

MEMO

To: Drafting Committee to Revise or Amend the Uniform Guardianship and Protective Proceeding Act (UGPPA)
Cc: Observers for the Drafting Committee to Revise or Amend the UGPPA
From: David English and Nina Kohn
Date: October 6, 2015
Re: Issues for the Committee's Consideration

This memo briefly outlines key issues for discussion at the Committee's upcoming meeting on October 9th and October 10th in Washington, DC.

A. ISSUES DISCUSSED AT THE SPRING 2015 MEETING

For the October 2015 meeting, among the key issues for consideration are those issues previously discussed at the spring 2015 meeting. This issue list revisits those issues and highlights key changes in the draft revised Act aimed at addressing them. Please note that it is not an exhaustive list of all changes in the draft revised Act.

1. Terminology. At the spring 2015 meeting, there was general agreement that the Act should attempt to incorporate person-first language. Accordingly, the revised draft uses the terms "person needing protection" and "protected person" to replace the terms "incapacitated person" and "ward." (See Section 102) Proposed definitions of "expressed interests" and "decision-making support" have also been added for the Committee's consideration. In addition, the term "protected minor" has been added for the purpose of increasing clarity. (See Section 102)
2. Incorporation of Person-Centered Planning. Consistent with this Committee's charge and the discussion at the last meeting, the revised draft aims to encourage person-centered planning by, among other things:
 - Requiring evaluations of the person to focus on the person's abilities and limitations, not just limitations. (See Section 305, Section 406)
 - Modifying the decision-making standard for guardians of adults and conservators to give an increased role to the person's interests and values. (See Section 312, Section 418)
 - Requiring guardians of protected minors to consider the minor's preferences in determining the minor's best interests. (See Section 207)
 - Modifying the priority list for selection of guardians and conservators to include "an adult who has exhibited special care and concern for the person and who is familiar with the person's values and preferences." (See Section 308, Section 409)
 - Making the person's preferences a factor in selecting among potential appointees. (See Section 308, Section 409)

3. Recognition of Supported Decision-Making. As part of the discussion of person-centered planning at the spring 2015 meeting, there was significant discussion of supported decision-making in relation to guardianship. The revised draft recognizes a role for supported decision-making by, among other things:
 - Defining “decision-making support.” (See Section 102)
 - Specifying that neither guardianship nor conservatorship is appropriate where the person’s needs can be met with decision-making support. (See Section 102, Section 301, Section 401)
 - Entitling providers of decision-making support to notice of a petition of guardianship. (See Section 302)
 - Allowing respondents to be assisted at the hearing by a person or persons of their choosing. (See Section 307, Section 408)
4. Promotion of Limited Guardianship and Conservatorships. At the last meeting, participants discussed how to encourage limited guardianship and conservatorship. The revised draft incorporates provisions aimed at encouraging limited guardianship including:
 - Specifying that neither guardianship nor conservatorship is appropriate where the person’s needs can be met with decision-making support. (See Section 102, Section 301, Section 401)
 - Requiring parties petitioning for guardianship to state what alternative means of meeting the person’s needs have been considered or implemented, and why they are inadequate to meet the person’s needs. (Section 302, Section 402)
 - Requiring that courts granting a full guardianship provide specific findings to support the conclusion that a limited guardianship is inadequate (See Section 309)
 - A model order designed to make writing an order granting a limited guardianship less burdensome than writing an order granting a full guardianship. (See model order)
5. Professional evaluation. Per discussion at the last meeting, the revised draft makes professional evaluation a default but does not mandate it unless demanded by the respondent. (See Section 305, Section 406)
6. Presence of and participation by the respondent. At the last meeting, participants discussed whether a guardian/conservator should ever be appointed if the allegedly incapacitated person is not present at the hearing. Per that discussion, the revised draft requires the allegedly incapacitated person to be present (in person or by real-time, audio-visual technology) with only limited exceptions. (See Section 307, Section 408) It also requires that the court permit and facilitate the provision of certain kinds of support to the respondent in the proceeding. (See Section 307, Section 408) In addition, it requires that the visitor provide the court with information about the respondent’s needs and abilities related to participation in the hearing. (See Section 304, Section 405)

7. Mandatory representation. As proposed by the Chair at the last meeting, the revised draft keeps the alternative approaches to this issue currently in the Act, but clarifies the role of the attorney for the respondent. Specifically, it prohibits the guardian ad litem and the attorney for the respondent from being the same person. (See Section 114) It also clarifies that the attorney for the respondent is to represent the respondent's expressed interests to the extent reasonably ascertainable. (See Section 304, Section 405)
8. Bond requirements. As suggested at the last meeting, this draft makes bond a default—but not a requirement—for conservators. (See Section 415)
9. Fees. As suggested at the last meeting, this revision incorporates the Third National Guardianship Summit (NGS) recommendations about fees. (See Section 117, Section 315, Section 417)
10. Guardianship monitoring. At the last meeting, participants discussed the importance of monitoring. To this end, the draft includes:
 - Automatic triggers for reexamination of guardianship and conservatorship. (See Section 317, Section 431)
 - Requirements that reports be provided to the protected person and to any other person identified by the court. (See Section 316, Section 423)
 - Enhanced requirements for annual review. (See Section 316, Section 423)
 - Enhanced responsibilities, including related to monitoring, for appointees who delegate their duties. (See Section 209, Section 314, Section 421)
11. Health care decisions. At the last meeting, participants indicated interest in incorporating the NGS recommendations related to health care decisions into the revised Act and discussed whether to create a new section of the Act pertaining to health care decisions and as to the potential content of such a section. The revised draft incorporates NGS recommendations related to health care decisions into an existing section of the Act. (See Section 313)
12. Residential decisions. Per discussion at the last meeting, the revised act includes a number of new provisions related to residential decisions, including:
 - A requirement notice of certain residential changes be provided to the court, the protected person, and certain interested parties for certain residential changes. (See Section 313)
 - A provision indicating that the person's preference regarding housing decisions is a relevant consideration for a guardian making such placement decisions. (See Section 313)
 - A requirement that the guardian give priority to residential settings that meet the protected person's needs in the least restrictive manner reasonably possible unless doing so would be inconsistent with the protected person's expressed interests and values. (See Section 313)

