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: April 10, 2015
Re: Issues for the Committee's Consideration

The Uniform Law Commission has charged this Committee 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 issues for the Committee to consider when doing so.

We have grouped the issues into three broad categories: (1) issues directly identified in the NGS recommendations; (2) issues implied by the NGS recommendations; (3) additional issues for consideration. Within these three broad categories, we have identified four sub-categories of issues: (a) overarching issues; (b) issues relating to the establishment, termination, and modification of orders; (c) issues related to the performance of guardians and conservators; and (d) issues related to guardianship of minors. This list is, however, not meant to be a fully exhaustive list of issues, but rather as a basis for beginning discussion.

I. ISSUES IDENTIFIED IN THE NGS RECOMMENDATIONS

A. Overarching Issues

People-First Language: The NGS recommended that the term "person under guardianship" replace terms such as incapacitated person, ward, or disabled person whenever possible. The Committee may wish to operationalize this recommendation by changing some of the Act's terminology. Possibilities include:

- Universal replacement of the term "ward" with "person subject to guardianship" or "person under guardianship"
- Selective replacement of the term "incapacitated person" with "person subject to guardianship" or "person under guardianship"
- Selective replacement of the term "protected person" with "person subject to guardianship" or "person under guardianship"

Person-Centered Planning: A key theme of the NGS recommendations is that there is a need to infuse person-centered planning into guardianship and conservatorship. A key issue for the Committee is, therefore, to consider how such an approach might be appropriately operationalized within the confines of the UGPAA. Possibilities to consider include, but are not limited to:

- Adding language to the definitions section defining "best interests" to reflect that a person's best interests depends, in part, on their previously and currently expressed preferences and values. (Affected Section: Section 102)

- Adding language that indicates that the person's preferences and values should be given consideration to portions of the Act that direct guardians and conservators as to how to make decisions. (Affected Sections: Section 314, Section 411, Section 418, Section 427)

- Adding language to sections indicating who should be appointed guardian or conservator to indicate that the person's preferences and values should be a consideration in making appointments. (Affected Sections: Section 310, Section 413)

- Adding language to grant persons subject to guardianship the right to reports generated by their conservator or guardian. (Affected Sections: Section 317, Section 413, Section 419, Section 420)

B. Issues Relating to Establishment, Termination, and Modification of Orders

Professional Evaluation: The NGS recommendations placed importance on obtaining an accurate detailed assessment of allegedly incapacitated persons' functional limitations. Under the current Act, however, professional evaluation is optional. An issue for the Committee is whether to revisit current requirements to mandate professional evaluation or, alternatively, to make it a default option (e.g., require professional evaluation if there is an objection to guardianship or conservatorship). (Affected Sections: Section 306, Section 406)

Bond: The NGS recommendations state that conservators should take all necessary steps to obtain a bond to protect the estate. The Committee might consider making bond a default option for conservators (e.g., to require a bond unless there is good cause not to require one). (Affected Section: Section 415)

Guardians' Fees: The NGS made numerous recommendations regarding guardians' fees. A key issue for the Committee is to identify ways that this recommendations might be synthesized into appropriate and administrable language for the UGPPA. (Affected Section: Section 417)

C. Issues Relating to Performance of Guardians and Conservators

Guardianship Monitoring: A central theme of the NGS recommendations is that improvements are needed in monitoring guardians' and conservators' performance. A key issue for the Committee is to consider adding provisions to the Act to improve monitoring practice. (Affected Sections 317)

Critical Types of Decisions: The NGS identified two types of decisions as deserving special attention: health care decisions and residential placement decisions. The Committee may therefore wish to add language providing guidance as to how guardians should make decisions in these two contexts. In addition, consistent with the NGS recommendations, the Committee may wish to add language specifying that, in the absence of a court order to the contrary, appointed health care agents retain their authority even after a guardianship or conservatorship has been put in place.

