has worked to strike a balance between the need to provide meaningful procedural rights for persons alleged to need a guardian or conservator, and the need not to make the process for appointing a guardian or conservator overly complex or expensive. Key revisions include a narrower exception to the general rule that the respondent must be present at the hearing (Section 308, Section 409), a requirement that explicit findings be made before certain fundamental rights are removed (Section 310), and the elimination of provisions that would have allowed appointment of a guardian for an adult by will or writing without prior judicial approval.

Enhanced procedural rights for persons subject to guardianship and conservatorship. The Drafting Committee has focused attention on the rights of persons subject to guardianship and conservatorship, including their right and ability to seek termination or modification of the appointment, or removal of a guardian. Key revisions related to these concerns include a provision that the court provide the person notice of key rights (Section 310, Section 412), provisions for attorney representation of persons subject to guardianship and conservatorship (Section 321, Section 322, Section 433, Section 434), a limitation on the guardian or conservator's ability to charge fees to oppose the person's efforts to alter the appointment (Section 317, Section 433), and additional triggers for reconsideration of an appointment (Section 321, Section 322, Section 433, Section 434).

Facilitation and encouragement of less restrictive alternatives. A central aim of the Drafting Committee's work has been to facilitate and encourage the use of less restrictive alternatives, including technological and decision-making support and single-issue court orders in lieu of guardianship and conservatorship. To this end, the revised Act provides that neither guardianship nor conservatorship is appropriate where the person's needs could be met with technological assistance or decision-making support (Section 301, Section 401). It also allows for a protective order in lieu of guardianship or conservatorship (Section 118); the 1997 version, by contrast, only provided for such an order in lieu of conservatorship.

Visitation and communication with third parties. In recent years, some family members of persons subject to guardianship have raised concerns that guardians have unreasonably restricted the ability of persons subject to guardianship to receive visitors and communicate with others, and family advocates have encouraged legislative responses to address this concern. The revised Act includes a variety of provisions addressing this concern. These include a limitation on a guardian's ability to curtail communications, visits, or interactions between the person subject to guardianship and third parties (Section 317) and a requirement that the guardian give priority to a residential settings that allow the person to interact with those important to the person (Section 315). Along similar vein, it establishes a default that the adult children and spouse/domestic partner of a protected person are entitled to notice of the protected person's death or a significant change in the protected person's condition (Section 310).

Modernized provisions related to minors subject to guardianship. While the Committee's focus has largely been on adults, the Committee is also concerned with updating provisions related to guardianship for minors. To this end, consistent with modern trends in the law, the revised Act provides for greater involvement of the minor in decisions involving them. The age of involvement for a minor has been lowered from 14 to 12, the decision-making standard for guardians now calls on them to consider the minor's view (Section 207), and an attorney must be appointed for the minor in certain situations (Section 205).

Improved compliance with limited guardianship and conservatorship requirements. The Drafting Committee has recognized that, despite the best efforts of previous Committees, there is a lack of compliance with the 1997 Act's requirement that limited guardianships and conservatorships be used where they would meet the person's needs. In order to facilitate compliance with this direction, the Drafting Committee has crafted a sample petition which makes it easier for a petitioner to seek a limited order, and a sample order which makes it easier for a court to craft a

limited order. In addition, the revised Act requires petitions seeking a full guardianship or conservatorship to do more to justify that approach (Section 302, Section 402).

Updated language. The terms “ward,” “incapacitated person,” and “disabled person” are increasingly seen as demeaning and offensive and were rejected by the NGS. The Committee has worked to find alternatives to this language. After much discussion, the Committee arrived at a decision to use the terms “person subject to guardianship” and “person subject to conservatorship” in lieu of “ward.”

Person-centered planning. A key theme of the NGS recommendations was the need to infuse person-centered planning into guardianship and conservatorship. The Committee has worked to do so. For example, included as part of these revisions is a new requirement for a guardian’s plan (Section 318), and provisions to facilitate court monitoring of compliance with guardian’s and conservator’s plans (e.g., Section 320, Section 425).

Title of Act. The current title of the Act is the source of some confusion. One reason for this is that it does not use the term “Conservatorship” despite the fact that provisions related to Conservatorship constitute roughly one-half of the Act. Another reason is that the term “protective proceedings” is confusing as the term is increasingly associated with protective orders in domestic violence and elder abuse cases, which are not covered in the Act. Additionally, in the previous Act, the term “protective proceeding” was used to cover conservatorships and single transaction orders in lieu of conservatorship. As the revised Act allows for such orders in lieu of guardianship as well, the title is now an even poorer fit for the substance of the Act. The Chair and the Reporter therefore recommend revising the title to the “Uniform Guardianship and Conservatorship Act.”