

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: March 23, 2016
Re: Issues for the Committee's Consideration

This memo outlines key issues for discussion at the Committee's upcoming meeting on April 1-2, 2016 in Chicago.

A. ISSUES PREVIOUSLY DISCUSSED OR IDENTIFIED

For the April 2016 meeting, key issues previously identified or discussed—but which would benefit from the Committee's further discussion—include:

1. Guardians' plans.

The draft revised Act includes a new section requiring the guardian to prepare a plan for the protected person. (Section 318)

In addition to the new Section 318, other revisions pertaining to guardians' plans include:

- A requirement that the guardian report and explain deviations from the plan. (Section 319)
- Revisions to the sections governing the conservator's plan that bring them in line with the new provisions regarding the guardian's plan (e.g., provisions that require fee/expense projections, the court to consider whether the plan is consistent with the conservator's duties, and the conservator to report deviations). (Section 420, Section 425)

2. Role of attorneys for respondents and protected persons.

Per the discussion at the October 2015 meeting, the draft revised Act includes new language clarifying how the attorney for a respondent should proceed if the attorney is unable to ascertain what the respondent wants. As part of this clarification, provisions governing attorney representation of respondents and provisions related to appointment of a visitor were given separate sections. (Section 305, Section 406)

Language indicating that a respondent has a right to choose his or her counsel was also added. (Section 308, Section 409)

A parallel right to choose one's own counsel was added for protected persons seeking termination, modification, or removal. (Section 320, Section 432)

In addition to considering these proposed revisions, related issues for the Committee are:

- Whether the rights related to attorney representation in an initial hearing should be extended to hearings addressing termination/modification/removal. (Section 320, Section 433)
- Whether the alternatives A & B in Section 305 should be added to Article 2 to give minors parallel rights in this regard. (Section 205)

3. Terminology.

The key terminology issue discussed at the October 2015 meeting was what to call a person for whom a guardian or conservator has been appointed. At that meeting, it was agreed that the next draft would continue to use the term “protected person” but that the Reporter would provide a sample portion of the draft revised Act using the “person under guardianship” and “person under conservatorship” language to show the Committee what that approach might involve. Such a sample has been provided in Appendix A attached to this memo.

Additional changes related to terminology for the Committee’s consideration include:

- Definitions of limited and full guardianships and conservatorships were added to the draft revised Act. (Section 102)
- The term “legal representative” was eliminated and instead the persons who fell into this category were simply listed in the two places in which this term was previously used. (Section 302, Section 402)
- The term “expressed interests” used in the last revision was eliminated in favor of spelling out what was meant by it in the places where it had been used.
- In Articles 3 and 4, the term “self-reliance” has been replaced with the term “self-determination” which was used in the recommendations of the Third National Guardianship Summit.

4. Visitation and right related to maintaining relationships.

Per the discussion at the October meeting, provisions were added to protect the protected person’s interest in interactions with other persons. These provisions include:

- A limitation on the guardian’s ability to curtail communications, visits, or interactions between the protected person and third parties. (Section 317)
- A requirement that the protected person be notified of their rights with regard to visitation, communication, and interaction with third parties. (Section 311)
- A requirement that, in selecting among residential settings, the guardian give priority to a residential setting that is in a location that will allow the protected person to interact with persons important to the protected person. (Section 315)
- A requirement that the guardian’s plan indicate persons, if any, with whom the protected person has a relationship and with whom the guardian plans to facilitate visits. (Section 318)

Along similar vein, the draft revised Act 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)

5. Limitation on delegation by guardian.
Per the discussion at the October 2015 meeting, the draft revised Act includes new provisions restricting the ability of the guardian to delegate. Specifically it includes:
 - A limitation on delegation by guardians of adults. (Section 316)
 - A limitation to six months on delegation by guardians of minors. (Section 209)
6. Notification of rights.
Per the discussion at the October 2015 meeting, new provisions were added requiring the guardian or conservator to provide the protected person with notice of key rights. (Section 311, Section 412)
7. Limitations on guardians and conservators opposing restoration of rights.
Per the October 2015 discussion, new bracketed sections limiting the ability of a guardian or conservator to oppose termination of a guardianship or conservatorship were added for the Committee's consideration. (Section 320, Section 433)
8. Restrictions on certain moves.
Per the October 2015 discussion, absent exigent circumstances, the draft revised Act does not permit the guardian to move a protected person to a nursing home or other restrictive or secure facility without express court authorization. (Section 315)
9. Voting rights.
The draft revised Act requires the court make an explicit statement in order to strip the protected person of the right to vote. (Section 310)
10. Guardian's power with regard to marriage or divorce.
Per the discussion at the October 2015 meeting, the draft revised Act includes bracketed provisions requiring the court to provide specific authorization before a guardian may consent or deny consent to marriage or divorce. (Section 315)
11. Revisions made pursuant to consultations.
In addition to changes made pursuant to the discussion at the October 2015 meeting, a variety of edits were made as a result of suggestions provided by the Style Committee member who reviewed the draft revised Act and as a result of consultation with JEB and its members. These include:
 - New language was added to account for the fact that a successor guardian or conservator may not immediately learn of the event triggering succession, and that it may be unreasonable to expect the successor to file materials with the court prior to learning of the event. (Section 110, Section 202, Section 204)
 - New language was added to address the consequences of the failure of a guardian appointed by a parent promptly to accept the appointment. (Section 202, Section 204)
12. Additional provisions added pursuant to October 2015 discussion.
In addition to the above-mentioned issues which will be a priority for discussion at the April meeting, we wish to highlight some additional changes that were made pursuant to

the Committee's discussion in October 2015 and which the Committee should also consider.

