

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 10, 2016
Re: Issues for the Committee's Consideration

This memo outlines key issues for discussion at the Committee's upcoming meeting on October 14-15 in Washington, DC.

A. NEW ISSUES FOR DISCUSSION

For the October meeting, the following new issues would benefit from the Committee's discussion:

1. Title of Act

The Act is currently titled "The Uniform Guardianship and Protective Proceedings Act." This title may be confusing because it does not reference conservatorships and because the Act does not cover many of the types of proceedings commonly thought of as "protective proceedings." The Chair and Reporter suggest that the Committee consider recommending a name change to better communicate the substance of the Act. One possibility is the "Uniform Guardianship and Conservatorship Act."

2. New terminology

At the annual meeting, concern was raised about the draft revised Act's use of the term "person" to refer to an individual for whom a guardian or conservator has been appointed because—in the world of the Uniform Law Commission—a "person" can include a wide variety of non-human entities. The term "individual" was suggested instead. In addition, it was suggested that the use of the term "person" in Article 3 to refer exclusively to adults when, in Article 4, it referred to both adults and children was confusing. Consistent with this feedback, the term "adult subject to guardianship" is used in the draft revised Act. An issue for this Committee is whether to adopt the parallel approach in Article 4, and refer to a "minor or adult subject to conservatorship" or, alternatively or in addition, refer to "an individual subject to conservatorship."

3. Priority list

A question for the Committee is whether the priority list for appointment of a guardian should include a previously appointed conservator, or vis versa. To enable to the Committee to see what this might look like, the draft revised Act adds a previously appointed guardian to the priority list for Article 4, and a previously appointed conservator to the priority list for Article 3. (Section 309, 410). At issue for the Committee is whether such inclusion is appropriate and, if so, what the priority should be.

4. Title of property

The subcommittee looking at Article 4 powers suggested revisiting and revising Section 425 (“Title by Appointment”) on the grounds that it is confusing and it is not clear why title changes. A suggestion was made that the current language be eliminated and replaced with:

Assets covered by the conservatorship are not available to pay a contract entered into by a person for whom a conservator has been appointed unless the contract is ratified by the conservator or by the court.

An issue for the Committee is whether changes to this section are needed and, if so, what alternative language to use. (Section 425)

5. Sexual and intimate relations

Increasingly, attention is being paid to the issue of consent to sexual relations by persons with diminished capacity. An issue for this Committee is whether this issue should be given specific treatment in the Act or whether it is adequately addressed by provisions governing the person’s right to association. (See Section 317)

6. Liability of guardian or conservator

The draft revised Act contains several new provisions clarifying and governing liability of appointees for the Committee’s consideration. These include:

- A provision stating that a guardian or conservator is not liable for the acts of the person solely based on their status as guardian or conservator; previously such protection was only stated for guardians appointed pursuant to Article 2. (Section 121).
- New language allowing a conservator or guardian to petition for instructions or approval of an act and a safe harbor for those who comply with the resulting instructions. (Section 122)

7. Protective order in lieu of guardianship or conservatorship

At the last meeting, the term “protective order” was identified as a source of confusion. The draft revised Act seeks to clear up this confusion by using and defining the term “protective order in lieu of guardianship or conservatorship.” The draft revised Act also includes a new section which provides for orders in lieu of guardianship or conservatorship for the Committee’s review. (Section 117) In considering this new section, it should be noted that the 1997 Act only permitted such orders in lieu of conservatorship.

8. Petition for guardianship of a minor and related notice

The 1997 Act provided little guidance as to what is to be included in a petition for guardianship of a minor, and minimal notice requirements. An issue for this Committee is whether greater process and guidance is advisable. For the Committee’s consideration, the draft revised Act adds new requirements for petitions for guardianships over minors and specifies personal service for some parties. (Section 205, Section 206)

9. Emergency conservator

The 1997 UGPPA provided for an emergency guardian but not an emergency conservator. (See Section 312) An issue for the Committee is whether an emergency conservator provision should be added.

10. Third party acceptance

The subcommittee examining Article 4 also discussed adding a provision to encourage third parties to accept letters of a guardian or conservator. An issue for the Committee is whether any provisions are needed to incentivize third parties to accept the authority of a guardian or conservator. The Power of Attorney Act contained such provisions to encourage acceptance of such powers. If the Committee believes such language is desirable, one option is a new section in Article 1 along the lines of the following

SECTION 1 __. ACCEPTANCE OF AUTHORITY OF GUARDIAN, CONSERVATOR

(a) A person that in good faith accepts letters of office presented by a guardian or conservator without actual or constructive knowledge that the letters are invalid or that the guardian or conservator is exceeding or improperly exercising authority may rely upon the letters as if the appointment is valid and in effect and the guardian or conservator had not exceeded and had properly exercised the authority.

(b) A person that is asked to accept a guardian or conservator's authority to act may request, and rely upon, without further investigation:

(1) the certification by the guardian or conservator under penalty of perjury of any factual matter concerning the powers of the guardian or conservator;

(2) a representation or confirmation by the Court as to any factual matter concerning the validity or authority of the guardian or conservator.

(c) Except as otherwise provided in subsection (b):

(1) a person shall either accept the authority of the guardian or conservator or request a certification or a representation or confirmation from the court under Section 122(b) no later than seven business days after presentation of letters of office for acceptance;

(2) if a person requests a certification or representation or confirmation from the court, the person shall accept the authority of the guardian or conservator no later than five business days after receipt of the certification, or after receipt of a representation or confirmation of the court indicating that the requested action is consistent with the authority of the purported guardian or conservator; and

(3) a person may not require an additional or different court order for authority granted to the guardian or conservator.