- A requirement that the visitor include as part of the visitor's report to the court a statement as to whether the proposed dwelling meets the respondent's individual needs and whether the respondent has expressed a preference as to residence. (See Section 304).
13. Attorney representation to seek termination or modification. At the last meeting, participants discussed the importance of attorney representation for protected persons, with the general sentiment being that court approval should not be required for an attorney to represent a person subject to guardianship for the purpose of seeking termination/modification of the court order, but that court approval was appropriate for approval of fees to counsel who engage in such representations. Per this discussion, revisions were made to Section 117 to require court approval of such fees but not of the representations themselves. (See Section 117) In addition, provisions were added stating that a person seeking to terminate or modify the terms of a guardianship or conservatorship may be represented by counsel for that purpose, and that the court shall award reasonable attorney's fees for such representations provided that underlying legal services benefited the protected person or were reasonably necessary to protect the person's interests. (See Section 317, Section 431)
 14. Age of involvement for minors. As part of the discussion of minors at the last meeting, there was a discussion of chronological age cut-offs. There appeared to be general agreement that the age for notice could be pushed downward, perhaps to age 12 consistent with the Uniform Adoption Act. The revised draft reduces the age of notice and involvement from 14 to 12. (See generally Article 2, Section 404, Section 409)
 15. Appointment of guardian for an adult by will or other writing. Per the discussion at the last meeting, the sections permitting such appointments have been eliminated but persons who would be nominees under those sections retain priority for appointment as a guardian. (See Section 308)
 16. Expanded and modified notice requirements. Per the discussion at the last meeting, the notice requirement was expanded to include Veterans Administration fiduciaries, persons providing decision-making support, domestic partners, and stepchildren under certain circumstances. (See Section 102) Likewise, the requirement that notice be provided to those "residing with for six months" was substituted for those who have shared household tasks, reflecting concerns that notice should not be provided to those whose relationship with the respondent is purely economic. (See Section 302, Section 402) In addition, a requirement of minimum font size was added in the provisions of notice to alleged person in need of protection. (See Section 303, Section 403)

B. ADDITIONAL ISSUES FOR CONSIDERATION

Additional issues for consideration at the October 2015 meeting include the following.

1. Powers and duties of conservators. Since the Act was last revised, a number of other fiduciary statutes have been adopted or revised, including the Uniform Prudent Investor Act, Uniform Trust Code, Uniform Power of Attorney Act, and the Uniform Fiduciary Access to Digital Assets Act. In addition, the NGS standards include a variety of provisions related to standards for financial decision-making. An issue for the Committee is whether to revisit the current provisions setting forth the powers and duties of conservators to harmonize the Act with these developments or otherwise improve it.
2. Scope of guardians' duties and retained rights of protected persons. There are some categories of important decisions which the Act does not currently specifically discuss but which might warrant specific provisions. These include:
 - *Visitation.* Under what conditions the guardian can limit access to the protected person by the person's family, friends, or other potential visitors? The Committee may wish to consider whether there are circumstances under which such visitation must be permitted or facilitated.
 - *Marriage and divorce.* May the guardian consent to the marriage or divorce of the protected person and, if so, under what conditions? This is an area where states have taken different approaches and the Committee may wish to consider whether the Act should speak specifically to it.
 - *Voting rights.* Does the protected person retain the right to vote? The Committee may wish to discuss whether the court should have the power to remove the right to vote and, if so, what findings are necessary to do so.
3. Inclusion of Minors. At the last meeting, a suggestion was made that the Act not include minors, and that, if it continued to do so, it should only include minors subject to conservatorship and not those subject to guardianship. To inform the Committee's approach on this issue, Erica Wood and Sally Hurme researched the extent to which states have created separate statutory schemes for adult and minor guardianship. Their research indicated that the vast majority of states have a guardian statute for minors and adults that is integrated. An issue for the Committee is whether to focus the Act exclusively on adults or to retain the current approach of addressing both adults and minors consistent with the approach in the majority of states.
4. Bill of Rights for Protected Persons. At the last meeting, a suggestion was made for a bill of rights for persons subject to guardianship. The Chair recommended that this issue be raised at a subsequent meeting. The Committee may, therefore, wish to discuss this possibility at this meeting.

5. Grounds for Removal of a Guardian or Conservator. At the last meeting, the Chair suggested that in a subsequent meeting the group consider the grounds for removing a guardian or conservator.
6. Organization of the Revised Act. This draft attempts to streamline the organization of the Act in order to make the Act more readily understandable to users. For example:
 - Certain Sections in Article 4 were reordered to make their order parallel to that of the comparable sections in Act 3.
 - Some section titles were changed to reflect more accurately the content of sections.
 - Provisions that applied to guardianships under both Article 2 and Article 3, as well as to conservatorships under Article 4 were moved to Article 1. For example, sections about registration of orders which had previously been in Article 4 were moved to Article 1.

A memo with charts showing this reorganization has been prepared and distributed to the Committee and to the Observers along with the draft revised Act.