- a. *Provisions related to kick-backs and conflicts of interest.*
A requirement for the guardian or conservator to report any commissions, gifts, or other benefits the guardian has received as a result of his or her status or actions as guardian or conservator was added. (Section 319, Section 425)
- b. *Provisions related to termination/removal/modification.*
New language to strengthen protections for protected persons was added to provisions governing termination and modification of guardianships and conservatorships, as well those governing removal of guardians and conservators. (Section 320, Section 425, Section 433)
- c. *Provisions related to the effect of previously appointed surrogates.*
Several revisions were made with regard to the effect of previously appointed surrogates. They include:
 - A provision was added to clarify that a less restrictive alternative to guardianship is using a previously appointed surrogate decision-maker. (Section 301)
 - A provision was added to clarify that a guardian is to defer to a surrogate appointed pursuant to a valid power of attorney for health care. (Section 315)
 - Additional previously appointed surrogates were given priority for appointment as a conservator. (Section 410)
- d. *Key court findings.*
Provisions were added to require the court to explicitly state certain key findings when imposing a guardianship or conservatorship. (Section 310, Section 411)
- e. *Fees provisions*
Per the discussion at the October 2015 meeting, Section 117 was revised to focus on appointees other than guardians or conservators. A related change was to add provisions governing fees of guardians for minors to Article 2. These provisions parallel those in Article 3. (Section 210)

B. ADDITIONAL ISSUES FOR DISCUSSION

1. Protections for non-English speakers and those with limited English language skills.
A key issue is how to address the needs of respondents and protected persons who do not speak English or who speak limited English. This is an issue relevant to notice provisions, evaluations, explanations of rights, etc. (Section 112, Section 202, Section 205, Section 303, Section 311, Section 403, Section 412, among others)
2. Petition requirements and draft model petition.
As agreed at the October 2015 meeting, the Reporter drafted a model petition for consideration. This contents of the model petition track those set forth in the current draft

revised Act. The Committee may wish to revisit these requirements or their wording as part of the review of the draft model petition.

3. Conservator's duties.

A key issue for the Committee is whether the duties of the conservator with regard to the management of the protected person's resources are appropriate and consistent with other model acts. Specific issues in this regard include:

- Should the conservator be empowered to loan money to the protected person? (Section 420(b)(19))
- May conservator defend him or herself against allegations of breach of duty, and pay defense costs from the estate? (Section 420(b)(24))

4. Jurisdiction over guardianship of minors.

In the current version, jurisdiction for Article 2 guardianships is covered by Section 105. An issue for the Committee is whether the Act should be revised so that provisions governing jurisdiction for guardianships over minors parallel those for jurisdiction for adult guardianships under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)? (Section 105)

5. Custodians.

There are two issues for the Committee with regard to custodians: Are any safeguards needed on the ability of an obligor to transfer funds to a custodian? Is the reference to the Uniform Custodial Trust Act needed? (Section 120)

APPENDIX A. SAMPLE SECTION USING THE ALTERNATIVE TERMINOLOGY

As discussed at the October 2015 meeting, below is a sample section of the draft revised Act using the language “person under guardianship” and “person under conservatorship.” The terms are in **bold** font for ease of reading.

SECTION 105. TRANSFER OF PROCEEDINGS.

(a) Except as otherwise provided in subsection (b), the following rules apply:

(1) After the appointment of a guardian or conservator or entry of a protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another [county] in this state or to another state if the court is satisfied that a transfer will serve the best interest of **the person under guardianship, conservatorship, or other protective order**.

(2) If a guardianship or protective proceeding is pending in another state or a foreign country and a petition for guardianship or protective proceeding is filed in a court in this state, the court in this state shall notify the original court and, after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of **the person under guardianship, conservatorship, or other protective order**.

(3) A guardian, conservator, or like fiduciary appointed in another state may petition the court for appointment as a guardian or conservator in this state if venue in this state is or will be established. The appointment may be made upon proof of appointment in the other state and presentation of a certified copy of the portion of the court record in the other state specified by the court in this state. Notice of hearing on the petition, together with a copy of the petition, must be given to **the person under guardianship, conservatorship, or other protective order**, if **the person under guardianship, conservatorship, or other protective order** has attained 12 years of age, and to a person who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under this [act] were applicable. The court shall make the appointment in this state unless it concludes that the appointment would not be in the best interest of **the person under guardianship, conservatorship, or other protective order**. On the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. Not later than 14 days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to **the person under guardianship or conservatorship** if **the person under guardianship or conservatorship** has attained 12 years of age, and to all persons given notice of the hearing on the petition.

(b) This section does not apply to a guardianship or protective proceeding for an adult individual that is subject to the transfer provisions of [insert citation to Article 3 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007)].