II. ISSUES IMPLIED BY THE NGS RECOMMENDATIONS

A. Implied Issues Relating to Establishment, Termination, and Modification of Orders

Presence of the Allegedly Incapacitated Person: A key aspect of person-centered-planning, the concept at the heart many of the NGS recommendations, is that the individual be involved. However, in the current Act, the presence of the allegedly incapacitated person is not required and can be excused for good cause. An issue for the Committee is whether this provision provides adequate due process protections and whether it is consistent with person centered planning. Further protections might be offered by requiring the individual's presence or by providing a limiting definition for what constitutes "good cause." (Affected Sections: Section 308, Section 408)

Attorney Representation to Seek Termination or Modification: Currently there is significant confusion in many locations as to whether a person subject to guardianship is empowered to engage the services of an attorney for the purpose of seeking termination of guardianship or modification of guardianship. Accordingly, this Committee might consider:

- Adding language specifying that the person subject to guardianship has the right to engage counsel to seek termination or modification of an existing order. (Affected Sections: Section 112, Section 318, Section 414, Section 431)

- Adding language specifying that the person subject to guardianship is entitled to be provided with counsel to seek termination or modification of an existing order under certain conditions. (Affected Sections: Section 112, Section 318, Section 414, Section 431)

- Adding language to indicate whether or under what circumstances counsel engaged for such a purpose can be paid using the person's resources. (Affected Sections: Section 112, Section 318, Section 414, Section 431)

B. Implied Issues Relating to Guardianship for Minors

Extent of Minor's Involvement: An issue for the Committee is to consider whether person centered planning might be extended to guardianship for minors. For example, the Committee might consider requiring the guardian to consult with the minor under certain circumstances. (Affected Sections: Section 207)

III. ADDITIONAL ISSUES FOR CONSIDERATION

A. Additional Issues Relating to Establishment, Termination, and Modification of Orders

Attorney Representation for Initial Determination: When the Act was last revised, there was significant controversy over the question of whether counsel is needed for allegedly incapacitated individuals. A key issue for this Committee is to revisit the provisions regarding such counsel. Key questions to ask include:

- Should the Revised Act continue the practice of creating two alternative approaches to representation of allegedly incapacitated persons? Alternatively, should the Revised Act mandate representation (either with or without the right to waive the right to representation)? (Affected Sections: Section 305, Section 406

- Should provisions regarding minors' access to counsel be enhanced? The Act currently does not require appointment of an attorney for a minor in any situation. Rather, appointment is at the court's discretion even if the court determines that the interests of the minor are or may be inadequately represented. By comparison, in the Uniform Adoption Act, the court is required to appoint an attorney for indigent minors. The Committee may wish to revisit the issue. (Affected Section: Section 205)

Appointment of Guardian by Will or Other Writing: Current Sections 302 and 303 provide for the appointment of a guardian of an adult without full process. This is at odds with the Act's overall commitment to due process and least restrictive alternatives. An issue for the Committee is therefore whether these sections should be modified or eliminated in the revised Act. (Affected Sections: Section 302, Section 303).

Notice Requirements: Given growing concerns about financial exploitation of vulnerable adults (including by persons petitioning for guardianship), this Committee might consider whether notice requirements should be expanded to involve persons who might be in a position to identify such exploitation. (Affected Sections: Section 304, 403, 404)

B. Additional Issues Relating to Performance of Guardians and Conservators

Delegation: In the current Act, a conservator may delegate his or her duties and is not liable for later improper acts if the delegation was done using reasonable care. This standard, while identical to the standard in the Uniform Prudent Investor Act, might not be appropriate for conservators. The Committee may therefore wish to consider revising it. (Affected Section: Section 426)

Duties and Powers: Since the Act was last revised, other Acts considering similar topics have been adopted. An issue for the Committee is what extent the Act should be revised to take account of the more modern fiduciary standards and powers in the 2000 Uniform Trust Code and the 2006 Uniform Power of Attorney Act. (Affected Sections: Section 207, Section 208, Section 314, Section 315, Section 418, Section 425)

C. Additional Issues Relating to Guardianship for Minors

Age of Involvement: Currently, only minors age 14 or older are required to be informed of or involved in the guardianship process. An issue for the Committee is whether that age is appropriate given modern understandings of child development and children's rights. Notably, the Uniform Adoption Act uses age 12 as the age at which children have rights to object to certain matters.

Notice: The Act currently does not require notice to previous custodians/caregivers other than parents unless those custodians/caregivers had primary care/custody within the immediate 60 days. The Committee may wish to revisit this notice requirement in light of the complexity of modern families. (Affected Section: Section 205)

Immunity for Guardian: The Act currently grants broad immunity to guardians. Especially in light of current trends in tort law that are seeing a move away from broad notions of family immunity, the Committee might wish to revisit this issue. (Affected Section: Section 209)

Concurrent Jurisdiction: In many states, guardians of minors may be appointed in the family and/or juvenile court in addition to the probate court. An issue for the Committee is to consider whether (and, if so, how) the Act should address this issue of concurrent jurisdiction?