(b) A person is not required to accept the authority of a guardian or conservator if:

(1) engaging in a transaction would be inconsistent with state or federal law;

(2) the person has actual knowledge or a reasonable, good faith belief that the letters are invalid or that the conservator or guardian is exceeding or improperly exercising authority granted by the court;

(3) a request for a certification under Section 122(b) is refused;

(4) the person makes, or has actual knowledge that another person has

made, a report to the [local adult protective services office] stating a good faith belief that may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the guardian or conservator or a person acting for or with the guardian or conservator.

(c) A person that refuses in violation of this section to accept the authority of a guardian or conservator is subject to liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of that authority.

(d) For purposes of this section, a person that conducts activities with a guardian or conservator through employees is without actual or constructive knowledge of a fact if the employee conducting those activities is without such knowledge.

11. Voluntary guardianship

The text of the previous version of the UGPAA does not explicitly state that a person may petition to have a guardian appointed for him or herself as it simply refers to “an individual or person with an interest in the individual’s welfare.” The comments, however, clarify that this means a person can petition for a guardianship over him or herself. An issue for this Committee is whether the text itself should explicitly state that this is permissible. For the Committee’s consideration, the draft revised Act includes a provision that would do so. (Section 302)

B. REVIEW OF OTHER CHANGES IN DRAFT

The draft revised Act incorporates a number of changes designed to be responsive to the Committee’s discussion at the last meeting. To facilitate the Committee’s review of these revisions, the redlined draft shows changes since the Committee’s last meeting. This section identifies some of the key changes that the Committee may wish to discuss at the October meeting.

1. Basis for appointment of a guardian or conservator

Per the Committee’s request and interest in appointments that protect a person from “undue influence,” the Reporter—after consulting with Lori Stiegel of the ABA Commission on Law and Aging—added an additional basis for appointment of a guardian or conservator. The new language is designed to capture the hallmarks of “undue influence”—control and deception. It purposefully avoids the use of the term “undue influence” as that term’s definition varies by state and context. The new language would allow the appointment of a guardian or conservator (and a resulting removal of rights) based on the person’s status as a victim of a third party, without a finding of any other functional limitation. (Section 301, Section 401)

2. Standby guardians

Provisions governing standby guardians for minors were reworked as they were found to be highly confusing. The new language explains that these sections concern standby guardians and clarifies the process for objecting to the appointment of a standby guardian. (Section 202, Section 203)

3. Appointment of attorney for minor

The draft revised Act includes provisions for mandatory appointment attorney for a minor under certain conditions; previously, all appointments were discretionary. (Section 207)

4. Model forms

At past meetings, the Committee was supportive of the addition of model forms to facilitate better practice. These model forms have been revised and added to the draft revised Act in the form of a new article: Article 6. The Committee is urged to review these forms with two key objectives in mind: 1) determine ways to improve the forms; 2) to the extent that the forms require information that seems unnecessary or unduly cumbersome, or do not require information that seems appropriate, whether the underlying provisions should be changed. (Article 6)

5. Confidentiality of records

The draft revised Act adds new language in Article 3 and 4 to grant certain persons access to court records. (Section 307, Section 408) This approach aims to balance concerns about privacy and disclosure of sensitive information with those about the importance of transparency.

6. Residential choices

The draft revised Act includes a number of provisions designed to protect a person subject to guardianship or conservatorship from unwarranted, objectionable moves. This includes a provision that the guardian may only change a permanent dwelling if the move is laid out in the plan, authorized by the court, or made with prior notice. (Section 315) In addition, the draft adds a provision stating that a conservator needs court approval to sell or encumber real property or to surrender a lease to a primary residence. (Section 414) An alternative approach to Section 414 that the Committee might wish to consider would be to add language that parallels Article 3 provisions instead such as:

Without authorization of the court, the conservator may not sell or surrender the primary residence of the person subject to conservatorship unless such sale or surrender is specifically set forth in the conservator's plan or notice of the sale or surrender is provided to the person subject to conservatorship and all persons entitled to such notice pursuant to Section 411(d) at least 14 days before such sale or surrender.

7. Duties and powers of a conservator

At the last meeting, the subcommittee was identified to consider revisions to the powers and duties of conservators under Article 4. The subcommittee looking at Article 4 powers recommended incorporating some of the key learning from the Prudent Investor Act. The revised Act reflects this inclusion. (Section 418)

In addition, as discussed at the last meeting, the draft revised Act includes a new provision that specifically discusses authority to structure finances for the purpose of establishing eligibility for public benefits (e.g., "Medicaid planning"). (Section 421)

8. Right to counsel for protected persons seeking termination or modification, or removal of the appointee.

At the last meeting, the group was asked whether the rights related to attorney representation in an initial hearing should be extended to hearings addressing termination, modification, and/or removal. As agreed, the Reporter added language to the draft revised Act for the Committee's consideration that makes this extension. (Section 320, Section 321, Section 432, Section 433)

9. Limitations on guardians and conservators opposing restoration of rights.

New provisions limiting the ability of a guardian or conservator to charge fees for opposing restoration were added in response to the Committee's lengthy discussion of whether and, if so how, to limit the ability of a guardian or conservator to oppose termination of a guardianship or conservatorship. (Section 120)

10. Reorganization of fees provisions

To avoid unnecessary repetition, a new section governing fees was added to Article 1 to avoid repeating identical language in Articles 2, 3, and 4. (Section 120)